Proceedings

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Idaho State Bar

VOLUME XXXI, 1957

Thirty-First Annual Meeting
SUN VALLEY, IDAHO
July 11-12-13, 1957

NOTE: The President and Secretary's reports and reports of standing committees distributed in advance of the Annual Meeting are reprinted herein in the appendix starting at page 105.

Past Commissioners

WESTERN DIVISION

JOHN C. RICE, Caldwell, 1923-25.
FRANK MARTIN, Boise, 1923-25.
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.
CLAUDE V. MARCUS, Boise, 1948-51.
T. M. ROBERTSON, Twin Falls, 1951-1954.
WILLIS E. SULLIVAN, Boise, 1954-57.

EASTERN DIVISION

N. D. JACKSON, St. Anthony, 1923-25.
A. L. MERRILL, Pocatello, 1925-28.
WALTER H. ANDERSON, Pocatello, 1928-34.
E. A. OWENS, Idaho Falls, Pocatello, 1934-40.
L. E. GLENNON, Pocatello, 1940-43.
PAUL T. PETERSON, Idaho Falls, 1943-46.
R. D. MERRILL, Pocatello, 1946-49.
RALPH LITTON, St. Anthony, 1949-52.
L. F. RACINE, Jr., Pocatello, 1952-55.

NORTHERN DIVISION

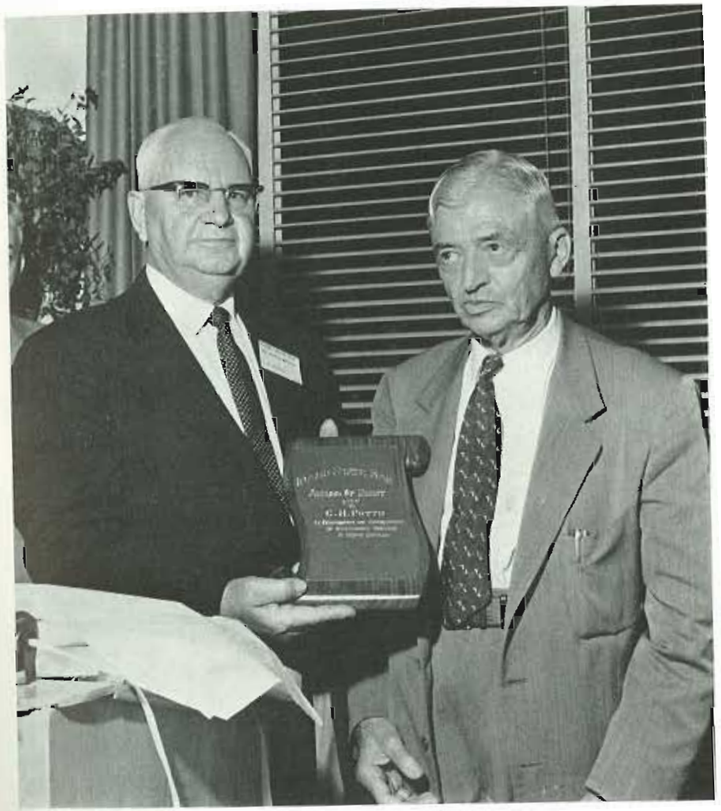
ROBERT D. LEEPER, Lewiston, 1923-26.
C. H. POTTS, Coeur d'Alene, 1926-29.
WARREN TRUITT, Moscow, 1929-32.
JAMES F. AILSHIE, Coeur d'Alene, 1932-35.
A. L. MORGAN, Moscow, 1935-38.
ABE GOFF, Moscow, 1938-41.
PAUL W. HYATT, Lewiston, 1941-44.
E. T. KNUDSON, Coeur d'Alene, 1944-47.
E. E. HUNT, Sandpoint, 1947-49.
ROBERT E. BROWN, Kellogg, 1949-53.
RUSSELL S. RANDALL, Lewiston, 1953-56.

Present Commissioners and Officers

GILBERT C. ST. CLAIR, Idaho Falls, President
CLAY V. SPEAR, Coeur d'Alene, Vice President
SHERMAN J. BELLWOOD, Rupert
PAUL B. ENNIS, Boise, Secretary

Local Bar Associations

Shoshone County—Richard Magnuson, President, Wallace
Clearwater (2nd and 10th Judicial District)—Wayne C. MacGregor, President, Grangeville
Third Judicial District—Robert W. Green, President, Boise
Southeastern Idaho (5th and 6th Judicial Districts)—J. Blaine Anderson, President, Blackfoot
Seventh District—Richard Riordan, President, Nampa
Eighth District—Richard McFadden, President, St. Maries
Ninth District—J. M. Sharp, President, Idaho Falls
Twelfth District—Grant Young, President, Righy



C. H. Potts (right) of Coeur d'Alene, receives second annual "Award of Merit," presented by Emery T. Knudson.

SPEAKERS

J. W. Ehrlich

Lou Ashe

Brent M. Abel

Paul E. Anderson

July 11, 1957, 1:30 p.m.

MR. SULLIVAN: The 1957 Bar Convention is now in session. Reverend W. B. Ellway of Hailey will now give the invocation. Please stand.

REVEREND ELLWAY: Maybe before I give the invocation I would say a word or two if you will be seated first. I apologize for making you jump up and down but still, as I did two years ago when I was asked to open your convention, I made one or two remarks about what the ordinary person thinks about the legal profession and its importance, I would like to do that now again. May I say first of all, it is not only a privilege but a pleasure to be here, and I thank my friend Joe for inviting me to be here. We are all aware that it is the legal minds of every country who draft the laws. We know that the Constitution of this country was drawn up by, not only men of keen legal mind, but also men who were honorable men. I think that is the same in every country which is trying its best to see that the people live under the necessary and just laws that insure liberty for the individual. And as we look at this country, especially I myself who am still an alien, we see here, in spite of all that is said, a legal system and a code of laws that is unexelled in the world today as far as fairness for the individual is concerned; and we know as far as fairness for the individual is concerned; and we know well enough that when a lawyer is a dishonorable lawyer, very much publicity is given to his sins. That is inevitable when a profession is regarded on the whole in a high light. If you get a parson who is a dishonorable man, look at the limelight that he gets. It is the same with all professions that are held in high esteem and which are recognized as the foundation, shall we say, upon which everything is built in a country. So, I would ask you to think of that while we pray to the good Lord during this invocation—that you will ask of him that you may be given the grace from God always to be conscious of your high responsibility to the people of this land, for in your hands rests not only the formulating of the good and just laws before mentioned, but also in your hands rests too the power of enforcing those. There are times when all men should rise above political party principles, for political parties while basically they think that their way is the best for any country, it does not necessarily apply that that is always so. So we will pray for the grace of God that you of the Idaho Bar Association, through your work, will not only maintain and elevate the laws of our state and of our country—it might be well if we also prayed that we might clarify them sometimes too—but also that you will be guided by God, maybe not consciously, I don't suppose you think about that at all duriug your work, but that you will be guided by God in establishing firmer and ever firmer as the years go on the principles of justice and liberty and freedom for all, upon which foundation of law everything in this country depends. And not only in the country, we should be well aware of this, gentlemen, I think, in this day and age, that the whole world looks to this country not only for leadership as far as security from war is concerned, not only for material aid to the countries which need it, but they also look to us for that spiritual and moral leadership upon which only peace and security and the principles which guide this country can be extended to the whole world. Let us pray.

Almighty God, the Father and Guide of all, we beseech Thee for Thy blessing upon this Idaho State Bar Convention now assembled. We pray Thee that they may get much benefit and that their minds may be made even keener by that which they hear. We pray too that as they are met together here for work, so in

this beautiful country of ours, and especially in this part of it, they may get much pleasure too. Grant these things, oh Lord, for the sake of Thy Son, Jesus Christ, our Lord. Amen.

Almigbty God, we pray to Thee for the President of our land and for all those in civil authority. Give them Thy grace that all things which may be done may be for the preservation of liberty and freedom and for the furtherance of Thy Holy Kingdom among us, through Jesus Christ, our Lord. Amen.

Almighty God, we pray to Thee for the whole world. We pray that there may be peace and prosperity in every land and freedom from fear of want, freedom from want, and liberty to do as we please according to Thy laws. Grant that all those who are engaged in the legal profession throughout the world may be conscious of their divine calling and that all things that they do may be done honorably and clearly for the good of Thy whole world, throngh Jesus Christ, our Lord. Amen.

MR. SULLIVAN: We have a few announcements. In the first place, we understand a member or members of the Asseciation are rather unhappy with the accomodations they have received here at Sun Valley. We might explain to you briefly how that operates, although it was printed in the bulletin at the time the reservation blanks were sent out. As you are well aware, it is impossible to accommodate all the members of the Association attending this convention at the Lodge. The reservation blanks were sent out and you were requested to send them in. You will note, if you examine them, they do not specify whether your reservation will be in the Lodge or in the Challenger Inn. We only had a certain number of rooms allotted to the Association at the Lodge. The Association itself has nothing whatsoever to do with the allotnent of accommodations exeept for our speakers whom we hring in to address us and also for the members of the Commission. The rest of the rooms are allotted on a first come first serve basis. As soon as the Lodge is filled, which was fairly early this year, then the reservations necessarily must be allotted to the Inn. I hope that that will explain to you at least in brief why the accommodations were allocated as they were.

There are a few changes in the program. Tomorrow morning and Saturday morning the breakfast for all the attorneys will be on the Lodge Terrace instead of in the dining room. Saturday noon the luncheon will be on the Lodge Terrace for lawyers and their wives. On the prosecuting attorneys' section, the lunch tomorrow will be in the Redwood Room instead of the Duchin Room, and the Prosecutors' breakfast on Saturday morning will be in the Ram instead of in the Duchin room.

I would like to at this time appoint two committees, the first is the Canvassing Committee to canvass the ballots for the election for the new Commissioner of the Western Division. L. H. Anderson, Chairman; Joe McFadden and Tom Walenta. I wish that committee would meet immediately after we adjourn this afternoon in Room 276.

The Resolution Committee is Gus Carr Anderson, Chairman; Sherman Furey; L. F. Racine; Wayne MacGregor; Jim Givens; Ray Cox; Lloyd Haight; William Cigray; and Clifford Fix. We would like that committee to meet immediately after adjournment this afternoon in Room 267.

As you are perhaps aware from a study of the bulletin, we have changed things a little this time in order to give every one a completely free afternoon on Friday. Consequently, if the Resolutions Committee will meet as soon as possible this afternoon, it is possible that the resolutions can be made and the action taken today so that it will not be necessary to meet again tomorrow afternoon. That meeting will be in Room 267. Because of the change in the schedule it has been necessary for us to change the time of meeting in the morning. The meeting will commence at nine o'clock in the morning instead of nine-thirty or ten as in the past, so we wish you would be courteous to the speakers and be on time at nine o'clock.

Would the Distinguished Guest Committee meet here in front of the hall immediately on adjournment this afternoon?

One innovation which works definitely for the members of the Association who attend this meeting is that the report of the President and the report of the Secretary were printed in the last issue of the bulletin. Therefore, you will not be required to sit and listen to them verbally. I hope you enjoyed the reports that were printed. If you have any comments upon them or questions about them, we will be glad to take those up privately.

At this time I ask Paul Hyatt of Lewiston to please introduce the first speaker. Paul Hyatt.

MR. HYATT: Mr. President and Ladies and Gentlemen: Our speaker for this section of the meeting started the practice of law with one of the leading law firms in New York City in 1940 just after his graduation from the Harvard Law School. As it did to so many, World War II came along and interrupted his career, and he entered the United States Navy and was on duty for five years. His service was distinguished by award of the Navy Cross and Navy Unit Commendation Ribbon. He is presently, I understand, a captain in the United States Naval Reserve. Now, I thought perhaps while he was in the Navy he had seen the great State of California and the wonderful City of San Francisco and that is the reason he decided to make his home there, but he tells me that it was an ambition of his to go west from his younger days in law school, and that is the reason he moved to the State of California. So, when his service with the United States Navy ended in 1946, he became associated with McCutcheon, Thomas, Matthew, Griffiths and Greene in San Francisco, and in 1954 was elevated to a member and partner in that firm.

He has made estate planning his specialty and in 1954 was president of the San Francisco Estate Planning Council. Recognizing his qualifications in this field, the University of California has him as one of its visiting lecturers in law.

His subject today, I know, is of great interest to all of us. It is a topic with which we must constantly deal, and I feel certain each of us will take from this session something very much desired and worthwhile.

It gives me great pleasure to present Mr. Brent M. Abel of the San Francisco Bar, who will conduct the institute and talk to us on the subject of the drafting of wills.

*MR. ABEL: Thank you very much, Mr. Hyatt.

Let me say first that it gives me the very greatest pleasure to be here with you. I had never before had the opportunity to visit your state. In the three or four days I have been here it seems to me the people of Idaho are much more concerned with arrangements and plans on how to live than on how to die. Never-

*Mr. Able's outline, which he refers to in his address is reprinted as Exhibit "A" in the Appendix, page 98.

theless, from the subject which your committee has selected, I infer there are at least a few people in the State of Idaho who are willing to prepare for the inevitable.

Now, I would say prelimiarily that I don't purport to he an expert. I come before you without anything except the qualification of having rolled in this subject a good deal, and some of it is bound to stick to you as it would in the case of anything else. So, I say that because I want to make this as interesting to as many of you as possible, not to confine it to matters which are rare in occurrence, but to bring it as closely as I can to your everyday practice.

Now, I should say also that I have not attempted to make a study of the Idaho law, and so there may be some things which I say which some of you will find exceptionable by Idaho standards. I have looked into it enough to know in general your institution of community property is very like ours in California, or at least like ours as it exists today with husband and wife having a present existing interest in the community property equal and undivided while both of them live and with each having the power to dispose of half of the community property by will if he or she dies first. I think the only major distinction between your law and ours is, as I understand it, nnder your law the income of the separate property received during marriage is community property, whereas under onrs the income retains the eharacter of the property from which it springs even after marriage. That, I think, is not particularly material to what we have to say here, so perhaps I can indulge in the standard conflict of laws presumption, distorted a little perhaps, but I will assume that the Idaho law is the same as California's until one of you establishes to the contrary.

Now, so you will see where we are going this afternoon, I have in mind discussing what I have to say in two parts. One will be a consideration of the matter which you have before you on the mimeographed sheets. (See p. 98) Since we as lawyers are all accustomed to thinking in terms of specifics, I think it is easier to have a specific problem before us. From there—and I promise an intermission during which many of you who wish to escape to the swimming pool or tennis courts may do so—I expect to go into consideration of some of the most common and difficult problems a lawyer faces in drafting a will in the nature of a checklist which I hope will be of some convenience in your office practice in the wills which you draw.

Coming then to the problem, (See p. 98) and you will see this is not one of the problems which reminds you of a radio script where the announcer starts at the beginning of the program and says our heroine Georgia has just broken her engagement and taken a job; meanwhile her Uncle, who has persecuted her so seriously over the years, so on, and so on, and so on. This is a simple problem—this is down to earth. I indulge in only one presumption which I think is irrebuttable judging from what I have seen of your state, and that is that the average man in Idaho has at least two hundred thousand dollars to dispose of. I am just as sure as anything that is a fact.

Apart from that, we have here the case of Mr. and Mrs. Jones—Idaho Jones, the husband, and Montana Jones, the wife, and I will leave it to you to surmise why the masculine gender has been assigned to Idaho. Now that I am here I see your state has considerable virility about it economy-wise and otherwise, and so I am glad I made that selection. Idaho is a person with some inherited property, some separate property worth roughly a hundred thousand dollars. He has also been successful in business, and he has accumulated during marriage approximately a

hundred thousand dollars of community property. Now, to keep this simple, I have assumed that the property which he has accumulated is not a business which he owns but that he has been employed at a good salary and that these are securities which he has purchased. Some things I have done here because I would like to suggest there are a great many other problems which could be discussed at some later Idaho Bar Convention if you ever need a speaker from San Francisco again. So we have then this couple, the husband Idaho with a hundred thousand of separate property, a hundred thousand of community property between husband and wife; and to make it plain that we have others to consider in the picture, two medium teenage children 15 and 13, for whom, I take it, it is important that both spouses arrange their affairs to have as much as possible. Now, this is not a discussion on estate planning which we have this afternoon, so I am passing the problem of how we reaeh the plan we select, and I am assuming that it has been selected, and I am assuming that the objective which you have recommended to Idaho and whicb he has approved is to preserve as much of the property, both separate and community, from successive tax as possible, that is, to exelude from tax on the death of the second spouse to die as mueh as possible of the property which has already been taxed on the death of the first. Also, I am deahng in the interest of brevity only with Idaho's will—only with the husband's will.

Now, as to the separte property, I am sure all of you have had occasion to consider the subject of the marital deduction, and yet it may be worthwhile for me to start from scratch in delineating the scope of the deduction and pointing out the objectives which in this particular case would seem to be important. Now, bear in mind that the husband has all the separate property. So it would be desirahle in his will to give Montana, the wife, only so much separate property as is necessary to qualify for the maximum marital deduction and no more. If you give her more, then you are exposing to tax in her estate on her later death a portion of the property wbich she has received from him. Now, rigbt here you get into the old difficulty about just how far you want to go in your document to aeconmodate the testator's intent to the tax laws as they exist today.

And in suggesting and describing this marital deduction formula clause which we will develop in a moment, I don't mean to imply that I think it is an altogether desirable thing to have in a will, but the formula clause is in common use throughout the country. It does have the advantage of achieving to perfection the objective which we are talking about of avoiding double tax and minimizing tax on the death of the first spouse to die, and so I think it is worth considering. The subject is timely because the tax court recently decided a case cited on the first page of the material you have before you, the Hoelzel case (28 T.C. 41, May 17, 1957), in which the court recognized that a formula provision was valid to obtain the marital deduction. (See p. 98)

Up until now there has been some question about whether a provision in the language fitting the deduction as described in the statute rather than simply giving the wife a fixed amount or a residuary bequest determined without reference to the tax law—hitherto there has been a doubt as to whether or not such a formula provision would qualify for the marital deduction. Most lawyers have thought that it would have and have felt free to use it, and the tax court now says that the formula is proper. But the Hoelzel case also points out a problem about the formula.

In that case—it is a case which arose in the east so that there was no community property to complicate the problem in determining the adjusted gross

estate—the formula is as quoted at the bottom of that first page. (p. 98) The testator gave his wife a sum equal to one-half of the excess of the property included in his gross estate for the purpose of the federal estate taxes over the deductions allowable. That, you see, is, roughly speaking, a definition of one-half of the adjusted gross estate, reduced by the portions of my gross estate which passes to my wife but would not constitute a part of my probate estate at the date of my death.

Now, prima facie, that is a pretty good formula clause. What is the hooker in it? Let us right there review what this adjusted gross estate is. The adjusted gross estate is the gross estate less that portion of the gross estate which consists of community property and less that portion of all the deductions, other than the marital deduction, on the estate tax return which is attributable to the separate property. Now, to simplify the adjusted gross estate it might be said just for the purposes of talking about it that it is half of the separate property. Getting back to this language, you will see that the clause in the Hoelzel case does fine in the first quoted portion and gets down to "reduced by," and we have got to reduce it by something. We have got to reduce in the will. We have to take first the gross estate—the adjusted gross estate--to measure our gift, and then we have to take half of it because that is the maximum limit of the marital deduction, and then we have, if the will is not to give the wife more property than necessary to qualify for the maximum marital deduction, then we have to reduce the one-half of the adjusted gross estate further by taking from it life insurance, joint tenancy property, any property outside of the probate estate and outside of this marital deduction clause which passes to the wife and qualifies for the marital deduction. Right there is the point at which the draftsman in the Hoelzel case let the ball go. He said "reduced by the portions of my gross estate which pass to my wife but do not constitute a part of my probate estate." Now, in this case there were annuities for the wife which were part of the gross estate, but they were payable to the wife only for life, so that she had only a terminable interest; so the trouble with the clause was that those interests, although not qualifying for the marital deduction, those interests in the annuities reduced the marital deduction. So what should have been said there would be something along these lines: "reduced by the portions of my gross estate which pass to my wife and which qualify for the marital deduction but do not constitute a part of my probate estate" and so on.

Now, I have set out on page two (see p. 99) a formula clause which has been used in a good many wills and which meets this difficulty, and if you will notice the underscored words near the top of page two, meet the Hoelzel problem, and going through that clause as it stands you will see that if the testator's wife survives him he gives to her an amount of his property and estate equal in value to the maximum marital deduction. That puts right into the will the language of the code allowable under the federal estate tax law "applicable to my estate, less such portions of the following as shall qualify for the marital deduction from my gross estate for federal estate tax purposes," and then listing, first, the property which is given to the wife under previous clauses of the will, meaning, perhaps, home, personal effects, whatever; second, amounts receivable by the wife as under life insurance policies; third, property passing to the wife by right of survivorship, meaning joint tenancy; and, fourth, the catch-all, any and all property and interests in property which pass or have passed to the wife and are includible in the gross estate for federal estate tax purposes. But notice, all those are subject to the requirement that they shall only be deducted from the marital deduction bequest if they are in such form as to qualify for the marital deduction.

Now, to make it clear that the property passing in satisfaction of the marital

deduction gift would itself qualify the next sentence is inserted to the effect that the gift provided for in this article is to be satisfied out of the assets or the proceeds which are subject to and qualify for the marital deduction and not out of other assets. In other words, if there were leasehold interests or something which were terminable during the life of the wife and would not qualify, then those assets are not to be used to satisfy this formula provision.

Then, of course, as we all know, people have a habit of making wills and putting them away—putting them away for a good long time and long enough so that conceivably the marital deduction will no longer exist at the time the will is offered for probate. To protect against that possibility, the last sentence is inserted and says "if the federal estate tax applicable to the estate does not provide for marital deduction, then this article is to be disregarded." You can cut that either way. In some situations it is better to say instead of disregarding the article, say "the provisions of this article shall apply as if the federal estate tax law in effect at the date of this will were applicable to my estate." It depends entirely on the planning situation as to which of those two alternatives you prefer, but I do think it is worth making the point that maybe there won't be any marital deduction by the time the will is offered.

The vice of using a formula provision is that you are squarely hooked to the law as it stands then, which again is something which gives people pause about using a formula clause. Nobody knows what the federal estate tax law at the time of decedent's death will be, and it is quite conceivable that the marital deduction will be computed in an entirely different manner. However, I think it is reasonably certain that the marital deduction is pretty well ingrained in our federal estate tax law as it stands, With minor modifications, of which there have already been some, of course, since the 1948 act, it is reasonably safe to couch the provisions in the terms of the deduction as long as we say something that doesn't render the clause ambiguous or meaningless at the time if the federal tax law is changed.

Now, I omitted to say at the beginning that I propose to throw the floor open for questions at the end of this discussion. It is more important and significant to me to know what is in your minds than to make clear what is in mine, because there may be a good many things which I say now which are not clear or about which you would like to talk further, and the invitation is open to you at the close of the discussion.

There is a problem about the marital deduction formula gift on the income tax side. It is this: If we use a clause like the one which I have just described to you, which is a clause really equivalent to a cash legacy because it is fixed in amount, if we use such a clause, then there is, of course, a possibility that assets of the estate, in fact, even the likelihood, that the assets of the estate will appreciate or depreciate in value between the date selected for valuing the estate for estate tax purposes, meaning the date of death or the optional year later, and the date of distribution. So suppose you have the marital deduction computed out based on the federal estate tax return at a figure of fifty thousand dollars, and then along comes time for distribution and the executor wants to allocate assets which at the date of death had a value of fifty thousand dollars but which are now worth forty thousand dollars to satisfy the marital deduction gift. Of course your local law enters into it, but under the law of most states at the time the estate becomes distributable I think it is generally true that legacies become a liability of the estate, so you have a liability of fifty thousand dollars

which you purport to satisfy by transferring assets worth forty thousand dollars. Question: Is capital gain realized by the estate? As you would expect, internal revenue says yes. They are nice enough to say, on the other hand, that if assets which have moved the other way are used, there will be a recognizable loss. That is better than you do with the government most of the time. In any event, it is clear enough that is to be the position of the government. I hope there are no internal revenue agents present because I don't want any of them to take my comments about the tax laws personally. I never ran across one who did, but maybe they are more sensitive up here—maybe they are less sensitive.

Now, how do you deal with this problem? The suggestion has been made that one effective way to deal with it is to couch the marital deduction formula clause in terms of the estate so that it is satisfied out of assets constituting residue rather than satisfied as a cash legacy—a general legacy of the kind which I have described in the clause we have been talking about. Now that is all right as far as it goes. I don't know that it meets the problem altogether. Of course, the value of the residue goes up and down with fluctuations in market value, and I think, if I am not mistaken about it, that you get into just about the same problem as you do with the general legacy in the marital deduction formula provision. So I put it forward with some reservations of my own although I have heard a good many attorneys say they believe it solves the problem. So far so good.

We have described then by this formula provision the minimum amount of property of the testator necessary to qualify for the maximum marital deduction, and that is what we are trying to do. If we get over the minimum, then we are putting property in the wife's estate which will be subject to a further tax bite on her later death and come out of the pocket of the children. We have described that property; now we have to protect it by other provisions in the will, and, particularly, provisions that direct that the taxes be paid from property other than the marital deduction gift. Of course, we must include not only federal estate tax but local inheritance taxes, and, of course, the provision as I have set it out here—what we will call for purposes of discussing it—the general legacy provision. That provision fits in very conveniently with the tax clause because you can say quite simply that the taxes are to be paid out of the residuary estate in somewhat the language you see near the middle of page 3. (See p. 100) If you have a formula couched in terms of a portion of the residuary estate you can still do it, but you have to make it clear that these taxes come out of that portion of the residuary estate other than the portion that qualifies for the marital deduction.

Now, the subject of simultaneous death deserves special mention in connection with the marital deduction, and, of course, it is related to a good many other things in the drafting of wills too. But it really is something more than just a refinement to have in your will a thoughtful treatment of the simultaneous death or near simultaneous death situation. Take this Jones case. Suppose Idaho and Montana die in an accident under such circumstances that it is difficult to determine which died first — in other words, a situation which fits your uniform simultaneous death act like a glove. Now, that act says that the property of both Idaho and Montana will be distributed as if each had survived the other. What does that do to our marital deduction in this instance? It throws it out the window. So that, if you leave this matter in this kind of estate to the simultaneous death act, you have two estates—one Idaho's, consisting of one hundred thousand dollars of separate property, and one Montana's, consisting of fifty thousand dollars community property, and no marital deduction in either one. So, as a result,

looking at your tax table, you find out that by omitting some special provision to deal with this you have cost these two teenage children roughly eight or ten thousand dollars in taxes which could have been saved by a rather simple provision to the effect, in Idaho's will, that "if my wife and I shall die under such circumstances that there is no sufficient evidence to determine which of us shall have died first, then my wife shall be deemed to have surprised—survived me." Not surprised me—that happens other ways—every day. Then what you have achieved in the event of this common disaster situation is two equal estates because you have got the marital deduction for Idaho, and his estate is then one hundred thousand, and half of his separate property, roughly half, has gone to Montana's estate, so that you have two one hundred thousand dollar estates and not one of one hundred fifty thousand and one fifty thousand. Such a provision, and here again it seems to me that regulations have been kind to us, has the sanction of the regulations under the 1954 code. The citation of the section appears at the top of page 4. (See p. 100) So much for the simultaneous death case problem.

How about the nearly simultaneous death case—the case where one spouse survives the other very clearly but only by a short time. Now, in the Jones situation we don't have to say anything particular about that. The only thing we have to remember is not to say anything particular, because if you have at the end of your will, as some attorneys do, a clause saying "if any person shall survive me but die within one hundred eighty days (or whatever the term may be) after my death, then the legacy given to him or her shall be deemed to have lapsed, and the estate shall be distributed as if he or she had predeceased me." If you have such a general provision in the end of your will, it damages your Jones situation unless you exclude this marital deduction provision from it.

So in the particular case we have before us we don't need to say anything about nearly simultaneous death as to this marital deduction clause, but there are many cases where it is better not to have the marital deduction if one spouse survives by only a short time. Take the situation, for example, where one estate—say there are two spouses each with one hundred thousand dollars of separate property—then, bearing in mind that taxwise for the benefit of the children the ultimate and optimum solution is to have two equal estates, even if you include in the will of the husband a marital deduction provision, you will want to cut it off if the wife survives by only a short time. Of course, I am getting into an estate planning problem really rather than a drafting problem. Nevertheless, as a drafting problem, the point I am making is that the simultaneous death clauses and nearly simultaneous death clauses are things which each have to be thought through with utmost care so that you neither lose the marital deduction if the spouse survives for the requisite period nor lose it if you don't want to lose it—if the death occurs nearly simultaneously.

Now, a further footnote about marital deduction and then we will leave it. I get a little sick of the subject myself; I don't know about you. It is forced on us by the condition of the tax laws. I think perhaps we in the west where we have community property are a little more fortunate than the people in the east in the sense that we have long had a system under which community property at least, only half the property is subject to tax anyway. But one further footnote which applies in community property estates, and that is this: Suppose the estate, as in the Jones case consists of both separate and community property. Need the will say or need the distribution plan provide that only separate property shall

be distributed in satisfaction of the marital deduction gift? To that the answer is plainly no. The marital deduction is a limit on the amount of property—on the amount of the deduction—one-half of the adjusted gross estate. It is also limited by the character of the property in the sense that it must not be property terminable in interest, but it is not limited as to the character of the property as between community and separate, and so we do not have to say in the will nor need the distribution plan provide that only separate property is to be transferred in satisfaction of the marital deduction gift. So here some of the community property securities could be used to satisfy the marital deduction provision for Mrs. Jones.

Leaving the marital deduction and coming to the part of this problem which is common to all estates of any substantial size, regardless of whether there is community or separate property included, and talking now about the residuary provisions of the will: you will see when you have had a chance to look this paper over a little more carefully that I have assumed that earlier in the will there have been bequests of tangible personal property and a devise of the home, or perhaps the home is held by joint tenancy and need not be disposed of in the will, so I am confined in the discussion here to marital deduction gift and then to residue. By the residuary clause we are seeking to do the same thing we did by the marital deduction clause in part. That is, we are seeking to take that portion of the community property (and now let us assume we have an estate consisting entirely of community property) we are seeking to take that portion of the community property which is subject to the will of the first spouse to die and put it in a bundle, a trust, say, a legal life estate perhaps, but to keep it simple let us say a trust, in such shape that it will not be again subject to tax on the death of the second to go. So, by the husband's residuary clause we would take his half of the community property and put it in the residuary trust over which the wife would not have such powers as to bring it within her taxable estate.

Now, what about the language of the residuary clause? Here the question of powers of appointment comes up in a surprising number of cases. It always seems to me that the talk about exercises of powers of appointment is talking in the clouds, and yet enough situations have occurred within my knowledge to make me think it is worth pointing out—that some thought should be given in the residuary clause as to whether to include the exercise of powers of appointment. Of course, item 1 is to ask your client whether he has any. If he says no, perhaps that isn't sufficient answer. Perhaps he has a power of appointment under his Uncle Joe's will that he doesn't even know about, or perhaps his Uncle Joe hasn't died yet but dies next year leaving a will giving him a power of appointment. You can't provide against all of those things. But by and large I suppose it is well to make it clear that to the extent you can exercise the power of appointment you wish to do so. Maybe it is a special power and maybe the residuary clause is given to persons who are not legitimate appointees under the terms of the power. That is something you don't know in drafting the will, but I think the safe assumption is that in most cases the testator wants to appoint as well as bequeath and devise, and so I think your residuary clause ought to say that. I don't know about your law in Idaho, but in California a general residuary clause exercises a general power of appointment. But to point up the thing I think it is just as well to say it.

So we come to the language which appears toward the middle of page 5 (see p. 101) under which the testator gives all the rest and residue of his property and estate

of whatsoever character, and so on, including all property over which at the time of his death he has the power of testamentary disposition by will or by power of appointment, and we wrap that all up and define it as a residuary estate as follows. You will see there a caveat about Idaho law. By that I don't mean the Idaho law is uncertain. I only mean I am uncertain about what the Idaho law is. The point of the caveat is this: by California law a husband disposing of residue by a clause in this form disposes only of his half of the community property, and it may be that under your law or under the law of some other community property states where the husband gives away all the property of the estate that is interpreted as meaning not only his half but also the wife's half of the community property. So our residuary clause then disposes of everything that is left after our marital deduction provision and cash legacy specific bequests and devises and throws it into this trust, which, in order to give it a handle, we call a residuary trust.

At this point we face the question of whether we have a situation under which the widow should be required or at least given the opportunity to elect to have her half of the community property pass under the terms of the husband's will. I don't know whether this particular subject is of great interest to you. It's a problem we have in California and has caused a great deal of discussion and is still surrounded by a good deal of uncertainty. I might ask for a show of hands as to how many are interested in hearing about widow's elections and the income tax and death tax questions that surround it. I think there are enough to make it worthwhile.

Of course, the objective of a widow's election (and it is a legitimate and worthy one) is to permit the community property to be managed as a whole. After all, it has been assembled as a whole, and after the husband's death there may be really substantial reasons why it is better to have it run as a unit rather than have it divided in two with the wife given her half outright and the other half passing into the trust. That is particularly true where the community property consists, we will say, of a business, a ranch property perhaps, a closely held corporation, anything like that that requires unified management and would suffer severely were it sliced in two in an arbitrary manner. So there are many situations in which it is well to consider having an election.

Here we have in California, and I imagine your law is roughly the same as this, two kinds of elections—under one the wife endorses on the will of the husband during the husband's lifetime a statement to the effect that in consideration of the execution of the will by her husband she agrees to allow her interest in the community property to pass under the terms of the will. Now, and we will say that the will puts all of the community property under the residuary clause, including both husband's share and the wife's into a trust of which all the income is payable to the wife but over which she has at most a special power of appointment, not a general one, so that on her later death at least half of the property escapes death taxes. Now, the effect of that election, which for the purposes of talking about it we call the inter vivos election, the effect of that under our law is this: either the wife or husband can call off the dogs while they are both living. The husband can make a new will, the wife can say "uh-uh, I have decided I don't want to be stuck with that election," and if she notifies her husband of that she isn't bound by it. If, however, the husband dies leaving the will in that form and the wife has not notified him she rejects the election, then she is bound at the moment of his death to take under the will and she has lost her right to claim her half of the community property outright. That is inter vivos election—type one.

Second is the form of election in which the terms of the husband's will squarely put it to the wife to elect during probate of his estate whether or not to claim under the terms of the will or to claim outright her half of the community property. Now, the terms of the husband's will are simply to make it clear that that is his intention, that she must during the period of probate elect, and, roughly, the clause should go something like this: "I give all of the community property (coueh it in the terms of the residual clause) "I give all the rest, residue and remainder of my estate, including not only my half of the commnnity property but also my wife's half, in trust, subject to the following provisions; provided, however, that if my wife shall not eleet to take the provisions of the will for her benefit, then certain other provisions take hold." And how sharp the teeth are that the husband wants to put in that provision to compel his wife to accept the provisions of the will depend on such factors as how great his affection is for her, how anxious he is to protect her, and so on. We call that type of election, for purposes of talking about it the post mortem election.

There is a third type of provision which I think perhaps is more useful than either of the other two; that is a provision which disposes only of the husband's half of the property but gives the wife the option of allowing her half to pass nnder the husband's will. Now, that is not an election because she can take under the husband's will anyway, but she is allowed to permit her half to pass under the terms of the husband's will.

Let's consider those three in terms of the tax aspects in particular but also of the substantive aspects; let's take the substantive ones first.

The advantage of the inter vivos election, of course, is that the husband knows if he dies with that will, the wife is hooked and she can't dig into that hard earned community property of his, either her half or his, for the benefit of her next beloved, and that may be something that is so important to him that he would rather have it that way. On the other hand, it has some rather ticklish tax problems which you will sec discussed in the paper. I am now on page 6. (See p. 102)

First is this problem. As you know, during probate of the husband's estate, the estate and the wife are still entitled, under the present law, to divide the gross income, the estate returning half of it and the wife returning the other half. Now, in the case cited below the middle of page 6, (see p. 102) Wells-Fargo Bank vs. United States, there was an inter vivos election by the wife to take under the husband's will and Internal Revenue came along and said: "Look, the wife at the moment of the husband's death was bound to take nnder the will; therefore, there is now only one income tax entity, namely, the estate, so all the income is taxed to the estate and none is taxed to the wife." The taxpayer in vain attempted to point out that the fact was that the local law said that all of the community property was subject to administration in the estate and the fact that she had made his election during her lifetime shouldn't change the split income benefits of the income tax laws. There was another factor in that Wells-Fargo case which leads to some hope of rcversal on appeal. The case is on appeal but it is not yet reported, so I couldn't give you the citation.

This other factor was this: The wife, under the election endorsed on that will, was given the option to withdraw her half of the commuuity property from the trust created under the will, and the taxpayer's position was fortified, although not to the satisfaction of the district court judge by the contention that since she had the right to revoke, her election was not final, and there were still two income

tax entities during probate, one the estate, and the other the wife. But the case does squarely suggest that if it is important to have split income benefits during the probate period, that there is a definite advantage in the post mortem election--the election made duiing the probate period--over the inter vivos election that becomes binding the moment of the husband's death.

The second tax problem that occurs is the gift tax problem, and the tenor of the thinking about that runs this way. The wife allows her half of the community property to pass under the husband's will, and this would apply under either the post mortem or the inter vivos election. So, even if she is entitled to all of the income, nevertheless, she has at the moment she makes that election made a gift of the remainder to the remaindermen under the will, and it is irrevocable unless we say something to the contrary making it revocable. So, while I know of no cases and while you can think of perfectly good arguments to the contrary, such as, really what she is doing is exchanging her outright ownership in one-half of the property for the right to receive the income from the whole during her lifetime, thereby reducing the amount of the gift. There is nevertheless, I think, a gift tax problem about elections unless you give the wife the right to baek out during her survivorship. If you do that, it seems to me, you haven't made a final gift, and if the wife has the power to revoke, it is like any other revocable gift. From the drafting standpoint, the point this raises is this: That it is well in drafting a residuary trust on which the wife is required to eleet either during probate or by an inter vivos election to take the benefits of the will or claim her half, it is well to provide that she has the right to revoke, and it is also well to provide that the trustee must keep separate books with respect to the wife's half of the community property as distinguished from the husband's half. Only in that way, you see, can you have identified at all times the property which she has the right to pull back out of the trust. The language is not difficult to devise to achieve that objective.

There is one further problem, and then I will give you gentlement the benefit of an intermission, and that is the death tax question of election. If the wife elects to permit her half to pass uuder the husband's will and the husband's will gives her the income from his half and from hers and if the election is irrevocable, then, of course, she is transferring her half of the community property but reserving a life estate. Now, that's not necessarily an undesirable thing because at most the government can assert a tax on her half of the commuuity property, but again it points to the desirability of having two separate funds in your document as a drafting matter so that it is perfectly clear in the course of investments over the years that only the wife's half of the community property is subject to the death tax on her death and so that you may ascertain what part of the trust is her half of the community property at all times.

I don't know what your customary length of intermission is--in California we usually start out at five and wind up at fifteen. Perhaps I should say five, Mr. Hyatt, and we will see where that takes us. (Intermission)

I am glad to see as many of you as did survive the intermission. I consider the competition from the fishing and what-not to be very stiff here. I conclude you are either conscientious or courteous, or both, in coming back here.

I want to run through, before we leave this problem, the terms of the residuary trust which are set out in this paper, and there is one point I wanted to make to you particnlarly. We are in an era now where there are a good many trusts which

the tax situation calls for in very moderate sized estates. And this suggests to me that we had better, in drafting trusts for moderate income tax people, get away from the old traditional distinction between principal and income. Take this Jones family with two teen-age children and the wife; if the husband were to die, the most important thing he can do for the children, and I think most everyone would agree about this, is to get them educated.

If they get to mature age and are educated, then they are equipped to take care of themselves. Similarly, with the wife, she ought to be allowed, if she is a person for whom the husband has a normal degree of affection, to pretty well go through what they have accumulated during the marriage (I am speaking of community property in particular but not exclusively), and that is normally what he would want. And most of the stinking problems (that is a word that should be omitted from the transcript, Miss Reporter) that have come up with trusts in the past and the things that have put trusts in bad odor with the general public, revolve about the point that there is money there which could very well be used by beneficiaries for purposes which the testator would have approved had he had an opportunity to think of it, but the trustee and the beneficiaries are hampered by the terms of the document that say only income go to the life beneficiary, or which has an emergency clause which doesn't happen to cover this specific situation. So, I suggest to you that in this moderate sized trust, and even in fairly large ones, that it is a pretty good idea to select the trustee carefully, whether it be a bank or an individual, or both, and commit to the trustee about the same breadth of decision as Jones would have were he here himself.

If the family can live within their income, fine, so much the better; but if they can't, don't make them give up the things which in the long run are most important to the unit of the family. So, this trust clause which you see in here and which is designed to cover the period while the children are still being educated (I am on page 7) (see p. 103) gives the trustees the authority to apply or devote all or any part of the net income or principal of the trust, or both, as the trustee's deem proper, to the support, maintenance, education, and welfare of the wife and children and survivor and survivors of them and the issue of any deceased child, bearing in mind if there is an age spread you may have during the wife's lifetime quite a difference in ages, of the children. And some may, during the wife's lifetime, die, and there might be grandchildren who might be in extreme circumstances and need help. "Taking into consideration all resources and support (including, in the case of my wife, circumstances arising out of her possible remarriage) available to each of them for the purposes and known to the trustees."

Now, of course, people think differeut ways about the effect of the wife's remarriage, and that's a personal question. I suppose, by and large, if the old lady ean catch a second meal tieket, she ought to be at liberty to do so and not be penalized. Nevertheless, if she should happen to get hold of somebody who can pay full freight himself, it might be better to save what is in the trust for the children. Those are things which it is best to make absolutely flexible, it would seem to me.

And then there is exculpatory language whieh gives the trustees and makes it erystal elear that the trustees have power to determine the manner in which and the purposes for which the income and principal are to be applied and devoted. It gives the trustees authority to expend income or principal, or both, and says it a couple of times, so that when the trust officer to whom you go with the widow and suggest that this be done looks at you over the table, you have

something you can read to him not once but twice. There may be some trust officers present, and that is only a compliment to the conscientious way in which trust officers do their work. Nevertheless, I think it is an important part of any will to have the language there within the covers of the document. It is a much more practical thing from the point of view of the trustee to be able to look and be able to say, "Herc it is; that is what it says," and not have to look into case law or statutes for interpretation.

Now, the next sentence, the one beginning, "The trustees are hereby authorized," a little more than halfway down on page 7, (see p. 103) makes it clear that the trustees may give more to one beneficiary than to the others; particularly with children that would be important where the educational needs of some of them will be larger than others; with boys going to law school or medical school and girls getting married young, whatever the differences might be.

Then there are precatory provisions to the effect in general, "It is my wish, but I do not require, that after the education of my children shall have been completed the trust shall be primarily for the benefit of my wife, unless she shall have remarried and the trustees shall in their discretion determine that she has other adequate resources. The trustees have authority to determine the outlay of income and principal, and then the last sentence provides for the accumulation of any income that may not be currently needed. That is simply to provide for the possibility that the thing may go the other way, that there may be more income than necessary, and perhaps there would be an income tax advantage in having it accumulate so that it is taxed at the trust rate rather than at the higher rate of the beneficiary.

Then the last suggestion I have made in this clause is that some rather broad definition of education be included, so that it is crystal clear that what the individual is driving at is that a primary objective of this trust is to permit the children to be educated even though at the termination of the trust, which might occur at the wife's death or at the attaining of a definite age by the children after the wife's death, even though at that time the trust is substantially exhausted.

Now, I might also say that if you have separate funds or two trusts, which would occur if the election is used perhaps or if there is a marital deduction trust, if you have two, theu the invasions of principal for the wife's use ought to come out of the part over whieh she has the right of revoeation, so that at her later death the estate taxable to her will be reduced by the invasions of prineipal and not the corpus which has already been taxed in the husband's estate.

Now, I would like to pass from the contents of this paper to the list of items which it seems to me is worth talking to you about whieh are of coneern in practically every will a lawyer draws, and I have a list of eight items here which it seems to me give you food for thought in reviewing your first draft of any will. Before getting to that list, let me suggest a couple of other elementary prineiples which could only be a refresher to you.

One of the major problems about drawing wills is getting the information out of your client, and I guess all of us have had elients eome to us who say something like this: "I have thought my whole estate over and I know just exactly what I would like to put in my will." And you say, "Oh, what is that?" And he says, "I would like my house to go to my Aunt Mabel and my General Motors stock to my sister, and my U. S. Steel stock to go somewhere else, and my Idaho Power stock to go somewhere else." So, if you stop there, you may be in

trouble. This is not an easy thing for a lawyer to get at because, particularly if this is a new client, there is an inevitable reticence on your part in appearing to be too penetrating about the questions you ask about the property the person has.

I don't know whether you have the same reaction that I have in talking to clients who are new and unfamiliar to me, but I always have a little the notion that the client suspects the reason I am asking the question has to do with the amount I am going to charge for preparing the will. We simply have to face that because when you cross question this man who has these fairly fixed ideas you find what he really means is that he has one hundred shares of General Motors stock worth about $4300, and that is about the size of the bequest he would like to make to this person; or his house is worth about $25,000, and that is what he wants to give to Aunt Mabel, about $25,000. But bearing in mind the fluctuations in value of all these items, when you go through that part of it with him and tell him what the in's and out's are and that under certain circumstances some of these legacies may be worthless, you usually find what he is really shooting at is a fractional distribution of his estate, and he has in mind amounts based on current values, and in his mind those values are going to stay the same, and that is what he wants to do for the people who are to be the beneficiaries of the will.

So, I think Item 1 in drafting wills is not really a matter of draftsmauship but It is in overcoming the notion that the lawyer is only a scrivener for writing the testator's wishes, because until you have gone over the whole thing with him pretty darn carefully, no matter what he says when he first comes in your office, he doesn't know what he wants; he thinks he does, but he doesn't. I think this is one of the most important techniques in drafting a will is to get at the information. This goes into a lot of other areas too—the kind of property he has. Do you have any separate property? No. Are your parents dead? Yes. When did they die? My father died last year. Did you inherit something from him? Yes, I inherited $25,000 in securities. Do you still have those? Yes. Are they in your name alone? Yes. Well those are separate property. But the man says, "But I am married, and I was married when I got them. I thought they were community property. So it goes. The matter of getting at the information is really a substantial part of this drafting problem.

Now, let me run through this list with you, and you might call this something like common problems or everyday problems in the drafting of wills.

First, what to do with tangible personalty. Now, in the ordinary case this may be easy enough; and, of course, tangible personalty by and large is not particularly well suited to be trust property and is better suited to outright ownership, so you probably want to do something with it by way of specific bequest. If you have the ordinary married couple, of course, each probably will leave it to the survivor; and if you have children and they are of age, it can go to the children to be divided among them in such shares as they may agree upon, or, in the absence of agreement as determined by the executor; and you go on to ask the probate court to follow the instructions of the executor in that regard.

So far so good, but take the case of the elderly person whose spouse is deceased and has a collection of family items that are important and a wide circle of friends, and perhaps her own children are not interested in these things, so she wants to use these personal items, silverware, paintings, or whatever it may be, as a way of recognizing her friendship, but she says to you quite frankly that her ideas change and people die and she doesn't want to have to make a new will every time she decides something goes to Aunt Emmy instead of to somebody

else. What is the practical way of dealing with that? Well, one way, is to leave personal effects out of the will itself altogether and cover them in a codicil, and right there you see there is a conflict of two things: one, the desire of the testatrix to have her wishes carried out, and, two, the desire to avoid getting the will cluttered up with a lot of very small items; and the two are fairly irreconcilable. But suppose these are things of substance, and she wants to be sure that such and such goes to such and such a person. One way to do that is to leave it out of the will altogether and then make a codicil dealing with personal effects, and when she changes her mind about one of them, all you have to do is revoke the codicil and write a new codicil, and it leaves the structure of the will untouched.

This has another advantage. It has the advantage of—if by its terms each later codicil revokes the prior one, nobody can see when they are offered for probate, what the vicissitudes of this lady's generosity have been, and that is a matter of importance to a good many people, avoiding embarrassment of having it apparent so-and-so has been cut down to two thousand dollars or an egg crate or whatever it may be. I don't know of any other way of dealing with the division of personalty than the kinds I have suggested. You can give them to a certain person outright and request that person to divide them in such manner as that person believes to be in accordance with your wishes, and then give them a letter. Of course, that reposes in the individual complete confidence in carrying out those wishes, and it also, under California law, and I guess under yours, results in the inheritauce tax being determined as if the entire gift were made to the person who is given these items. That may be immaterial if they are not substantial in value; but if they are heirlooms or antique silver or something, that may enter into the picture. Item one then on the check list is to examine your provisions regarding disposition of tangible personal property and make sure that the proper compromise is reached between setting ont the wishes of the testator in the will on the one hand and not making the document unduly cumbersome or unworkable on the other.

Now, the second thing I would mention is the condition of survivorship—what you might call the anti-lapse provisions. It is very easy to put in the will "I give to my Uncle Joe $5,000, period." And Uncle Joe, of course, predeceases. Under our California law, and I don't know how your anti-lapse law reads, but under our California law, since Uncle Joe is a relative, if he dies before the testator leaving children, his children succeed to that bequest. That may be wholly out of accord with what the testator wishes. I have such a problem now which I will talk about in a different context in a minute. So, I can hardly think of any specific or cash bequest in which you would not want to say someting about the possibility that the first beneficiary may predecease the testator. Maybe the testator wants the person's children to have the property if the person predeceases. Maybe it is the last thing he wants. In any event, something should be said.

Third, I think the subject of near simultaneous death provisions is something that you should consider in connection with every will. There are several possibilities. Five thousand dollars to my Aunt Mabel if she survives me by one hundred and eighty days, would be one. Five thousand dollars to my Aunt Mabel if she shall be living at the time of distribution thereof from my estate, would be another possibility. Now, as between those two, of course, looking at the distribution from the estate is really what you mean, but there is a little caveat there. If the executor is an individual and has some interest in the residuary estate, he may just take it into his head that by dragging his feet on this distribution, Aunt Mabel may never get the five thousand dollars. This is not just pulling a sugges-

trouble. This is not an easy thing for a lawyer to get at because, particularly if this is a new client, there is an inevitable reticence on your part in appearing to be too penetrating about the questions you ask about the property the person has.

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First, what to do with tangible personalty. Now, in the ordinary case this may he easy enough; and, of course, tangible personalty by and large is not particularly well suited to be trust property and is better suited to outright ownership, so you probably want to do something with it by way of specific bequest. If you have the ordinary married couple, of course, each prohably will leave it to the survivor; and if you have children and they are of age, it can go to the children to be divided among them in such shares as they may agree upon, or, in the absence of agreement as determined by the executor; and you go on to ask the probate court to follow the instructions of the executor in that regard.

So far so good, but take the case of the elderly person whose spouse is deceased and has a collection of family items that are important and a wide cirele of friends, and perhaps her own children are not interested in these things, so she wants to use these personal items, silverware, paintings, or whatever it may be, as a way of recognizing her friendship, but she says to you quite frankly that her ideas change and people die and she doesn't want to have to make a new will every time she decides something goes to Aunt Emmy instead of to somebody

else. What is the practical way of dealing with that? Well, one way, is to leave personal effects out of the will itself altogether and cover them in a codicil, and right there you see there is a conflict of two things: one, the desire of the testatrix to have her wishes carried ont, and, two, the desire to avoid getting the will cluttered up with a lot of very small items; and the two are fairly irreconcilable. But suppose these are things of substance, and she wants to be sure that such and such goes to such and such a person. One way to do that is to leave it out of the will altogether and then make a codicil dealing with personal effeets, and when she changes her mind about one of them, all you have to do is revoke the codicil and write a new codicil, and it leaves the structure of the will untouched.

This has another advantage. It has the advantage of—if by its terms each later codicil revokes the prior one, nohody can see when they are offered for probate, what the vicissitudes of this lady's generosity have been, and that is a matter of importance to a good many people, avoiding embarrassment of having it apparent so-and-so has beeu cut down to two thousand dollars or an egg crate or whatever it may be. I don't know of any other way of dealing with the division of personalty than the kinds I have suggested. You can give them to a certain person outright and request that person to divide them in such manner as that person believes to be in accordance with your wishes, and then give them a letter. Of course, that reposes in the individual complete confidence iu carrying out those wishes, and it also, under California law, and I guess under yours, results in the inheritance tax being determined as if the eutire gift were made to the persou who is given these items. That may be immaterial if they are not snbstantial in value; but if they are heirlooms or autique silver or something, that may enter iuto the picture. Item one then on the check list is to examine your provisions regarding disposition of tangible personal property and make sure that the proper compromise is reached between setting out the wishes of the testator in the will on the one hand and not making the document unduly cumbersome or unworkable on the other.

Now, the secoud thing I would mention is the condition of survivorship—what you might call the anti-lapsc provisions. It is very easy to put in the will "I give to my Uncle Joe $5,000, period." And Uncle Joe, of course, predeceases. Under our California law, and I don't know how your anti-lapse law reads, but under our California law, since Uncle Joe is a relative, if he dies before the testator leaving children, his children succeed to that bequest. That may be wholly out of accord with what the testator wishes. I have such a problem now which I will talk about in a different context in a minute. So, I ean hardly think of any specific or cash bequest in which you would not want to say someting about the possibility that the first beneficiary may predecease the testator. Maybe the testator wants the person's children to have the property if the person predeceases. Maybe it is the last thing he wants. In any event, something should be said.

Third, I think the subject of near simultaneous death provisions is something that you should consider in connection with every will. There are several possibilities. Five thousaud dollars to my Aunt Mabel if she survives me by one hundred and eighty days, wonld be one. Five thousaud dollars to my Aunt Mabel if she shall be living at the time of distribution thereof from my estate, would be another possibility. Now, as between those two, of course, looking at the distribution from the estate is really what you mean, but there is a little caveat there. If the executor is an individual and has some interest in the residuary estate, he may just take it into his head that by dragging his feet on this distribution, Aunt Mabel may never get the five thousand dollars. This is not just pulling a sugges-

tion out of the air nor is it to say that it would be a matter of deliberate fraud on the part of the executor—it is just that there are very many reasons for keeping the administration of an estate open in these days related to death taxes and income taxes, and it may be a little better to fix a definite time at which that person becomes entitled; and if a hundred and eighty days is roughly the time at which an estate is distributable under your local law, then perhaps that is the period you should select. I tend to prefer a definite period rather than make a gift contingent on the survival at distribution. Now, of course, these simultaneous death provisions also come up in marital deduction and community property problems, and there are just all sorts of angles which you have to think about whether each provision of your will (they may not all be the same) fits with that possibility.

The fourth thing for the list, it seems to me, is a tax clause of some sort. When the average person puts in a will, "I give to my Aunt Mabel five thousand dollars," he expects her to get the five thousand dollars, not five thousand dollars less her pro rata share of federal estate tax and less the local inheritance tax attributable to the gift. Normally that is what he expects so unless you have some specific instructions for the testator to the contrary, that Aunt Mabel is to bear her share of the taxes, it is well to have some kind of a clause either alongside the specific legacy saying "free of local inheritance and federal estate tax" or in a residuary clause which says that all of the death taxes are to be paid out of the residuary estate. Now, even if your testator tells you, yes, he wants Aunt Mabel to bear her fair share of the taxes, it is probably a good thing to say that in some way or other, taking it the other way now, because Aunt Mabel sees this and sits back waiting for her five thousand dollars and she gets a check for three thousand five hundred dollars, and she is both displeased and surprised, and probably more displeased than surprised.

As a matter of protecting yourself against her, it is well to have some clear indication as to whether this legacy is to be tax free or not. In your tax clause also it is desirable to make it clear whether or not the probate estate is to pay taxes attributable to property outside of the probate estate, for instance, life insurance payable to named beneficiaries or joint tenancy property. These are things which you simply have to think about. It is a mistake to adopt a policy of in all cases inserting a provision that all taxes payable by reason of my death, whether on account of property included in my probate estate or not, shall be paid out of residue, because that may mean that ready cash in the form of life insurance payable to the wife, we will say, is made unavailable for taxes, requiring the sale of valuable assets out of the residuary estate, so the tax clause is something which you simply have to think about in the terms of the individual set of circumstances before you.

Now, item five would be the subject of specific bequests or devises. This gets back to the point I put to you at the beginning of this part of my talk in the nature of the importance of getting from the testator what he really wants. Specific bequests have a way of becoming distorted with the passage of time in relation to the total value of the estate. By way of illustration, I have now to wrestle with this problem: a maiden lady who had a brother and sister; she had in 1935 an estate worth roughly a couple of hundred thousand dollars and a house worth maybe twenty-five thousand. She drew a will at that time in which she gave the house to the brother and left the residue of the estate to the sister. And the passage of time resulted in this: the lady grew older; she retired; she is now totally

incompetent; the brother has died leaving two children who are not known to the testatrix at all and whom she would rather not see benefit. With the passing of time the entire property of this old lady now in her nineties has been consumed except for this house, so that now we have a wholly uncorrectable problem because the house was given specifically to the brother, which she meant to be only a token, roughly ten per cent, and over the years the sister is the person who has taken care of her and seen to her needs and for whom she has had the real affection, and the thing has worked the wrong way.

I would say as an answer to that kind of situation when you make a specific bequest or devise there must be something in the document to qualify that in terms of the value of the estate of the testatrix—something perhaps to the effect that "I give my house on Cedar Street to my brother, but if the value of my house as determined for inheritance tax purposes shall exceed twenty per cent of my probate estate, then this devise shall be null and void, and instead I give my brother, if he shall survive me, twenty-five per cent of my probate estate." That is not artfully phrased, but the point is that the provision itself should have something to protect against having it become wholly distorted by the passage of time.

Now, the sixth item I would mention is related to some extent to the anti-lapse provisions, but now the problem comes up in a different way. I have in mind the use of the words "die" and "survive." A great many of the problems you see in the books relate to this kind of situation: "I give my estate to the trustee in trust for my brother for life, remainder to his children; but if any of his children shall die, then to his issue." Now, "die"—of course, what happens is that the brother survives the testator but dies before the life tenant. What does "die" mean? Does it mean he must survive the life tenant? The simple answer to this, it seems to me, is that you must never use the word "die" without referring it to some point of time in this kind of context. Die when? "Dying," "living" and other words of the same context, both of those have got to have some reference in time in order to pin them down and avoid ambiguities. The same thing is true of the word "survive." "I give my estate to the trustee in trust for my Brother Joe, and at his death to those of his children who shall survive." Survive whom? Survive Joe or survive me? The word "survive" from the derivation means live after, and unless you say live after whom, you have an explosive ambiguity in your document.

The seventh item I would put on your checklist, which has to do primarily with the wills in which a trust is created, would be some provision having to do with income during the probate period. Now, I don't know how your Idaho law is; ours in California is in the greatest confusion as to what the status of income received during probate is after distribution to the trustee. Is it to be treated as income or principal? And, if the geueral rule is that it is to be income instead of principal, then what about the income during probate of property which is later sold to pay death taxes before distribution. Is such income to be deemed income of the trust or principal? To this I can only suggest that you put it down to think about in terms of the individual trust you have drawn and in terms of the general family situation and also in terms of your own local law about widow's allowances during probate. If your family allowance covers the needs of the widow during probate, and the children, then perhaps it is as well to provide any income left after distribution is to be deemed principal. On the other hand, if you have a will in which, we will say, the testator is unmarried and has no children but is setting up a trust to take care of the needs of members of his family who are not entitled to family allowance, (in California that would include any person other

than the wife and children), then perhaps you will want to provide for payments of income during the probate period to those persons, pending distribution to the trust. But in any event, you will probably want to provide that upon distribution all income should belong to the income beneficiaries and should not be part of the principal. That would give the income beneficiary the opportunity to borrow from the bank against the time when this would be distributed and the loan could be repaid. You will notice that in the type of trust which I have put in the problem, where there is no real distinction between income and principal, that you are left a good deal more flexibility in what you do with income during probate because no matter what it states, when it comes out of probate, the trustee can deal it out to the beneficiaries or withhold it as the trustee thinks best under current circumstances. By and large, as a trust accounting matter, death taxes and debts are a charge against principal. Now, if that is so, and if the family allowance takes care of the needs of the beneficiaries during the probate period, then even in the case where there is a distinction between income and principal in the trust, it may be desirable to say that income during probate is to be available for the payment of debts and taxes and any balance distributed to the trustee is deemed principal. I can only say this is/can be a pretty major problem, and it is something that ought to be on your list for any will in which a trust is called for.

Now, the last suggestion I would make to you has to do with the definition of the word "issue." That is a word which we all use rather commonly. In California it doesn't include adopted children. I don't know how your law is on that point. By and large, of course, nowadays both grandparents and parents want adopted children, whether they are their own or adopted by their children, to be included as if they were natural born children. There have been a number of rather tragic instances where because the word "issue" is used and is not further defined, the adopted child has been left out in the cold. And, of course, when you start defining it, you have got to do it right. This gets into something I have fiddled with at great length, to define issue to include natural children, adopted children of natural children, adopted children, natural children of adopted children, and adopted children of adopted children, and you get into a fairly long definition, but I think it is worth having in your document as a matter of thoroughness, particularly where you are drawing a trust which may go on for some years after the testator has lost the opportunity to do anything about changing it.

Now, in closing, I would say, first, that I have not attempted to give you much in the way of specific forms. That is by design because I have never found another's form particularly useful, and in fact it seems to me they are kind of dangerous, but for your reference, if you haven't seen it, in the magazine called "Trusts and Estates," I am not sure whether any of you take that or not, but I suspect your local banks do and you can obtain a copy, in the issues from January to May of this year, 1957, is a series of typical provisions for wills. It is prepared by a St. Louis attorney. I don't think you will find much help on community property problems. It is rather carefully thought out. Some of the provisions, I think, are unduly long and more comprehensive than need be, but in using a form book I can see this to be an error in the right direction, and I think you might find it helpful to look at that.

In California two of our banks, the Security First National Bank of Los Angeles and the Bank of America, have each published a very elaborate booklet on will forms primarily for the use of California attorneys. I would hope that one of your Idaho trust companies, if they haven't already done it, might think it worthwhile to prepare such a set for the use of attorneys in your state.

I thank you very much indeed for being as courteous about being here as you have and about listening all of this time, and I will be glad to throw the floor open now for questions, and thank you very much indeed for your extremely generous and warm hospitality to me and my family during our visit here.

MR. SULLIVAN: Does any one have any question?

MR. WYMAN: Would you repeat the names of the banks again?

MR. ABEL: The Security First National Bank of Los Angeles and the Bank of America National Trust & Savings Association. I know I have had occasion to ask for copies of those for attorneys in other states, and they are always ready to send them, but I don't know that they are available on request at all. I don't know that.

MR. HYATT: I would like to ask a question in regard to the situation where the wife agrees in some way before or after death to put her part of the community into the trust? Does she have to reserve in that the right to pull out the entire trust or if she says "I reserve the right to take out part of the property," is that all right, or does she have to say she reserves the right to pull it all out to get away from the gift tax?

MR. ABEL: The question is this: where the wife elects either during the husband's lifetime or after his death to permit her half of the property to pass under her will, is the gift tax question avoided by giving her the partial right to revoke as to her half as distinguished from the right to pull out her entire half? To that the answer is, it seems to me, the part as to which she has the power to revoke only escapes the gift tax contention, and the part as to which she does not have a power to revoke is still subject to it.

MR. HYATT: It should be worded that she has the right to pull it all back out?

MR. ABEL: Yes, if you are going to avoid the gift tax question altogether, I would say she should have the power to revoke the whole election. Of course, you say, doesn't that defeat the whole purpose of having her elect to have it pass under the trust? There is no answer to that except potentially yes, but, by and large, once the thing is set up, if it is run properly, the widow isn't likely to want to pull out of the thing, and if the situation deteriorates to the point where she wants to, perhaps it is just as well to give her that right. It gives her the whip hand in dealing with the trustee perhaps; if she has the power to terminate the trust as to her half, perhaps she can get a little better attention to her problems.

MR. SULLIVAN: Are there any other questions? If not, I wish to thank you very much, Mr. Abel. I am sure we find your address most beneficial and instructive. We hope you and your lovely wife and children enjoyed your stay with us and that you may soon return to Idaho.

For the benefit of those who were late, I would like to repeat the committees that were appointed in the opening of the session.

Canvassing: The chairman, L. H. Anderson; Joe McFadden, and Tom Walenta. That committee will meet immedately in room 276.

Resolutions Committee: Gus Carr Anderson; Sherman Furey, L. F. Racine, Wayne MacGregor, Jim Givens, Ray Cox, Lloyd Haight, William Gigray, and Clifford Fix. That committee will meet immediately in room 267. We will be recessed until tomorrow morning at nine o'clock.

July 12, 1957

MR. SULLIVAN: We have just received a wire I would like to read to you: "We regret missing this annual meeting, which we hope and expect will rank among the most successful, and pledge ourselves to highest endeavors in representing Idaho at the forthcoming ABA meeting. Sincerely, Jane and Gilbert St. Clair."

Mr. T. M. Robertson will introduce our first speaker this morning.

MR. ROBERTSON: I think it is commonplace, maybe almost to the point of prejudice in the practice of law that when clients come in and talk about partnerships, for the attorney to make the analogy to the client and tell him a partnership is very much like a marriage; it is easy to get into; when it works, there is no finer way in the world to operate; when it doesn't work, why there can probably be no more troublesome, expensive, or unhappy experience than to get out of a partnership. Unfortunately in matters of partnership consultation and in dealing with clients the lawyer has the full responsibility of doing it himself, whereas in marriages there are the clergy, the social workers, and the whole host of well-wishers and do-gooders to advise people about their problems. It behooves, I think, the legal profession to be sure to know all there is to know about partnerships when we consult with our clients on that subject. Not the least of the partnership problems are the tax aspects of partnerships, and here again we find ourselves in an isolated position where it is our responsibility to handle those matters with the client sometimes also by ourselves. In many tax matters, in fact, I think in most of them, particularly in this state where specialization in law practice is somewhat limited, we rely to a large extent on the members of the accounting profession to consult with on tax matters generally. However, in partnerships there are a lot of tax problems that are violative of a lot of accounting theories, and I think in the matters of the tax problems of partnerships the accounting profession is probably less helpful than in the general field of taxation. We are fortunate this morning in having a specialist in tax matters, a lawyer's lawyer who practices law in San Francisco in a firm devoted entirely to tax practice. I was talking to Mr. Anderson last night and asked him how you specialize in taxes inasmuch as taxes now cover such a broad field. I said, "What about drawing wills"; he said, "We draw wills but we don't handle any probates; we leave that to other counsel." And I think it is rather unusual in our profession to find a specialist of this kind, and I think we are very fortunate to have a specialist here to talk to us on the subject of drafting partnership agreements, because that is, as I say, not only a very complicated tax field but one that is peculiarly, as far as the tax aspect is concerned, a responsibility of the legal profession. Mr. Paul Anderson has come along since the war; he is a 1950 graduate of Michigan; he has taught tax law; he has worked for the government; and is now in a firm of tax practicing specialists in San Francisco. Mr. Anderson.

DRAFTING A PARTNERSHIP AGREEMENT UNDER THE 1954 INTERNAL REVENUE CODE

By Paul E. Anderson*

The adoption of the Internal Revenue Code of 1954 saw the inclusion for the first time of a comprehensive set of rules for the treatment of partnerships under the

federal income tax. Many of the provisions contained referenees to the partnership agreement and others provided for options to be elected by the partnership. These provisions reemphasized the importance of the agreement in governing the tax relationships of the partners among themselves and with the federal government. The purpose of this paper is to explore some of the clauses that might well be considered for inclusion in the partnership agreement to control the incidence of the income tax among the partners according to their own agreement rather than according to the dictates of the examining agent of the Revenue Service.

1. *Profit and Loss Ratio.*

A partnership, as such, is not taxed under the federal income tax. The income tax is levied upon the individual partners to the extent of their distributable share of the partnership's net income. Each partner is taxed on his share of the partnership's income whether or not that share is actually distributed to him in the year earned by the partnership. Section 701, I.R.C.

However, a partnership is required to file a return of partnership income which shows the amount of net income earned by the partnership for its taxable year, together with the amounts allocated to each partner. Section 703, I.R.C. The amount of net income allocated to a partner depends upon his share of the partnership's profits and losses as established by their partnership agreement. Section 704(a), I.R.C. Similarly, if the partnership realizes a net loss for the year, a partner's share of that loss is also determined by reference to the partnership agreement. A partner's share of losses incurred by a partnership is deductible by him to an amount equal to his basis for his interest in the partnership. Section 704(d), I. R. C.

How are capital gains and losses, tax-exempt interest and recoveries, dividends, and other items subject to special rules of inclusion, deduction or exclusion treated? Section 703(a), I.R.C. requires that the following items be segregated from the ordinary income of the partnership and be separately stated in the partnership return:

(a) Long-term capital gains and losses;
(b) Short-term capital gains and losses;
(c) Section 1231, I.R.C. gains and losses;
(d) Charitable contributions;
(e) Dividends qualifying for the dividend exclusion or credit;
(f) Foreign taxes; and
(g) Tax-exempt interest.

To this list of separately stated items, the Regulations add the following items (Reg. Sec. 1.702-1(a) (8)):

(a) Excludible recoveries;
(b) Wagering gains and losses;
(c) Soil and water conservation expenses;
(d) Nonbusiness expenses under Section 212, I.R.C.;
(e) Medical and dental expenses;
(f) Child care expenses;
(g) Alimony payments;
(h) Taxes and interest paid on cooperative housing corporations;
(i) Intangible drilling and development costs;

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(j) Exploration expenditures;
(k) Sales or exchanges among partners of partnership's unrealized receivables and substantially appreciated inventory;
(l) Other items having a special allocation to partners.

If the partnership agreement is silent upon the point, all of these items are shared among the partners in the same proportion as their interest in net income or loss of the partnership. Section 704(b), I.R.C.

However, if the partners provide for it by agreement, these specially stated items may be shared among themselves in a ratio other than the normal profit and loss ratio. Section 704(b)(1), I.R.C. For example, suppose Prospector and Moneybags organize a partnership to explore for and to develop mineral deposits. P puts up nothing but agrees to devote his full time to partnership business. M contributes $100,000 but no services. The agreement provides that M is to receive 90% of partnership profits until he has recouped all the exploration expenses incurred, then he and P will share equally in partnership profits. A further provision is inserted to allocate all of the exploration expenditures made to M so that he may elect under Section 615, I.R.C. to deduct them currently in full.

Suppose in 1957 the partnership realizes net income of $80,000 before exploration expenses of $50,000. How are the shares of M and P. determined?

	Partner Gross Income	*Exploration Expense*	*Partnership Net*
M	$72,000	$50,000	$22,000
P	8,000	-0-	8,000
	$80,000	$50,000	$30,000

Such an agreement is valid because it accurately reflects the actual economic relationship between the parties. M having put up all the partnership capital, the burden of paying out the exploration expenses falls upon him. Reg. Sec. 1.704-1(b)(2), Example (5).

But any special allocation of these extraordinary items that is designed to avoid or evade tax will be disregarded and the item will be reallocated among the partners in proportion to their interests in profits and losses. Under the Regulations, a special allocation provision must have a "business purpose" and must have "substantial economic effects." A provision which merely shifts deductions or exclusions from one taxpayer to another without rhyme or reason will be disregarded. Reg. Sec. 1.704-1(b)(2).

For example, suppose Moneybags and Financier organize a mining partnership, each contributing $100,000. The partnership hires a prospector. Because Financier has large exploration expenditures from other sources which exceed his deductible ceiling under Section 615, I.R.C., they agree that all the exploration expenses will be allocated to M. Assume $80,000 income before deducting $50,000 of exploration expenses and a 50-50 sharing of profits and losses. How does it work out?

	Partner Gross Income	*Exploration Expense*	*Partnership Net*
M	$40,000	$50,000	($10,000)
F	40,000	-0-	40,000
	$80,000	$50,000	$30,000

Because the only purpose of this agreement is to shift the deduction to M, the agreement in all probability be invalid. Actually both parties are each bearing one-half the exploration expenses, because each put up one-half the capital. The only purpose for the agreement is to avoid the ceiling on Financier's deduction for exploration expenses.

SUGGESTED PROVISION: "Profits and losses of the partnership shall be shared equally among the partners.[1] For the purpose of determining profits and losses, all amounts expended for exploration of mineral properties, as defined in Section 615, I.R.C. shall be excluded and shall be allocated in their entirety to Partner M."

2. *Special Allocation for Contributed Property.*

In the absence of a special provision in the partnership agreement, depreciation, depletion, and gain or loss realized upon property contributed by a partner to a partnership will be allocated among the partners in the same proportions as their interests in profits and losses. Section 704(c)(1), I.R.C.

Because the contribution of property to a partnership is ordinarily[2] a tax-free transaction, the partnership takes the same basis for the property as it had in hands of the partner before contribution. Section 721, 723, I.R.C. If the property is accepted by the partnership at an agreed value in excess of its basis to the partnership, the partners may find the relationship among themselves is adversely affected by the low-basis property.[3]

For example, A and B form a partnership, A contributing a building with an agreed value of $25,000, which has a basis to him of $10,000. B contributes $25,000 cash. They agree to share profits and losses equally. Assume first that the first year's depreciation on the building is $1,000.

	Partner Agreed Contribution	*Profit and Loss*	*Depreciation Allocation*
A	$25,000	50%	$500
B	25,000	50%	500
			$1,000

Is this fair to B? B contributed $25,000 cash and in effect bought a one-half interest in the building for half of his cash, or $12,500. Although he paid $12,500 for his one-half interest in the building, he receives only $500 depreciation on his half, whereas A, who has only $5,000 unrecovered of his original cost for the building, also receives $500 depreciation. Although A's effective depreciation rate is 10% of basis, B's is far below.

Assume, second, that the partnership sells the building for $25,000 before any depreciation is taken. Who reports the gain?

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1 It is not essential that losses be shared in the same proportion as profits.
2 Note Section 752, I.R.C., for an exception in the case of property subject to a liability in excess of its basis.
3 A similar and related problem may arise in the case of property contributed to a partnership at an agreed value lower than its basis to the contributing partner. However, this problem can ordinarily be avoided by having the contributing partner sell the property to the partnership. His loss on the sale will be deductible, provided he and his family own not more than 50% of the partnership's capital and profits at the time of sale. Section 707(b), I.R.C.

	Partner Agreed Contribution	*Profit and Loss*	*Gain Allocation*
A	$25,000	50%	$ 7,500
B	25,000	50%	7,500
			$15,000

Why should B report $7,500 of the gain? He has realized no economic gain on the liquidation of the building. The partnership's assets still total only $50,000. All of the gain realized is attributed to the period of A's holding of the building prior to the partnership and in all fairness A should pay the tax on the gain.

One answer to these dilemmas would be for A to contribute $25,000 in cash to the partnership and then sell the building to it. Section 707, I.R.C. Then A would pay the tax on the entire appreciation in the property that occurred prior to sale to the partnership. The partnership's basis for the building would be $25,000, and assuming a 10% depreciation rate, the annual depreciation would be $2,500, split $1,250 to each partner. If a sale occurred, only the gain attributable to the partnership's period of ownership would be taxable to the partners because the partnership's basis for the property would be $25,000.

But A may not want to pay a tax on the unrealized appreciation at the time the partnership is organized. A therefore insists upon contributing the property to the partnership at its low basis. In this event, it is possible under Section 704(c)(2), I.R.C. to achieve substantial equity between the partners by providing special rules of allocation of depreciation and gain or loss realized on the contributed property. Suppose, for example, the AB partnership agreement provides (1) that depreciation on the contributed property be allocated to B until the difference between the agreed value and the basis for the property be made up, and (2) that any gain realized on the property be allocated to A to the extent of the difference. Then we have the following situation, assuming first annual depreciation of 10% and second a sale for $25,000:

	Partner Contribution	(1) *Depreciation*	(2) *Gain*
A	$25,000	-0-	$15,000
B	25,000	$1,000	-0-

The advantages of such a special provision covering the allocation of depreciation and gain or loss on contributed property are three:

(a) The contributing partner need not pay any tax on the pre-contribution appreciation in value at the time he contributes the property to the partnership.

(b) All of the depreciation on the property is allocated to the partner who contributes cash until his interest is written down by the depreciation deduction to an amount equal to the difference between the agreed value and the basis of the property (subject to the limitation of the amount of depreciation allowable on the property. Reg. Sec. 1.704-1(c)(2).)

(c) Any gain realized on the property which is attributable to pre-contribution appreciation is taxed to the contributing partner; gain in excess is taxed to all the partners according to their profit and loss ratio.

SUGGESTED PROVISION: "Depreciation and/or depletion realized upon property contributed by a partner to the partnership which has a basis to the partnership that is lower than the agreed value of the property shall be allocated solely to the partners other than the contributor until such time as the depreciation and/or depletion allocated to them out of the property equals the original difference between the basis of the property and its agreed value at the time of contribution. Additional depreciation and/or depletion realized from the property shall be allocated among all the partners in proportion to their profit and loss ratio.

"Gain or loss realized upon any such property by the partnership shall be allocated as follows:

"(a) If gain is realized, it shall be allocated first to the contributing partner to the extent of the original difference between the basis of the property to the partnership and its agreed value at the time of contribution less the amount of depreciation from the property previously allocated to the other partners; the remainder of the gain, if any, shall be allocated among all the partners in proportion to their profit and loss ratio.

"(b) If a loss is realized, it shall be allocated first to the partners other than the contributor to the extent of the original difference between the basis of the property to the partnership and its agreed value at the time of contribution less the amount of depreciation from the property previously allocated to them; the remainder of the loss, if any, shall be allocated among all the partners in proportion to their profit and loss ratio.

"(c) See schedule annexed for a list of contributed property with an accompanying statement of the difference between basis and agreed value."

3. *Provision for Undivided Interests.*

An alternative solution to the problem of contributed property can also be found in Section 704(c)(3), I.R.C. If all the partners in a partnership own undivided interests in certain property to be contributed to the partnership and if the interests of the partners in the capital and profits of the partnership correspond to their respective interests in the property, then gain or loss, depreciation and depletion on the property will be allocated among the partners as if they still retain their individual interests in the property. Reg. Sec. 1.704-1(c)(3).

For example, let us return to the problem discussed in part 2, supra. Suppose A decides to sell an undivided interest in the building to B for $12,500, half its agreed value, prior to its contribution to the partnership. A will then be required to pay a tax on his gain of $7,500 realized on the sale of the half interest. His basis for his remaining undivided half will be $5,000. Both A and B then contribute their undivided half interests in the building plus $12,500 each to the partnership. Assuming that A and B have equal interests in the capital and profits of the partnership, we have the following results, assuming first annual depreciation of 10% and second a sale for $25,000:

	Partner Contribution	*Basis in Property*	(1) *Depreciation*	(2) *Gain*
A	$25,000	$ 5,000	$ 500	$7,500
B	25,000	12,500	1,250	-0-
		$17,500	$1,750	$7,500

This rule applies automatically if the above conditions are met; because the effect of the rule is to treat each partner as if he still owned his undivided interest in the

property, the allocation of gain or loss, depreciation and depletion is dependent upon each partner's basis for his interest in the property. Hence the unfairness and inequity that may result in the case of low basis property to a partnership is eliminated. The partner holding the low basis for his interest is automatically saddled with all its adverse consequences.

This rule was added to the 1954 Code to prevent serions hardship in the case of an unintended partnership. For example, tenants in common operating property may engage in business to snch an extent that they qualify as a partnership under the Code. Even if held to be partners, they may still share gain or loss, depreciation and depletion as if their ownership as tenants in common continned. Reg. See. 1.704(c) (3), Example (3).

Section 704(c) (3) contains a hidden trap. If the partuers rely upon this provision to safeguard their relative allocations of gain or loss, depreciation and depletion, they must be snre to retain their initial proportionate interests in capital and profits in the partnership. Any change in either or both ratios will deprive them of the right to allocate these items in accord with their original interests in the property. Reg. Sec. 1.704-1(c) (3) (ii). Ordinarily a change in the profits ratio will require express agreement of the partners and consequently will be an intentional act. At the tinne any such change is made, a provision should be added to the agreement which takes advantage of the right to allocate all the tax consequences of precontribution appreciation to the partner responsible for it. See part 2, supra. Reg. Sec. 1.704(c) (3) (ii), Example 2.

But the requirement of a constant capital radio is a dangerous thing because of the practice of accountants to close all drawing account balances into capital at the end of each year. Thus, if one partner overdraws his share of the profits, his capital account will be reduced. An under-withdrawal of profits will also be closed into capital and appear as an extra capital contribution. In either case, the capital ratios will be changed and the henefits of Section 704(c) (3) will be lost.[4]

To prevent these unintended changes in the respective capital accounts of the partners, a provision against capital impairment and against non-proportionate capital contributions may be advisable. Such a provision may also have value in other contexts than the present one.[5]

SUGGESTER PROVISION: "The capital accounts of the partners shall be as follows:

Partner A $
Partner B $

Profits and losses of the partnership shall be credited or debited to the respective drawing accounts of the partners in accordance with their interests in profits and losses. Drawings made by a partner during the year shall be debited against his drawing account. Any balance in a partner's drawing account shall not he closed into his capital account but shall represent, if a credit balance, a loan from him to the partnership, and if a debt balance, a loan from the partnership to him. From time to time as the partners may agree, the capital accounts of the partners may be increased or decreased but only in amounts which bear the same proportions among the partners as the original capital accounts bore one to another.

4 Substance is given to this warning by the provision in the Regulations that "drawings made throughout the year against profits, and loans will be disregarded." Reg. Sec. 1.704-1(c) (3) (ii). Presumably, all other changes in capital, including drawings against capital and additional contributions to capital, will deprive the partners of the benefits of Section 704(e) (3).

5 For example, such a provision may prevent unintended transfers of unrealized receivables and substantially appreciated inventory under Section 751, I.R.C.

4. *Guaranteed Salary or Rental Payments.*

If the partnership agreement provides for a payment to a partner for his services or for the use of his property which is *not* continguent upon partnership earnings, then payments made nnder the provision are treated as deductible salary or rental expenses of the partnership. Section 707 (c), I.R.C. Although made to a partner, the payment is not considered to be a distribution of partnership earnings.[6] Hence, even if the partnership has no cnrrent earnings, the payment of salary or rent to a partner will be taxed as ordinary income to him and a corresponding deduction allowed to the partnership. The time for reporting the payment is controlled by the year in which the partnership deducts the payment, the partner who receives the payment being reqnired to report it in the return for his taxable year with which or within which the partnership taxable year ends. Reg. Sec. 1.707-1(c).

For example, assume that the AB Partnership has no net income, but pays partner A a $10,000 salary:

	Partner Gross	*Expenses*	*Salary*	*Net Loss*	*Partner's Return*
A)			($10,000	($ 5,000)	$5,000
)	$20,000	$20,000	(		
B)			(-0-	(5,000)	(5,000)
	$20,000	$20,000	$10,000	($10,000)	-0-

In effect B pays one-half of A's salary out of his capital contribution and gets a deduction for it. Reg. Sec. 1.707-1(c), Example (3).

By the use of a gnaranteed salary or rental payment, the partners are able to compensate one partner who devotes extra time or property to the partnership without upsetting their basic profit sharing ratio. Also the device permits the other partners to realize a deduction for the amount paid, even in loss years.

5. *Provision Requiring Consent of Partnership to Sale of Partnership Interest on Date Other Than the Close of the Partnership Taxable Year.*

If 50% or more of the total interests in the profits *and* capital of a partnership is sold or exchanged within a period of twelve consecutive months, the partnership shall automatically be considered terminated under the Internal Revenue Code. Section 708(b), I.R.C. Even if the partnership business is continued by the new partners and the partnership entity continues under local law, the partnership is deemed terminated under the tax laws. The involuntary termination of the partnership will have at least three consequences which may be of more or less importance depending upon the individual case:

(a) The partnership taxable year closes on the date on which the partnership terminates. Reg. Sec. 1.708-1(b) (1) (iii). If the partnership is on a fiscal year which differs from the tax year of any of its partners, this premature closing of

6 Under the Regulations guaranteed payments "do not constitute an interest in partnership profits for purposes of sections 706(b) (3), 707(b), and 708(b). For the purposes of other provisions of the internal revenue laws, guaranteed payments are regarded as a partner's distributive share of ordinary income." Reg. Sec. 1.707-1(c). Presumably this broad language would exclude the possibility of using a guaranteed salary in conjunction with the contribution of undivided interests in property to a partnership. This result is unfortunate, and probably unintended, but as long as the language of the Regulations reads as it does, guaranteed salary payments to one of several tenants in common will be treated as part of interest in profits, thereby disqualifying the partnership from the benefits of Section 704(e) (3), I.R.C., discussed in part 3, supra.

the partnership's taxable year may result in bunching more than twelve months' income from the partnership in that partner's tax return.

(b) The new partnership will not be permitted to continue on the same taxable year as the old partnership, but will be compelled to choose its own taxable year. Under the very restrictive rules of Section 706(b), I.R.C., the partnership may be deprived of the benefits of having a fiscal year that differs from the taxable years of its partners.[7]

(c) All the property of the partnership is deemed to be distributed to the new partners in kind; if they continue the partnership business, each of them is deemed to have recontributed their undivided interests in the property to the new partnership. This involuntary distribution and recontribution may or may not have adverse tax consequences depending upon circumstances that will be discussed in part 6, infra. Reg. Sec. 1.708-1(b)(1)(iv).

This rule as to automatic termination applies not only to the outright sale or exchange of more than 50% of the capital and profits interests, hut also to a series of sales or exchanges of minority interests in partnership capital and profits that total 50% within the period of twelve consecutive months commencing on the date of the first sale and ending with the last. In a series of sales, termination is deemed to occur on the date of the sale or exchange which pushes the total transferred over the 50% mark. Thus a relatively minor sale or exchange may wreak serious consequences. Furthermore, the rule as to termination applies even in the case of sales or exchanges of partnership interests among the partners themselves as well as to outsiders. However, gifts, bequests or inheritances of a partnership interest are not counted as sales or exchanges within the meaning of Section 708, I.R.C. Reg. Sec. 1.708(b)(1)(ii).

In order to prevent these unintended consequences of a termination in the middle of the partnership's taxable year, it may be wise to include a provision in the partnership agreement to restrict the effective date of a sale or exchange to the end of the partnership's taxable year. For example,

SUGGESTED PROVISION: "Unless the consent of the partnership in writing is first obtained, no sale or exchange of a partnership interest shall be effective except at the colse of the partnership taxable year."

6. *Option in Partnership of Purchase Partner's Interest at the Same Price the Interest Is Offered to Another.*

As we pointed out in part 5, supra, the sale or exchange of 50% or more of the total interest in the partnership's capital and profits will result in the automatic termination of the partnership. Section 708(b), I.R.C. One of the consequences of such a termination is the distribution of all of the property of the former partnership, including cash, to the new partners in kind. Reg. Sec. 1.708-1(b)(1)(iv). On receiving distribution of the properties of the partnership, a partner may have taxable gain or recognizable loss under the following circumstances:

(a) Gain will be recognized to the extent that the cash received by a partner exceeds his basis for his interest in the partnership. Section 731(a)(1), I.R.C.

(b) Loss will be recognized if the only properties distributed consist of cash,

7 Under Section 706, a new partnership must select as its taxable year the same taxable year as "that of all its principal partners" unless it obtains the consent of the Commissioner for a different taxable year. Any partner having an interest of 5 per cent or more in partnership profits or capital is defined to be a "principal partner." Section 706(b), I.R.C.

unrealized receivables and substantially appreciated inventory and the amount of cash plus the transferred basis of the unrealized receivables and substantially appreciated inventory is less than the partner's basis for his partnership interest. Section 731(a)(2), I.R.C. The termination and involuntary distribution may also result in a change of basis for the property distributed out of the partnership. On a distribution, the partner receiving the property is entitled to transfer his basis for his partnership interest to the property received, reduced by any amount of money also received. Section 732(b), I.R.C. Thus, if the partner's basis for his interest minus cash received is less than the partnership's basis for the property distributed, other than cash, the difference in basis will be lost without a corresponding tax advantage to the partner.[8] Reg. Sec. 1.732-1(c)(1), Example.

A problem potentially as serious as the possible realization of gain or loss or change of basis on distribution arises in the case of a sale or exchange of an interest in a partnership owning unrealized receivables [9] or substantially appreciated inventory [10] at the time of the sale or exchange. On the sale of a partnership interest which owns either of these income items, the selling partner is required under Section 751(a), I.R.C., to allocate a portion of the price received by him for his interest to his proportionate share of the partnership's unrealized receivables and substantially appreciated inventory. To the extent that this allocated amount of the price exceeds his proportionate share of the partnership's basis for these income items, [11] the selling partner has realized ordinary income.

In effect, Section 751(a) compels him to realize his share of the partnership's income items and pay a tax on the income whether or uot the sale of the partnership interest was for a profit or a loss. Reg. Sec. 1.751-1(a).

Thus at the tiue of sale, the selling partner's proportionate share of the partnership's income items is taxed. Certainly then the new partner who purchased his interest ought uot be compelled to pay a second tax on these items when the partnership effects collection of the receivahles or sells the inventory. Yet that is exactly what might happen barring the election by the partnership of an extremely complex optional basis adjustment for his benefit under section 743(b), I.R.C., [12] or the liquidation of the purchasing partner's interest within two years of acqnisition under Section 732(d), I.R.C.

Both of these problems (the involuntary distribution of partnership property and the possible double taxation of the selling partner's share of the partnership's income items) can be avoided by arranging for the partnership to buy out the selling partner by liquidating his interest for cash. Subsequently, the purchasing partner may then contribute cash to the partnership to create the interest he desires. The regulations expressly except "the liquidation of a partner's interest" or "the contribution of property to a partnership" from the rules relating to the

8 On the other hand, it is entirely possible that a partner may have a basis for his interest in the partnership that exceeds the partnership basis for the property plus cash distributed to him. If so, the effect of the involuntary distribution may be to step up the new partnership's basis for the property on recontribution. Reg. Sec. 1.732-1(b), Example.

9 Section 751(c), I.R.C., defines "unrealized receivables" to include all "rights (eontraetual or otherwise) to payment for (1) goods delivered, or to be delivered, to the extent the proceeds therefrom would be treated as amounts received from the sale or exchange of property other than a capital asset, or (2) services rendered or to be rendered," if the rights have not been previously reported as income. The most common example of unrealized receivables is trade accounts receivable of a cash basis taxpayer. Reg. Sec. 1.751-1(c).

10 Section 751(d), I.R.C., defines "substantially appreciated inventory" to include all partnership inventory that has been appreciated to 120 per cent of its adjusted basis to the partnership, provided the value of such inventory exceeds 10 per cent of the value of "all partnership property other than money."

11 Ordinarily, the unrealized receivables will have a basis of zero to the partnership, so that all of the price allocated to the partner's interest in them will be ordinary income.

12 An election which may return to haunt the partnership, because it may under other circumstances result in a decrease of basis.

automatic termination of the partnership taxable year. Reg. Sec. 1.708-1(b) (1) (ii). Thus, even if 50% or more of the partnership assets is sold, the partnership is not terminated.

And because the partnership has purchased the selling partner's interest in the firm's income items, the partnership will automatically have a basis for these items equal to the price paid for them which it can use to offset against income realized on the subsequent collection of the unrealized receivables or sale of the substantially appreciated inventory. The potential threat of a double tax is eliminated without the necessity of filing an election for the optional adjustment to basis.

SUGGESTED PROVISION: "The partnership reserves the option to purchase the interest of any partner who desires to sell his interest at the same price that the partner can obtain from any other purchaser."

7. *Provision for Distributing Partnership Income to Retired Partner or Estate of Deceased Partner.*

Under Section 736, I.R.C., a partnership can obtain the effect of a deduction for any portion of a payment to a retired partner or to the estate of a deceased partner that exceeds the amount necessary to buy out the former partner's interest. Once the allocation between the amount paid to liquidate the partner's interest and the excess is determined, the application of the rule is automatic. If the excess payment is for a fixed amount, it constitutes a guaranteed salary payment to the former partner, deductible as such; if it is conditioned on partnership earnings, the payment is treated as an allocation of a distributable share of partnership income to the former partner. Reg. Sec. 1.736-1(a)(3). In either event, the tax liability for the payment is transferred from the partnership to the former partner or his estate; to him or to his estate it represents ordinary income.

The other portion of the payment in liquidation of the former partner's interest is treated as a non-deductible capital expenditure by the partnership. The payment is received by the former partnership or his estate as a return of capital; any amount in excess of his basis is capital gain.[13] Reg. Sec. 1.736-1(a)(2).

Obviously these rules represent a substantial advantage to the remaining partners to the extent they can shift the incedence of the income tax on current partnership earnings to the former partner or his estate. For this reason, provisions calling for the payment of sums in addition to the amount necessary to liquidate the interest of a former partner are appearing with great frequency in partnership agreements. These excess payments may represent a form of mutual self-insurance among the partners, or a payment in recognition of good will built up by the former partner or for his interest in the unrealized receivables of the partnership at the time of his death or retirement.

The drafting of a provision to provide for such payments requires an understanding of the principles governing the allocation between the interest liquidation payment and the income distribution payment. The Code approaches the problem of allocation by defining the amount of the liquidation payment; any amount in excess of the liquidating payment is then automatically treated as an income payment. How much then must be assigned to the payment in liquidation of the former partner's interest? The Regulations require that the amount paid to buy out the former partner's interest correspond to the fair market value of his proportionate interest in all the assets of the partnership except its unrealized

13 Subject to an exception for substantially appreciated inventory, discussed below.

receivables.[14] Thus, if the parties fail to provide for an allocation of their payments by agreement, the Commissioner will make the allocation for them on the basis of fair market value. Also, if the partners allocate too little to the liquidation payment for the former partner's interests, the Commissioner can step in to readjust the allocation made by the partners. Generally, however, the Regulations presume that a valuation placed upon a partner's interest in an arm's length agreement will be correct. Reg. Sec. 1.736-1(b)(1). This presumption illustrates the wisdom of providing for a reasonable allocation between the two types of payment by agreement in order to minimize the possibility of later disputes with the Internal Revenue Service and to ensure that both the partnership and the former partner will report the same allocations of the payment in their respective returns.

If the partnership owns any substantially appreciated inventory at the time of the liquidation of the former partner's interest, part of the payment in liquidation may result in ordinary income to the former partner. The special rules of Section 751, I.R.C., treat the transaction as the equivalent of a sale by the former partner of his interest in this inventory. Because the partnership has purchased these items from the former partner, his share of the substantially appreciated inventory will have a basis to the partnership equal to their cost of acquisition.[15] Hence the potential gain on the former partner's share of this inventory will be taxed only to him, not also to the partnership. Thus the payment by the partnership for these income items is not deductible at the time made, but rather it represents a capital expenditure for their acquisition. Reg. Sec. 1.751-1(g), Example (3)(e)(1).

Included in the amount of the payment is the former partner's share of partnership liabilities that are assumed by the partnership. Reg. Sec. 1.736-1(a)(2). The assumption of his share of liabilities is treated as part of the payment received in the first year. From this total is subtracted the amount paid in liquidation of the former partner's interest. The excess is taxed as ordinary income to the former partner and is deductible (or represents an allocation of current income) to the partnership. Included in this excess payment are amounts paid for the former partner's interest in the following items:

(a) Payment for the former partner's interest in unrealized receivables falls under this rule. Because the partnership takes a deduction for the payment made, it does not adjust its basis for the former partner's share of these receivables. The transaction is treated not as a purchase of the receivables from the former partner but rather as a premature distribution of the income to be realized on them. Reg. Sec. 1.736-1(b) (2).

(b) Payment for the former partner's interest in partnership good will; this portion of the excess payment is subject to the exception discussed in the section below.

(c) All additional amounts not otherwise accounted for.[16]

14 For this purpose the assets of the partnership are not to be reduced by its liabilities. Reg. Sec. 1.736-1(a) (2).

15 In this situation the Regulations again point up the importance of providing for allocation by agreement. How much, if any, of the payment in liquidation of the former partner's interest is attributable to his interest in the substantially appreciated inventory? Under the Regulations, it is "the portion of the total amount realized which the seller and the purchaser allocate to Section 751 property in an arm's length agreement . . ." Reg. Sec. 1.751-1(a) (2).

16 These rules apply equally as well to two-man partnerships in which the payments are made to the retired partner or estate of the deceased partner by the surviving partner as a sole proprietor. Reg. Sec. 1.736-1(a) (6). But, curiously, if the estate of the deceased partner continues to participate as a partner in the business, these rules do *not* apply. Reg. Sec. 1.736-1(a) (1) (i). See part 9 below.

How do these rules work out in practice? Suppose the partnership agreement provides for the liquidation of a former partner's interest for a lump sum in the year of death or retirement plus 10 per cent of profits for five years thereafter. Provided the lump sum payment reflects a reasonable valuation of the partner's interest in gross assets less receivables and good will, it will be a capital expenditure to the partnership. The 10 per cent of profits payments will represent the former partner's distributable share of partnership income.

Assume, instead, a provision for liquidating a former partner's interest for $20,000 payable over a four-year period. In this case, it becomes necessary to fix a value on the former partner's interest. Suppose that interest is valued at $8,000, excluding unrealized receivables and good will. Then of each year's payment of $5,000, $2,000 will constitute a capital expenditure by the partnership and $3,000 a deductible salary payment. Reg. Sec. 1.736-1(b) (7), Example (1).

Suppose, on the other hand, the partners agree that the payment of 20 per cent of partnership profits for a period of five years after death or retirement shall constitute full settlement of his interest. Again it is necessary to value the former partner's interest because that value is not fixed by the agreement. Assume the value to be $8,000 and suppose the 20 per cent share of profits equals $6,000 in the first year. All $6,000 will be a nondeductible capital expenditure. Payments in the next year will also be a capital expenditure until an additional $2,000 has been paid. Thereafter all payments made will constitute an allocation of current partnership income to the former partner. Reg. Sec. 1.736-1(b) (7), Example (2).

SUGGESTED PROVISION: "On the death or retirement of a partner, the partnership shall pay him or her estate the sum of $2,000 in addition to the balance in his capital account at the date of his death or retirement. This payment shall be made in two installments (the first being due 90 days after death or retirement and the final payment 90 days thereafter) and shall be in full settlement and payment of his interest in the partnership and its assets.

"In addition to the payment provided in the first paragraph hereof, the retired partner, his estate, or the estate of a deceased partner shall continue to share in partnership profits for a period of three years after death in a reduced amount according to the following schedule:

Year after Death or Retirement	*Percentage of Partner's Proportionate Share of Profits at Date of Death or Retirement*
First	50%
Second	30%
Third	15%
Fourth and Thereafter	0%

8. *Provision for Good Will.*

As we intimated in the preceding part, the rules applicable to payments to a retired partner or to the estate of a deceased partner may be varied by setting a value on partnership good will in the partnership agreement. [17] If the partnership agreement establishes a value for good will, then the amount paid in liquidation of a former partner's interest in the partnership which is attributable to his interest in good will becomes a nondeductible capital expenditure by the remaining partners. Correspondingly, that amount is received by the retired partner or the

17 Whether at the time of liquidation, a value may be placed upon partnership good will by provision in the liquidation agreement remains a matter of conjecture. Reg. 1.736-1(b) (3).

estate of a deceased partner as a capital payment; if the former partner had a basis for his interest in good will, the payment represents recovery of capital to him; if he had no basis for good will, the payment will be capital gain, long-term or short-term depending upon his holding period. Section 736(b) (2), I.R.C.

Obviously, the insertion of an agreed value for good will in a partnership agreement represents a matter for negotiation. For example, suppose the ABC partnership agreement provides for a payment of $10,000 to a former partner on death or retirement. Assume that Partner A retires, having owned a one-third interest in capital and profits. Assume further that A's interest in partnership assets, other than unrealized receivables and good will, equals $5,000. Contrast the tax results that occur, first if a $6,000 value is placed on partnership good will and, second, if no provision for good will is included in the partnership agreement:

	Good Will	*No Good Will*
Total Payment	$10,000	$10,000
Less:		
A's Interest in Assets	5,000	5,000
A's Interest in Good Will	2,000	-0-
Excess Payment (ordinary income)	$ 3,000	$ 5,000

In the first case, A will receive $3,000 ordinary income; the remainder will be a capital payment to him. Reg. Sec. 1.736(b) (7), Example (3). Conversely, only $3,000 of the payment will be deductible by B and C. In the second case, A receives $5,000 ordinary income and $5,000 is deductible by B and C. Thus, it is to the interest of the retiring partner to allocate as much as possible to good will; and conversely the self-interest of B and C opposes any allocation to good will.

How much may properly be allocated to partnership good will? Obviously the rule of reason provides a ceiling. In general, the amount paid for a former partner's interest in good will must bear a reasonable relationship to its actual value as established by an arm's length agreement. Reg. Sec. 1.736-1(b) (3).

SUGGESTED PROVISION: "It is agreed that the value of $6,000 shall be assigned to partnership good will and on retirement, withdrawal, or the death of a partner, the payment to him or his estate shall include an amount necessary to liquidate his proportionate interest in partnership good will on the basis of the above valuation."[18]

9. *Provision for Postponing Capital Expenditure for Retired or Deceased Partner's Interest.*

The rules of Section 736, I.R.C., discussed in parts 7 and 8, supra, apply only to the case in which the retiring or deceased partner's interest in the partnership is liquidated on the date of death or retirement. Reg. Sec. 1.736-1(a) (1) (i). If the withdrawing partner or the estate of a deceased partner continues on as a partner after death or retirement from active service, then Section 736 is inapplicable. Payments to him or his estate would presumably be treated as allocations of current partnership income (if contingent on profits) or as salary (if guaranteed).

By this mechanism, it is possible for the partners to postpone the nondeductible capital expenditure for the retiring or deceased partner's interest to the end of the period of continuing participation. The necessity of making an allocation between

18 No provision need be included in the agreement if the partners decide to place no value on good will for the purpose of these payments.

the liquidation payment and excess payments will not arise until the final year of the period of continuing payments, at which time the retiring or deceased partner's interest will actually be liquidated.[19]. The payment in liquidation of the retiring or deceased partner's interest in the final year of these continuing payments will then be governed by the rules of Section 736.

In order to ensure that the liquidation payment will be postponed to the final year, the interest of the retiring or deceased partner must be left in the partnership subject to the vicissitudes of the partnership business. That interest must be liable for its proportionate share of partnership losses as well as profits during the period of continuing participation.[20]

A second advantage may flow out of this arrangement. In the case of the death of a partner, the right of his estate to receive payments under Section 736 may be valued and be included in his gross estate for estate tax purposes. *Estate of Charles A. Riegelman*, (1957) 27 T.C.--, No. 101. The amount thus included would qualify as income in respect of a decedent and a partial offset against the income tax imposed upon the estate for the receipt of these payments would be obtainable under Section 691(c), I.R.C.[21]

But suppose the continuing payments after death do not qualify under Section 736 because the estate of the deceased partner participates as a partner in the business. This was the situation in *Bull, v. United States*, (1935) 295 U. S. 247. There the court held that the right of the deceased partner to continue to share in partnership profits was so contingent as to be incapable of valuation for estate tax purposes. Hence, if the estate continues as an actual partner after death, its right to receive payments out of income after death should not be includible in the deceased partner's gross estate for estate tax purposes. Only the income tax will reach these payments.[22]

SUGGESTED PROVISION: "On the date of notice of intended retirement by a partner, or on the date of the death of a partner, the partner or his estate shall continue to share in profits and losses for a period of five years after the date of such notice or death. The retiring partner's (or deceased partner's) interest in capital of the partnership shall not be paid to him, but his participation in profits and losses shall be diminished to one-half of his participation at the date of the notice (or death) to compensate the remaining partners for the loss of his services to the partnership. At the end of the five-year period, the value of the retiring partner's (or deceased partner's) interest in partnership assets (less his interest in receivables and good will) shall be paid to him or his estate in full."

10. *Conclusion.*

This discussion of clauses for inclusion in a partnership agreement is by no means exhaustive. There are many other matters that might profitably be considered on the formation of a partnership which will affect the incidence of the income tax upon partnership income. For example, it would be the part of wisdom to spell out the rule to be applied to the partnership on the following questions:

(a) Shall the taxable year be the calendar year or a fiscal year? See Section 706, I.R.C.

(b) Shall the partnership adopt the cash method or the accrual method of reporting income?

(c) Shall the partners be entitled to reimbursement from the partnership for expenditures made by them on behalf of partnership business, or shall they be expected to pay these expenses out of their share of partnership income? See *Frederick S. Klein*, (1956) 25 T.C. 1045, acq. 1956-43 I.R.B. 6.

(d) Shall a provision be included to prevent unintended changes in partnership capital, assuming that the partnership will have unrealized receivables or substantially appreciated inventory? See Section 751, I.R.C., and part 3, supra.

(e) Shall a special allocation for losses be included in a partnership in which one partner contributes services only? See Section 704(d), I.R.C.

(f) Shall a partner who contributes services only be given an interest in profits but not in capital on the formation of the partnership? See Reg. Sec. 1.721-1(h) (1).

(g) Shall a partner be permitted to withdraw monies from the partnership in excess of his basis for his interest? See Reg. Sec. 1.731-1(a) (1).

(h) Shall a partner be permitted to designate a successor in interest for payments under Section 736 other than his estate? See Reg. Section 1.706-1(c) (3) (iii).

(i) Shall the partnership be committed to elect the optional adjustments to basis under Sections 734 and 743, I.R.C.?

(j) How shall receivables and inventory be distributed on liquidation of the partnership? See Section 751, I.R.C.

Obviously much can be done for the partners by considering these tax provisions at the time the partnership agreement is drafted. In many places in the above discussion, we referred to the fact that the tax character of certain payments could be controlled by provision in the agreement. Allocations between income and capital, changes in the profit and loss ratio, special provisions for deduction, are all normally matters to be bargained out for inclusion in the agreement. And, assuming that the partners are strangers so that the agreement is at arm's length, these provisions will control. But in the case of a partnership among family members, these rules must be followed with caution. The presence of family motives in the partnership situation may well invalidate special arrangements that would otherwise be unimpeachable. Arm's length dealing is not presumed among members of a family; it must be proven by other objective and external standards.

MR. ANDERSON: Do any of you have any questions?

MR. ADKINS: Where you have a partner die during the course of a partnership year, can you distribute any of the assets or earnings of the partnership during the year to be reported by the wife in the joint return, or must all income be distributed to his estate?

MR. ANDERSON: The income to the date of the death would be in the joint

19 Assuming, of course, that the payments in the final year are sufficient to pay for his interest in full. If these payments are not large enough to liquidate the retiring or deceased partner's interest in partnership assets, it is presumed that the Commissioner will audit all open years to make the necessary allocation between the liquidation and excess payments under the theory that Section 736 applies to the final payments.

20 Obviously, if state law prohibits an estate in probate form from participating in a partnership business, this alternative is not available. However, the author sees no reason why the retired partner or estate of a deceased partner cannot continue to participate as a limited partner in the business, risking only the amount of capital invested during the period of continuing payments.

21 Section 753, I.R.C., expressly provides that the amount of any payment under Section 736 which qualifies for inclusion in gross income of the successor to the deceased partner be treated as income in respect of a decedent.

22 This distinction in facts between the two basic plans for continuing payments was the ground on which the Tax Court distinguished *Bull* v. *United States* in its decision in *Estate of Charles A. Riegelman*.

return. After the death you can, under the Internal Revenue Code, name a successor who will receive the amount of the deceased partner's income. Name the wife as the successor to the partner; she to receive the same amount of income the partner would have received had he lived until the termination of the partnership tax year in which he died. That will mean then she will receive the income and she has the privilege, as you know, under the Internal Revenue Code, of filing a joint income return for, I believe it is, two years after death, so she will pick up the post-death income as well as the pre-death income and put it in a joint return. On the other hand, if you find it more useful to split the income between, say, the first half in the joint return and the second half all in the estate, then you would not have such a provision but you would have the income paid to the estate. The person you name as suecessor to the deceased partner's interest is the one to receive that income. So you can take care of that problem by a provision.

MR. ELAM: Under the uniform partnership law doesn't the death of one of the partners close out the partnership?

MR. ANDERSON: It may close out the partnership for the purposes of local law, and it might require you even to probate the interest and everything else, but unless it represents transfer of a fifty per cent interest, it does not close the tax year. That is extremely important and something you want to keep in account in these partnerships. I might mention this, I did skip this point, but these provisions for retired or deceased partners we were discussing apply to two man partnerships as well as three or greater partnerships. So that if you have a case in which after one partner dies and the other partner takes hold of the whole thing and operates as a sole proprietor, he can still get a deduction for payments made to the estate of the deceased partner or to the deceased partner's successor, whoever he may name, or to the retired partner.

Anything else while they are hot? Thank you again. (applause)

MR. SULLIVAN: Thank you very much, Mr. Anderson, for your valuable and enlightening address. We are very pleased you could be with us here at Sun Valley.

MR. ANDERSON: I enjoyed it.

MR. SULLIVAN: I would like to introduce a guest from Florida who is a member of the Board of Governors of the bar of that state, Mr. Sherwood Spencer. Is Mr. Spencer here? He has been our guest here for several days; I was hoping he would be here now.

I will ask Mr. Joe Imhoff of Boise to introduce our next speaker, Joe.

JOE: Who?

MR. SULLIVAN: Joe Imboff.

MR. IMHOFF: Ladies and Gentlemen. Paul Ennis called the other day as he has in the past, and asked Cal Dworshak and me to meet our distinguished guest and drive him to Sun Valley. I was quite happy to have the opportunity to visit with Mr. Ehrlich on the way here, and, frankly, I am somewhat surprised I was asked to introduce him, because I think he is a person who doesn't need too much of an introduction. I think many of you have read his biography as set forth in his book "Never Plead Guilty," which he admitted to us on the way was condensed quite a bit from what he wished to put in it, but which the folks wouldn't let him do. Without any further ado and particularly because I am not prepared, I give you from San Francisco, Jake Ehrlich. (Applause)

MR. EHRLICH: Mr. President and Ladies and Gentlemen: Well, I want to thank you for asking me to be your guest. I thus far have had a very pleasant time. Every one has been very gracious to me, and I am a little bit concerned as to what will be thought of me when I finish this little talk which I have prepared for you, and I want you to know that if you have read "Never Plead Guilty," that had I always told the truth iu every story—the whole truth—the exodus of the people from San Francisco would make the exodus of the children of Isreal from Egypt look like a slow walk.

WHAT'S WRONG WITH THE JURY SYSTEM?

For the trial lawyer there is no greater privilege than to address lawyers and judges. Yet, at this moment if the choiee were mine, I would rather try a cold-blooded murder case—it would be much easier.

Lawyers and judges are exacting, and the speaker always is in fear that something will be left unsaid.

Be that as it may, I shall immediately incur your questioning glances by saying that our law has made very little real advance since the days of Blackstone.

In the criminal law, it still belongs to the 15th century, even though some effort has been made to get rid of its worst absurdities. If medicine had remained as backward, the doctor's chief remedial aid would be blood-letting.

This is particularly true when we analyze the relationship between man and the law, and particularly the treatment of man by the law which he creates.

Man is a rational being, but his reason is distorted by prejudice and easily overcome by passion. He is a spiritual being, but he is also selfish and sensual.

He is a being whose natural impulses often seem to lead him spontaneously toward goodness—but he suffers from the most irresponsible and destructive egoism.

Man always aims at what seems to him desirable; but owiug to ignorance, or weakness, or disease, or the complexities of the world which mere human insight and skill cannot adequately understand or control, he oftcn acts in such a manner that the result is disastrous both for him and for others.

In attempting to explain criminal behavior, to unwind the origins and trace the consequences, and to fix the responsibility, the individual no matter how detached, clear-headed and scrupulous, however skilled at imagining himself in the other man's shoes, is nevertheless faced with a network of facts so minute, connected by links so many and complex, that his lack of understanding must always far outweigh his knowledge—consequently his moral judgment.

The difficulties of disentangling even a minute portion of the truth are so great that he must, if he is an honest and serious practitioner, soon realize how far he is from being in the position to moralize.

Human motives have seldom had any decisive influence on the actual course of events.

It is the jury's business to discover the how and why, and it must not allow its moral opinions of other men's characters and motives to colour the interpretation of his acts.

Criminal law is concerned with the problem of judging human actions. Guilt and responsibility are not only moral but also juridical concepts.

We are faced primarily with a question of moral philosophy. This question is

of vital importance when a person has infringed a moral or legal norm. We reproach him for having transgressed the norm, and impute guilt to him. We distinguish between what he "could have helped" and what he "couldn't have helped." But on the other hand, we cannot help the hereditary dispositions with which we are equipped, nor can we help the environment into which we are born.

Personality is formed as the result of an interaction between disposition and envirounent: and the individual act is the reactiou of this personality to a definite external situation.

How can we be reproached for an action if we cannot be reproached for any of the factors which have determined it?

With regard to punishment, we have on the one hand the attitude that the aim of punishment is expiation or retribution of the crime; and on the other hand, we have the attitude which considers that the aim of puuishment is to he measured in terms of its benefits to society.

In the religious sphere, there is the doctrine of predestination, which declares that some people have been chosen from everlasting by God to enjoy salvation, while others are doomed.

It happens not infrequently that a serious crime, such as murder, is the result of an unfortunate personal conflict, and with a considerable degree of certainty it may be said that there is no fear of a repetition.

Punishment is used not only to induce the person punished to abide once more by the law, but also to hold up to the members of society generally the need for obedience to the law.

Our thinking is too much preoccupied with punishment, and too little with the causes of social derailment and the possibilities of rehablitation.

St. Paul said "That the law is good, if a man uses it lawfully."

For—what is law but the enforcement of justice amongst men?

Cicero contended that if the fortunes of all cannot be equal—if the mental capacities of all cannot be the same—at least the legal rights of all ought to be equal.

To protect this equality before the law—man adopted the jury system.

This system grows from the ancient trial before elders which was the forerunner of the trial by jury as established in England after 1066.

For centuries the jury was consisted of twelve men. In 1682 the book "Cuide to English Juries" explained, and I quote "of late, the jury is reduced to the number of twelve, like the prophets were twelve to fortell the truth: The apostles twelve to preach the truth: and the stones twelve that the heavenly Jerusalem is built on."

Today the jury is the only defense against arbitrary laws—the only defense against arbitrary judges—the only defense against persecution—the only defense against cold-blooded prosecution—and—the only defense against our government.

For some years an organized attack has been made on the jury system. The claim is, and has been, that it is not all it should be.

There is nothing wrong with the jury system. If there is anything wrong—the trial judge is to blame.

If he fails to realize that with a jury, he is dealing with people whose purpose is good—but people not learned in the intricacies of the law and its uses.

Jurors do not know how to apply the meaning of words and terms used by judges and lawyers. The court's instructions are a nightmare to them.

In the Bible we read that God is the judge of all earth.

The primitive judge was expected to administer justice directly—determine which of the parties to a controversy was right or wrong—determine the gnilt or innocence of a defendant—and meet out punishment according to the offense, as did God in the case of Adam and Eve, and in Cain's case.

Under ancient Talumudic law, a judge was required to be a worthy man, pious, of good character, and learned in the languages and sciences as well as in the law.

In Luke we read: "He is an unjust judge if he fears not God nor regards man—but gives justice lest he become weary of being troubled by those who seek it."

In our day we believe a judge should be a man of wisdom, uprightness, learning and charity.

We expect the judge not to yield to the influence of partiality, prejudice, or sentiment. Nor do we expect him to seek out strained analogies, or blind himself to realities by a slavish adherence to technicalities.

We want to fill the seats of justice with good men—but not so absolute in goodness as to forget the frailty of the human being.

Through the years, I have been concerned about the causes which change a pleasant, amiable, and capable lawyer into a harsh and unrelenting judge. This thinking forces me to distrust men in whom the impulse to punish is powerful.

It seems to me that harsh judges are actually public reformers who had first better practice on their own hearts that which they propose to try on others.

Not withstanding this, I each day find a surprise in the compassion and understanding of my fellowman, be he judge, lawyer or street-clearner—mercy—has a human heart.

Please do not for a moment think I have come here to quarrel with the judiciary.

It is my sincere belief that a lawyer should and must respect the court—must be honorable and trustworthy. He must look upon the court, not as someone to impress—but someone with whom he ean discuss the problem of his client and jointly arrive at a just decision.

The courts, too, should and must respect lawyers. I have watched judges snap and snarl at lawyers.

No judge is entitled to more respect or consideration than he in turn gives to the lawyer.

It is true that lawyers—enthusiastic for the cause of their client—will occasionally get off-base—but the good judge will understand the lawyer's position.

Mutual respect, mutual esteem, mutual honesty and mutual understanding, will do much to raise the respect of the people for the legal profession generally, and for lawyers and judges in particular.

Years of experience have not restrained me completely from addressing myself

to some courts in a rather caustic manner, but it was because some judge has felt that he, and secondly, God, was right.

The U. S. Supreme Court in 314 U. S. 252 said: "Judges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions. Just because the holders of judicial office are identified with the interests of justice they may forget their common human frailities and fallibilities.

There have sometimes been martinets upon the bench as there have been pompous wielders of authority who have used the paraphernalia of power in support of what they call their dignity. Therefore judges must be kept mindful of their limitations and of their ultimate puhlic responsibihty by a vigorous stream of criticism expressed with candor however blunt.

There is no higher position of trust in all our civilization than that of judge. He holds the power of life and death. He may scold, he may punish, he may forgive—but he must be just. Even God does not propose to judge man until the end of his days.

The jury too has a great responsibility. It must understand that fear, prejudice, malice, and the love of approbation bribe a thousand men where gold bribes one.

The mind of every juror should be governed by the evidence, and not by the direction and whim of the trial judge. Thc mind of the juror should never be disturbed by clamor, nor prejudice, nor suspicion. His mind should not be affected by the fume, froth, friction, or fury of the prosecution.

Man when he undertakes to judge his brother-man undertakes to perform the highest duty given to humanity.

The juror as well as the judge must understand man's weaknesses and that man seeks to punish in others the misconduct in himself.

But to return to our subject. Society creates crime—the criminal commits it.

George Washington, the Father of our country, the Commander of our first armies, and the first president of the United States, was a common traitor to his country--England.

He committed treason. His crime was successful, and he became the emblem of virtue, the example of everything good in American life.

Benjamin Franklin is supposed to have said of this treason, that the leaders of the Revolution either hung together or they would be hanged one by one.

Suppose Washington had failed—he would have been executed as a traitor, and today perhaps, we would be less concerned about our income taxes than about the love affairs of Princess Margaret.

Since the law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread, it is not strange that the criminal jury trial is the most attractive phase of the law practice, not only to the lawyer, but to the public as well.

Most people enjoy the mystery, and the cloak and dagger excitement of the criminal trial. Strange as it seems—many good people—nice people, law abiding people commit crime and—kill.

I have never defended a criminal, but have defended people charged with crime.

Violent crime is not the expression of an inborn instinct of aggression and destruction—people like to be non-violent.

It is always other factors in personality development and in the social medium that lead to murderous aets of violence.

Murder grows from negative emotions—from fear and hatred--from anxiety and anger—from jealousy and greed—from humiliation and spite—from repressiou and resentinent.

Deep down in their hearts people have a longing for action—and a constant interest in those who do act out--what they themselves have only thought of doing.

The so-called good citizen enjoys reading about the phenomenon of action, whether by the bad man—by the murderer—or hy the policeman who is permitted to act out his most aggressive impulses on the so-called right side of the law.

There is magic in murder. Most men haven't killed anybody—but they have read obituaries with a great deal of pleasure.

Now, let us walk into court—we are about to try a man for his life—we observe the judge and jury .

Let us search their hearts--and minds—to learn whether the so-called murderer will receive a fair and impartial trial.

Let us try to learn why man is charitable towards physical deformity—and vengeful towards moral and mental deformity. Let us see if justice will remove the bandage from her eyes long enough to distinguish between the vicious and the unfortunate.

Generally speaking, murder is the unlawful killing of a human being with malice aforethought.

The judge thinks that the term "Malice aforethought" is easy for the jury to understand—but is it?

We know the court will instruct the jury what malice is, but too often, the judge insists that the trial lawyer not take up his time--and the time of the jury—with what he terms "useless questions on vior dire."

I have been told by judges that it was a waste of time to minutely examine a juror. In one California case it appears that an insane man sat on the jury through a long trial and participated in bringing in a judgment. This was discovered after the verdict—and the Appellate court said, quote: "Surely there can be no question but that the right to trial before mentally competent jurors is as fundamental as the right to trial before unbiased and unprejudiced jurors which our courts have held to he an 'inseparable and inalienable part of the right to trial by jury guaranteed by the constitution." The legislature has determined who are not competent to act as jurors. By sueh statutory provisions a person not in 'possession of his natural faculties' may be disqualified to serve as a juror. But that fact would not necessarily be disclosed under ordinary questioning on voir dire."

An insane juror trying an issue and you can't do a thing about it because judges say it is a waste of time to minutely examine on voir dire.

Yes, your Honor, foreclose a minute examination of the juror--yes, Your Honor, it is true, you will instruct the jury on the law. But is the juror mentally equipped to understand? And—will a stereotyped instruction, mumbled at some given speed, really be understood and properly applied by the juror?

Instruction of the jury has been described, somewhat humorously, as "The process in which the judge detracts from and discounts counsels' multiple argumeuts, makes his own deduction, adds his own wisdom, divides the blame, and roundly charges the jury to deliver a square result."

The system uniformly followed is but a rank injustice to litigants, a bushwacking of the presiding judges, and a travesty on justice.

Or better still, how hany of us—including judges, can define the various phases of the law of homicide—without a book in hand?

(So you and I will know)

As was said, murder is the unlawful killing of a human being with malice aforethought. This malice is an essential element of the crime—it may be express or implied.

If you seek to educate the jury in the meaning of this—the court will stop you—saying—"I will instruct the jury on the law."

Generally the instruction will be—

"Malice may be express or implied. It is express when there is manifested a deliberate intention to take away the life of a fellow-creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned aud malignant heart."

The jury doesn't know what the court is talking about.

What my dear Judge—and ladies and gentlemen of the jury does the term "an abandoned and maligant heart" mean?

In this connection, there is the old yarn about the juror who as asked—"Do you have any objection to capital punishment?—he thought for a while and replied: "No—unless it is too severe."

Now—to further add to the juror's *clear understanding* of the court's instructions, the judge will read to him that the bare existence of hatred, ill will, and the like does not amount to legal maliee.

What does it amount to? Should not the court permit the trial lawyer to educate the jury?

The court rumbles on—

"Malice aforethought is not synonymous with the elements of deliberation and premeditation which must accompany a homicide to characterize it as murder of the first degree."

Well, now we've got it.

The legally uneducated juror certainly knows what this simple little gimmick is all about.

Of course—your Honor will permit the trial lawyer to explain minor and unimportant things—such as—deliberation—and—premeditation.

Everyone knows what these words mean—and everyone knows how to apply them—when the other fellow is on trial for his life.

Surely—the court will tell the jury that the state must prove to a moral certainty and beyond a reasonable doubt that the accused person had the mental intent to take the life of the person killed, and that such mental intent was arrived at as the result of deliberation and premeditation.

Simple? I might use my grandson's usual answer—Oh Yeah!

Well—let us see if we understand? To deliberate means to weigh in the mind, to consider the reasons for and against, to consider maturely, to reflect upon, to ponder, to weigh the arguments for and against a proposed course of action. To carefully consider and examine the reasons for and against a proposed course of action.

A deliberate act is an act formed, arrived at, or determined upon as a result of careful thought and weighing of considerations.

To premeditate means to think on and revolve in the mind beforehand; to contrive and design previously.

Can the juror understand, absorb and apply these rules? Further the law requires the state to establish to a moral certainly and beyond a reasonable doubt (1) That the defendant did kill the deceased. (2) That such killing was accompanied by a mental intent to take the life of the person killed, and (3) That such mental intent was arrived at by the accused upon the result of the thought and weighing of considerations on bis part, by his weighing the act in his mind and considering the reasons for and against such act, and by his having previously contrived and designed to do such act, such contrivance and design having been arrived at as the result of deliberation.

It is presumed by judges that as a result of this instruction the juror—suddenly becomes a learned logician.

It ain't so my friends—it just ain't so.

Believing as we do, that every citizen has a right to be tried according to the law; that it is his only shield against oppression and wrong; justice demands that judges permit counsel to educate the jury to an understanding of the law involved.

On questions of law the juror's deficiencies must be supplied by the professional directions of the judge, in language the jury can understand and apply.

The collected powers of the juror's mind must be fixed upon the issue of fact which he is sworn to try. But unless the juror has a clear understanding of the law applicable to the issue of fact, he eannot render a fair verdict.

I should enjoy diseussing this in more detail, but time prevents.

My purpose is not to attack trial judges or to belittle juries. The purpose is to put more understandiug and humanity into our trials. It is not enough to search with our mind—we must reach with our heart.

Man's inhumanity to man is almost intolerably distressing. Unfortunately, no workable cure for it has ever been discovered.

It seems to be inevitable for all men, after they are put in position of authority, to exercise it in a brutal and inequitable manner.

The moral bully is the worst of all men. Puritanism is completely merciless.

But the trial lawyer after the long days and nights of preparation and of trial are ended—when he has waited with pounding heart hour on hour before the jury returns and is seated—it seems that years pass in endless time before the verdiet is read—NOT GUILTY.

Then the defense lawyer stands in the full realization of the conqueror's dream. He stands in the complete fruition which bis learning, courage and confidence in

his cause has won. It is from such scenes that man ascends to the dignity of the Gods.

During my years of practice it has been my responsibility to try many civil and criminal cases. Often the public condemns the criminal trial lawyer as one who is full of tricks and will do anything to win.

No injustice should be done the criminal trial lawyer by attributing to him any want of loyalty to truth, or any deference to wrong, because he employs all his powers and attainments, and uses to the utmost his skill and eloquence, in exhibiting and enforcing the merits of his case. In doing so he does his sworn duty.

The profession to which we belong is, of all others, fearless of public opinion. It has ever stood up against the tyranny of power on the one hand, and the tyranny of public opinion on the other.

If, as the humblest among them, it becomes me to instance myself, I say that there is not in all this world the wretch so humble, so guilty, so despairing, so torn with avenging furies, so pursued by the arm of the law, so hunted, so fearful of life, so afraid of death—there is no wretch so steeped in all the agonies of vice and crime, that I would not have a heart to listen to his cry and a tongue to speak in his defense, though round his head all the wrath of public opinion should gather, and rage, and roar, and roll as the ocean rolls around the rock.

Good Luck and God Bless You.

MR. SULLIVAN: Mr. Ehrlich said he would be glad to answer any questions if any of you have any you would like to ask. If not, thank you for your marvelous address, and it is our great pleasure you are able to attend our meeting.

MR. EHRLICH: It is my privilege.

MR. SULLIVAN: The next order of business is the report of the canvassing committee on the new commissioner of the Western Division. Mr. Anderson, would you report the results?

MR. ANDERSON: Mr. President and Ladies and Gentlemen: The result of the vote for the new commissioner from the Western Division is the Honorable Sherman Bellwood. (applause)

MR. SULLIVAN: Thank you, Mr. Anderson. Judge Bellwood are you present?

JUDGE BELLWOOD: Yes.

MR. SULLIVAN: Would you please come forward? Congratulations on your election. (applause)

JUDGE BELLWOOD: To the lawyers from the western division I certainly say thanks for the honor conferred. To the rest of the lawyers, I am going to do the best of my ability that which you expect. Thank you. (applause)

MR. SULLIVAN: Thank you Judge. We will now recess. The next business session here and the next speaker start at nine o'clock tomorrow morning, and I wish you would all be on time. I want to remind you of the cocktail hour that starts at 6:30 in the Redwood Room, followed by dinner in the Lodge Dining Room. There will be a meeting of the Resolutions Committee at noon on the Lodge Terrace. I have announced the membership a number of times, some of them haven't shown up. The membership is Gus Carr Anderson, Ray Cox, Louis Racine, Clifford Fix, Jim Givens, Bob Elder, Lloyd Haight, Bill Gigray, and that is about it. If any of you have any resolutions, will you please submit them to the committee this noon.

EXCERPT FROM BANQUET PROCEEDINGS COVERING AWARD OF MERIT

MR. BERT LARSEN:

Last year in this same room a momentous occasion took place. We have been struggling in this state as a bar and as a fraternity of lawyers and occasionally there arises above the common herd a lawyer who demands, and until last year had not received, special recognition. Those of you who were here last year know there was initiated an award of merit. In the year 1956 that award of merit went to an illustrious member of the bar of Boise. I will call now on the man who introduced him last year and made the award to that gentleman, Mr. Ralph Breshears.

MR. BRESHEARS: Mr. Toastmaster, last year it was my privilege and pleasure to make the first award of merit to an outstanding member of the bar. I now present him to you again, Mr. Oscar Worthwine. (applause)

MR. LARSEN: In this year, 1957, the second Idaho award of merit will be presented. To present such an award it is only becoming that we have an outstanding lawyer of the Idaho Bar to make the presentation. In the northern part of the state is a lawyer who recently tried a case involving—I don't know just how to go about it—but people some times operate riding academies, and to accomplish their purposes they employ horses or they own horses. This young lady availed herself of its services and sustained an injury. The nature of it was somewhat meritourious, but this illustrious member of the bar, when it became his opportunity to cross examine this plaintiff, made it very clear where the injury took place. I will not elaborate. Perhaps the speaker would like to. He is a member of the firm of Whitla & Knudson; Mr. Emery T. Knudson will be the next speaker on the program, and he will award the 1957 award of merit. Mr. Knudson.

MR. KNUDSON: Mr. Toastmaster, members and friends of the bar, I am going to leave that horse alone. I had trouble enough with it the way is was.

For many who attended these annual meetings I realize that they indulge in a lot of work, and I think it is nice that the commissioners have arranged such a function as this so that they can relax. It gives opportunity for us to hear something about some of the really important members of our bar. As has been mentioned, this is the second time that an award of this kind we have in mind has ever been given or made by the Idaho State Bar, and I am pleased that the one who has been chosen to receive it comes from the northern part of the State where I live. I refer to Claude H. Potts of Coeur d'Alene. (applause) And I would like to briefly tell you just a few of the interesting facts of his lifetime thus far.

Mr. Potts was born in Atchison, Kansas. His parents were farm folks, and up until the time he went away to school his life was that of a farm boy. With his mind centered on a legal career he attended the Kansas City College of Law. I think that has since been changed and is now known as the Kansas City University. And it was here that he received his legal training. Incidentally, I am informed, not by Mr. Potts but by a friend of his, that at approximately the same time there was another well known individual who attended this institution, and his name was Jesse James. I have never heard him referred to as a classmate, and I think Jesse graduated from another institution. Anyway, Mr. Potts was first admitted to the practice in 1902 in Missouri, and in 1904 in the State of Kansas, and during his search for a fertile field in which to practice his profession he came to Coeur d'Alene and there opened his office and built his home, and he has lived there

ever since. Within approximately two years after he came to Idaho he was elected prosecuting attorney of Kootenai County. Incidentally, that county comprised a substantially larger area than it now does.

During his eventful career as prosecntor, I am going to call attention to a couple of things that happened just at that time to make his work a little more troublesome. It became his duty to enforce two newly enacted statutes—one was the Sunday closing law, and the other was the local option statute. When you keep in mind that a substantial percentage of the people who comprised his district consisted of lumberjacks and miners and that they had lived pretty much along the line of their own choosing, you can understand that they didn't rejoice in having somebody telling them what they could or could not do on any particular day of the week, and they didn't appreciate having anybody interfere with their habit of passing in and out of swinging doors. So you can imagine what problems Mr. Potts had in enforcing those two statutes.

One of the most publicized and well-known criminal cases ever tried in the northern part of the state found this man sitting at the prosecutor's table, when he and his associates prosecuted a man by the name of Steve Adams. Perhaps some of you will recall that Steve Adams was referred to as a confederate of the late Harry Orchard, who spent so many years of his life in our state penitentiary. For approximately three long weeks Mr. Potts sat at the counsel table in that Steve Adams case and matched wits with that illustrious and dynamic personality in the form of Clarence Darrow. Clarence Darrow was the chief counsel for the defense, and at that time Mr. Darrow was in middle life and probably at the height of his very eventful career. So you can appreciate the resourcefulness with which the prosecution in that case had to deal. During Mr. Pott's years as prosecutor, I think he had the burden of more than his share of work. The area within which he had jurisdiction was beset with serious labor disputes and uprisings, and the facilities they now have for settling those things were not available to him. But notwithstanding those difficult problems, he had by this time established himself as a man of great capacity, ability, and unusual integrity.

Following his retirement from the prosecutor's office he became our state senator, and here again he became and was one of the principal figures in dealing with the difficult problems of the legislature. In fact, he served in one of the longest special sessions ever had, at which the ever present tax problem was thoroughly threshed out—not the amount of tax, but the method by which property would be assessed for taxation purposes. While serving as a state senator, he drafted and presented to the state legislature statutes relating to search and seizure in this state, which have so greatly contributed to the law enforcement of this state.

Following his services as state senator, he sought to devote his time to more private matters, but his popularity again caused him to be literally drafted as the mayor of the city of Coeur d'Alene. That was during the war period, during which taxes were high, money was scarce. Mr. Potts agreed to accept the office upon the coudition that no salary would be paid to the office of mayor or to any councilman who served with him. It was to be and was strictly a public service. Besides performing his duties as mayor in his usual able manner, he devoted more than his share of time and effort in aiding the campaign for the sale of liberty bonds and victory loan securities which were offered by the government.

He has, throughout his active practice, devoted a great deal of time to the

study of legal problems connected with the timber and lumber indnstry and has become regarded as an authority on those snbjects. Mr. Potts has been, throughout his very enviable career, one of our most able and distinguished lawyers. He has always taken an active part in our local bar association matters, and between the years 1926 and 1929 he served as a commissioner of this bar; and tonight in point of service he is the oldest living past president of the Idaho State Bar.

Mr. Potts has raised a family of six children—four sons and two daughters, each of whom is well educated and equipped to pursue his respective calling. He is a devoted father and husband, and the home he and Mrs. Potts have maintained and the lives they have lived are the kind that you enjoy to look over, and when you do, you are left with the feeling that such lives are really worthwhile. And, now, Mr. Potts, I assure you it is a real pleasure for me to present to you on behalf of the Idaho State Bar this award of merit which you so definitely deserve. (applause)

MR. POTTS: Mr. Toastmaster, Mr. Knudson, Ladies and Gentlemen: Words fail me to respond to the eloquent address just made by my fellow townsman and associate, Emery D. Knudson. To be slightly facetious, I listened with interest and tried to determine in my own mind who he was talking about. It sounded entirely too good to me. Of course, he told you the good things and he told them in a very eloquent manner. He didn't tell you some of the other things. I had a lot of friends some forty-five or fifty years ago who told those. I am not going to bother you with a long speech. I have made many talks to bar association meetings in Idaho. This is going to be the shortest. I express my appreciation for this honor conferred on me. I appreciate very much the friendship of the members of the bar of Idaho.

I want to take advantage of this opportunity to pay a trihute to the legal profession of the State of Idaho a half century ago and more. That profession in those days had among its members some of the ablest and most outstanding lawyers in the United States. They had such standing with the people of Idaho and their ability was so great that they gave to the legal profession in this state and to us and all of you a dignity and prestige that could not have been accomplished by any one else or in any other manner. Among those men I am going to very briefly select four of the most outstanding lawyers at the turn of the century and mention his achievements briefly. I don't wish to ignorc others—there were many others—but it so happened I had the privilege and opportunity of knowing these four men as lawyers before they attained the great standing in public life. They were Senator Weldon B. Heyburn, Senator William E. Borah, Goveruor James H. Hawley, and Judge Frank S. Dietrich. They, in my opinion, a half century ago and more were the tops in the legal profession in Idaho. I could name more, but I did not know any of them as well as I had the opportunity of knowing those four men. Exactly fifty years ago tonight the State of Idaho was represented in the Senate of the United States in the finest manner that it has ever been represented by two outstanding lawyers who had made great reputations in our state—Weldon B. Heyburn had made his reputation as a mining lawyer in the Coeur d'Alenes; Senator William E. Borah had made his reputation in Boise, particularly in the famous Pettibone-Heywood-Moyer trial—the first trial. All four of these men were lawyers of great ability. James H. Hawley had participated with William E. Borah in the trial I mentioned fifty years ago this fall. He was the head counsel for the prosecution in the Steve Adams case, a side issue of the Western Federation of Miners issue, which company hired Harry Orchard to assassinate Governor Steunenberg. I then had the privilege, because that case had been transferred from Shoshone County where the murder was committed to Kootenai County on a change of venue,

to have a minor roll with the prosecution staff aided by James H. Hawley—mainly I let them use my offices in the court house and helped choose the jury, but I saw them in action. I saw James H. Hawley in action in the court room, and I was with him there with his prosecutors in my offices the rest of the time, and I learned a lot about them. Yes, some way or another, I never had such an opportunity to know a man. And I met Senator Heyburn after he was elected senator because he was in the senate more than fifty-two years ago. Let's see, 1903 he was elected to the office by the legislature. Senator William E. Borah, ran for United States Senator in the general election in 1906 and I became personally acquainted with him after he also was elected by the legislature in 1907, and those men accomplished exactly what I said they did—adding prestige and luster to the offices they held.

Judge Frank S. Dietrich became district judge shortly thereafter. Already with a fine reputation as a scholarly lawyer and then circuit judge of the Circuit Court of Appeals, and if things had been a little different and Idaho had been a larger state, he would have been, I believe, or, should have been, on the Supreme Court of the United States. My tribute is to those men and to many of their associates who added so much fame and luster to the legal profession in the State of Idaho about half a century ago. Thank you. (applause)

MR. LARSEN: It is with great people we meet the humility we had displayed to us. With all of our misgivings in not having awarded certificates of merit to Senator Heyburn, Senator Borah, Governor Hawley, and Judge Dietrich, we now have with us one of these men who have given, as he says, prestige and luster to the Idaho Bar, Mr. Potts.

July 13, 1957

MR. SULLIVAN: I will ask Mr. Sam Kaufman of Boise to introduce our next speaker.

MR. KAUFMAN: Thank you Willis. I think the Commissioners of the Bar have in the past afforded us the opportunity and privilege of hearing from some of the finest legal minds and talent in the country. In bringing our guest speaker to us this morning they have certainly carried on that tradition. Let me say briefly about our speaker's subject, which is the Medical-Legal Aspects of Preparing and Trying Neck Injury Cases – whiplash injuries as we call them, should be of extreme importance and interest to all of us engaged in the practice of trying personal injury cases. I think it was just a few years ago, that a paper on whiplash injuries was presented to the American Medical Association by several doctors who had made a study of it, and up until that time, in this part of the country at least, the doctors themselves were not too well acquainted with this type of injury and weren't of too much help to us in trying the cases. Because of the nature of the injury itself, many times there were hairline fractures, very difficult to see, many of the doctors did not even recognize them for what they were. Our speaker this morning is eminently qualified to discuss the matter with us, and I think we can all learn a great deal. Lou, of couse, is an expert in the field of personal injury litigation and many articles connected with personal injuries bear his name. He is a former vice president of the National Association of Claimants Compensation Attorneys and is presently a member of the Board of Governors, Ninth Circuit, of that organization. He is a fellow in the International Academy of Trial Lawyers and has on occasion in the past been one of the

speakers at the Law Science Institute with regard to the medical-legal aspects of personal injuries. You know, I was reading Coronet magazine the other day and came upon a little story relating to the famous atomic scientist Neil Bohrs. It seems a friend of his visited Mr. Bohrs and he noticed the man had a horseshoe hanging over the door, and the friend said, "Mr. Bohrs, certainly a man of your education, a scientist, you don't believe in superstition, you don't believe in horseshoes, do you?" Mr. Bohrs, said "No, not at all, but I understand that they are lucky whether you believe in them or not." I am sure that Lou Ashe is not superstitious and that in trying his cases he relies mainly upon the facts and law and his preparation and eloquence, but I am told that a few years ago he and Mel Belli, his former partner and associate, were trying a case, and they were out preparing to go back to court to present their final arguments when they were visited by a colored minister, an elderly gentleman wearing a straw hat and he had a big white cross on his vestments, and he came in seeking alms. Lou, not being superstitious, nevertheless seized upon this omen with great glee and sincerely so, I understand, and they went back to court with a light heart, full of confidence, and that visitation was worth a verdict of $250,000. I am also told that Lou has looked for that colored minister many times in the past. Without further ado, it is my great pleasure and privilege to present to you this morning Lou Ashe of San Francisco. (applause)

I INTRODUCTORY COMMENT

MR. ASHE: Thank you very much. Mr. President Sullivan, Mr. Secretary, Ladies and Gentlemen, my colleagues of the bar, and, where is he, and fellow musicians. I am not much at these morning performances. It is a little early for me, and I am rather pleased we have a small and, I trust, select group this morning. If you are so inclined, sit in front if you want to. Please relax. I understand I am scheduled for a two hour period. Quite frankly I am still somewhat at a loss to understand why your committee and Mr. Ennis saw fit to invite me here at all. I have conjectured the invitation may have been inspired by one of the most masterful of my written treaties on the law published in the Alaska Law Journal, Volume I, for June, 1906, entitled "The Doctrine of Res Ipsa Loquitur and the Eskimo Problem." This is also subtitled Medical-Legal Aspects of Blubber Fat, Cause and Effect, Conclusion and Consideration of Sequelae, i.e., Pot Belly! (laughter)

You know, when I join a group of you, each an expert in his own field, I feel like a dog suddenly surrounded by four trees—I don's think I have got a leg to stand on. (laughter)

These other fellows will be sorry they didn't come, because I am going to give a half an hour of gags first. I was saving one in particular, but with so many women in the audience I don't know whether it would be tactful. I will save it and see how this session warms up.

I want to tell you at the outset I never met so many nice people in my life, and I mean this! The sight of a district judge up there on the bandstand blowing a hot saxophone—the talent I saw last night—and Mrs. Coxs' talent the night before—it is all a very warm and wonderful thing, and I want to add this:

It seems to me, an outsider as it were, that a great state such as this, blessed as it is with its minerals, its mines, its lumber and other natural resources plus a highly intelligent, well-trained and obviously amiable Bar—ought to give serious thought to the adequacy of Judges' salaries in this jurisdiction.

I am advised that only recently salaries of trial judges were raised from $7,500.00 to $9,500.00. Unquestionably, these are men of the highest caliber and learning who leave remunerative private practices, who have families and obligations similar to those which burden us—who go into public service because of the honor and dignity in such service. In my humble opinion, such men should not be asked to live in less than the dignity which comes with a feeling of security in their economic lives. Such considerations should motivate the Bar to the highest effort to attain so well merited a purpose.

Despite many similar prior experiences there is a tendency when a man stands up with a group of people he doesn't know too well to develop a few fears. It reminds me of the story of the little southern boy who was sent down to the creek to get a big pail of water. When he got down there this huge alligator came crawling up on the river bank and scared him away and he ran home and he ran to his sweet mammie and said, "Mammie, I just saw the biggest alligator I ever saw in all my life." And his Mammie turned to him and said, "Now Joesphus, you go right back to that river and get that pail of water, and don't you know that that alligator is just as sceered of you as you is of him?" The little boy turned to his mother and said, "Mammie, if that alligator is as sceered of me as I is of him, that water ain't fit to drink." (laughter)

Some of you have read the advance publicity and concluded you were going to be addressed by an expert. That is what Sam told you. You know what an expert is? That is any lawyer who is fifty miles away from home. Thus cloaked with all this respectability, I appear before you unabashed, covered with a big fig leaf to hide my naked ignorance.

Although a native Bostonian and an adopted son of California, I now lay some claim to a very exclusive Idaho society. How, I don't know, but I am a member of the Marv Hornbeck's imbeciles. How I ever let anyone talk me into squeezing into a small life raft to run the rapids and falls of the Middle Fork of the Salmon River I shall never know. Up until that time I thought the Middle Fork was the fork you used for the salad. But know this, that I was seduced into taking this idiotic trip by the chief claims adjuster for a certain major insurance company in San Francisco, and I have always suspected that he was motivated strictly by a burning desire to reduce the claim losses of his San Francisco office. (laughter) And, of course, all of you know what a claims adjuster is; that is a fellow that can come in behind you in a revolving door and come out ahead of you on the other side. (laughter) I see you have met a few of them.

Quite seriously following this trip on the Middle Fork, I returned to the tribulations of the ulcer and the cardiac circuit renewed and refreshed in spirit and body and conscious that the magic of your forests and the verdant fascination of the Indian country had in some delightful, enchantiug way impressed their majesty thereapy upon a fatigued barrister, middle aged as he is, and revived his ancient spirit. And last night I was thrilled and excited to see your award to Mr. Potts, and I recall that Mr. Knudson was stated to have had a case in the northern part of the country which couldn't be discussed because it involved a lady who fell off a horse. He couldn't offer a diagnosis, and I have the temerity to offer it now. *She had a rear-end whiplash injury!* (laughter)

As we now approach, somewhat circuitously, the announced subject matter, I at least feel some identity with you. I am like the speaker in that famous place in Hyde Park in London where they can say anything they like while standing on soapboxes, and this particular fellow was reviling the capitalistic system, the Queen,

and the royal family, and all other English institutions, and to emphasize his points he would close his eyes and drive his fist into the air. At one point he opened his eyes and there wasn't a soul there except one little Cockney, and he looked around and said, "Where did every body go?" And the Cockney replied: "Oh, I don't know governor." And he said, "And ooh are you?" And he said, "Ooh, me? Why, I am the next speaker." (laughter)

That story would give anybody a pain in the neck, and that brings us to the subject matter. I trust only the subject and not the speaker will be characterized in that fashion. There are some Freudians who always are referring to the unpalatable, odious character as a pain in the neck, and there are some who have heard my talk on whiplash and other medical-legal subjects who have described their reaction to what I said as giving them a pain in the area somewhat removed to the south. But, of course, there is no scientific proof to support pathology in this area.

II THE PERIMITERS OF THE PROBLEM

Let's pause to think for a moment about this world around us—so that the problem of cervical injuries will not appear to be presented in a sort of semi-vacuum. We shall be talking, Ladies and Gentlemen, about the basic economic and sociological unit of our entire society—the human being—the individual, who when he becomes injured, becomes the problem and concern of each one of us regardless of what side of counsel docket we may occupy.

I shall be extremely gratified if in the succeeding moments our discussion will serve to formulate some concepts of the individual victim and his concerns—and to refresh and stimulate our thinking in a non-specific way regarding our particular inquiry—the cervical spine.

This is no horse and buggy age malady we are talking about—it is strictly a product of our times—and the solution lies not alone in the diagnosis, treatment, and care of cervical injuries—but even more in the prevention of the accidents which cause them, and once the victim employs our resources, to obtain for him a just verdict before a jury—that we are prepared and able—by reason of our amassed background materials—to do justice to each individual cause.

Let's pause for a moment and think of the traffic accident problems in the United States.

Through automobile accidents, a life is lost every 15 minutes and an injury sustained every 30 seconds. Now, I assure you these statistics have been well checked. Moreover, about 10 percent of such injuries result in permanent disability.

Traffic accidents, the sixth major cause of mortality and the single greatest cause of death in persons under the age of 28, caused about 5,000 more deaths in 1955 than the total American battle casualities in the Korean war. About 38,300 persons were killed, and another 1,350,000 were injured, at a total cost of $4,-500,000,000.

Andrew J. White, Director of the Motor Vehicle Research Incorporated in Lee, New Hampshire, one of the most brilliant of our statisticians and research men on the question of automobile accidents, speaking in New York just last week, pressed into focus one important consideration which I suggest now for your thinking as you think about the injury itself.

"The amazing progress of science and techonology in our time which has

endowed mankind with virtually unlimited physical power has brought with it a gigantic responsibility. While we are performing miracles of engineering and scientific achievement, we are at once setting the scene for the production of catastrophe. We have now reached the point where the machine has dwarfed man, for the characteristics of the individual the human machine have not changed in the memory of man and will not change for countless generations to come, while the man made engine is capable of every increasing power, scope, and speed of operation. And we must consider man's capabilities as a constant in contrast to the unending progression of the machine."

Although hundreds of mechanical products carrying a claim to safety appear each year on the market, most of them are short lived due to the lack of performance under use conditions. For example, the use of seat belts, which ostensibily would he more effective to reduce injury following impact. Although I shall have more to tell you about this later, sufficient for the moment to tell you that creditable research by analysts of integrity in Mr. White's great research bureau have cast serious doubt upon its efficacy and merit. Of course, seat belts did succeed in stirring up interest with a potential existing market of sixty million people at $10.00 each.

The bureau reports the safety belts now available are not even insured by law to meet certain minimum requirements and these are an illusional protection. "This position is rendered even more tragic when it is remembered that the dead or injured motorist bought this restraining device for the express purpose of protecting himself from just such a fate." A week ago I witnessed high speed motion pictures which showed that the typical seat belt which was being investigated in a front end crash under thirteen miles an hour permitted the head to act like the business end of a sledge hammer as it went through the windshield.

One of my distinguished friends—a learned internist of Los Angeles—has reported to me two recent cases where that very belt intended to provide safety has resulted in impressive insult to the abdominal area by virture of the external pressures applied as a concomitant to the rapid deceleration.

Now, accompanying the so-called "whiplash" injury, there has been a marked high incidence of injury to the low back and the head, and no blow to the head is taken with impunity. Unconsciousness, for any length of time, most often results in irreparable brain damage. While injuries to other parts of the body, including the neck, may be crippling and disabling, the greater part of these may be circumvented by modern medicine. However, damage to the brain itself cannot be repaired.

III "WHIPLASH" – WHAT IS IT?

A young gentleman came up to me a few moments before this session and said, "I have a report from a doctor in which he says, 'this lady sustained a severe whiplash injury.'" And I said to him, "I don't know what severe whiplash injury is." This points up the problem of defining the subject matter. Here we are, men who deal solely in semantics every day of our lives; every communication we have between the judge, the jury and ourselves is based upon our ability to speak certain simple words which carry a simple message to the triers of the fact, and yet we have taken this phrase "whiplash injury" and virtually kicked it into the ground. What is it we are talking about? What has been done here by both the medical and legal profession is to attempt to describe a medical diagnosis with rhetoric. Now, please hear this!

The term "whiplash" does not describe any medical ill or pathology. It is not a medical term. It is not a scientific term. It is a term of convenience which has been used and abused by doctors and lawyers to describe a condition. In some areas the constant use of this term "whiplash injury," both by the medical man and the lawyer, has caused jurors to become very skeptical. They raise quizzical eye-brows at its mere mention, with inequitable results to the injured plaintiff, his counsel, and the treating physician.

And this is rather regrettable, the so-called neck syndrome is relatively recent, and medicine is still grappling and groping its way with the multiple and complex symptoms produced by this type of injury. Much, or all, may depend upon the competency and even the tolerance of the initial medical observer (sometimes a general practitioner) and too often those who suffer from injuries to the cervical spine and its adjacent structures, ligaments, muscles, etc., are passed off with a few rounds with the therapy lamp, a little stretching, and a sedative, and, when the neck symptoms persist, the client is dispatched with the vague diagnosis of "neck sprain" and, if you will pardon the expression, "functional overlay."

You must ask yourselves at the outset, Gentlemen, what is it? Just as the phrase "post concussion syndrome" or "post concussion residual" is meaningless without some basic definition of what has been injured and to what extent, so if there is organic insult anywhere in the neck, why not describe it in medical terms and not rhetorically. So when the report comes through, don't accept the bland statement of the medical observer that "this lady has had a whiplash injury." It's meaningless. What is it that happened to her crevical spine or his cervical spine?

Is it, ONE: a fracture of the bodies of the vertebrae and their bony processes, that is, interruptions in the continuity and shape of the vertebral body? TWO: Is it traumatic arthritis, or injury to the cartilaginous surface of the joints resulting in loss of the incongruity of the joint surfaces? THREE: Subluxation and dislocation, mild or severe ligamentous sprain leading to changes of position with relation to the vertebrae on one another with movement? FOUR: Is it a herniated or intravertebral disc? FIVE: Is it an injury to the spinal cord and its contiguous nerves, is it paralysis, is it a change in vegetative fuuctions or sensations? SIX: Is it tearing of muscle or its covering, the fascia? SEVEN: Is it a vascular injury with hemorrhage, scarring and the other sequelae? EIGHT: Has there been injury to skin and fat? Is it a combination of a number of these things? NINE: Is it an aggravation of a pre-existing condition, of the degenerative disease, or congenital anomaly?

Now, each one of these things describes a pathology of the neck but not "whiplash." My point is, Gentlemen, get rid of the expression. "Whiplash" does nothing more than describe the mechanics of the injury! In other words, how did this injury come about?

I have taken the liberty, in my discussions with your committee to offer them whatever copyright I have on an article entitled "Medical-Legal Aspects of Cervical Injuries." I am told they will reproduce it with all of its diagrams, charts, et cetera. I am happy to make you a gift of this and I hope it serves you somewhat. I will refer to it only rarely in my talk this morning, but you will find most of the basic material compiled in it.

All of us seem to know reasonably well how to handle the case where we have a fracture, where we have X-ray evidence of dislocation or subluxation. We might point out some of these things as we go along. (Incidentally, as a matter of court-

room procedure, no exhibit was ever worth its use at all if it couldn't be seen by those you want to impress. So, this morning we have a little spot light. The exhibit I have before me at the moment is one of those simple things which carries a message. (See figure 36) It has simple line drawings. It is not involved.

The Exhibit (see Figure 36) I have before me at the moment is one of those simple line drawings which carries a message. It is not involved.

First, the vertebrae are shown in their normal position of rest. Next, in extension and in flexion.

At Marking "D"—these vertebrae are demonstrated following trauma with pathological conditions imposed. We see a hyperextension, (the head thrown backwards) with a fracture of the spinous process.

At Marking "E," we demonstrate a flexion (the neck in a downward position) fracture where muscle and tendon have excecded their downward command.

Marking "F" exhibits a complete separation of the disc following hyperextension of the neck, and marking "G" demonstrates a compression fracture with disc injury following a severe flexion of the neck.

I commend for your thinking this type of exhibit in the courtroom in order to describe the anatomy of the precious thing I shall talk about in a moment, so that the jury may begin to understand what goes on in this neck.

FIGURE 31—And in another simple line drawing we have shown the basic muscle groups in position with simple lines. These, of course, are the anterior muscle groups shown by simple lines, the anterior and the sternocleidomastoid, or center group of muscles shown with a line in this fashion. We show it first with the head and neck at rest, and held in place by the normal functioning of these various muscle groups; we now show the head thrown back beyond the range of normal extension, the insult having been applied to it. Then we show it when rapid acceleration occurs, which is precisely the mechanics of the whiplash, and show why the cervical syndrome may set itself up in various forms. So much of that for the moment.

IV THE "VAGUE" CASES

How about the vague cases—the ones where there is nothing left but the subjective complaints. Let me say a word about subjective complaints. Defendants invariably attack the basic honesty of these as a basis for diagnosis. Notoriously they look on the subjective symptom as a conspiratorial tool. The plaintiff's counsel must stress that it is impossible for any doctor to treat any one without hearing what his complaints are. Questioning any doctor will disclose that it is often only upou the basis of the subjective symptoms that disease can he said to be present they being, quite frequently, even more important than the objective signs. Without the patient's history, or the patient's description of subjective complaints, the profession of medicine would have to close its doors.

Can you imagine a man walking into the doctor's office—He sits down, a the doctor sits comfortably behind his desk, and says, "Well Mr. Jones?" A Mr. Jones doesn't open his mouth. He just sits there. Diagnosis? treatment? W is wrong with this man? And Jones says, "Guess!" It is the old story about t man who walked into the dentist. He wouldn't talk. He wouldn't tell the de *which* tooth hurt, and the dentist pulled out *every tooth in his mouth.* He was

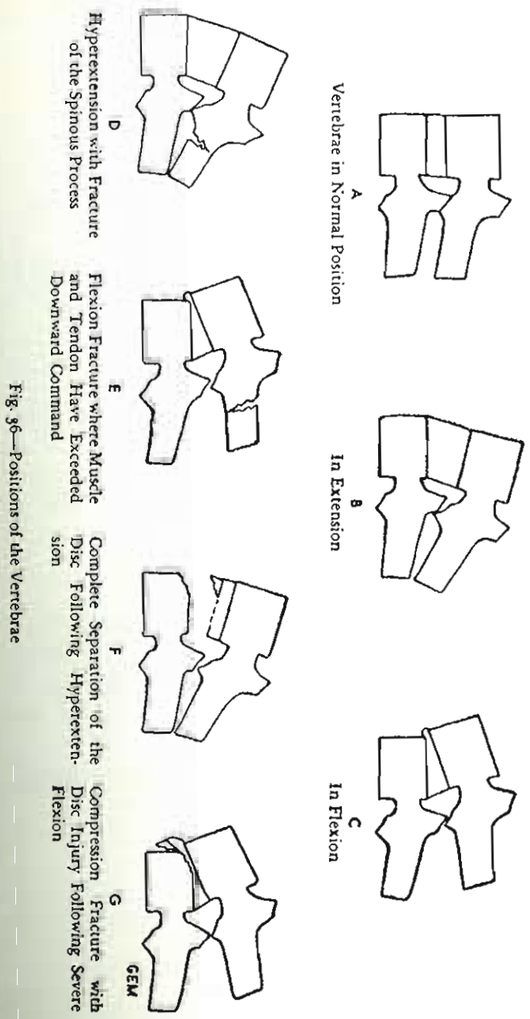
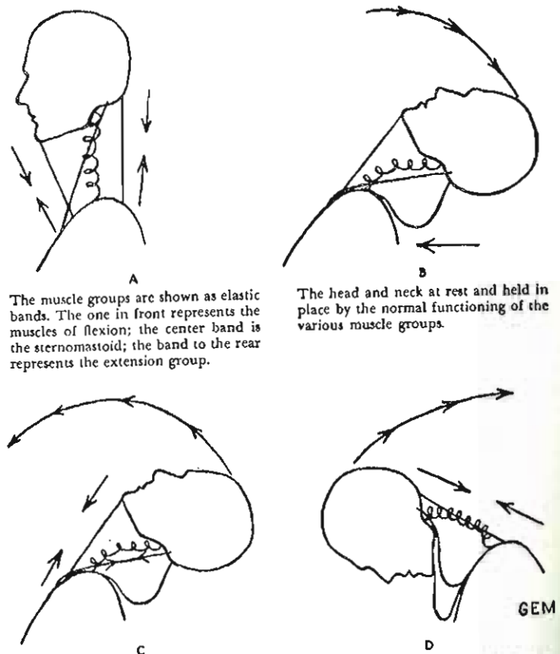


Fig. 36—Positions of the Vertebrae



A

The muscle groups are shown as elastic bands. The one in front represents the muscles of flexion; the center band is the sternomastoid; the band to the rear represents the extension group.

B

The head and neck at rest and held in place by the normal functioning of the various muscle groups.

C

The head thrown back beyond the range of normal extension, i.e., it is hyperextended. The groups to the rear are now relaxed. The groups in front are stretched to their maximum and are exceeding their command.

D

When rapid deceleration occurs, the taut flexion muscles pull the head forward into forced flexion.

Fig. 31—Action of Muscle Groups

a stubborn man. Think of it! How do you gentlemen, relate what is wrong with you?

The patient's subjective complaints may be his only means of communication with the doctor who is about to undertake his treatment.

V THE NECK – A MASTERFUL PIECE OF ENGINEERING

Now, how can we bring to the juror, who in most cases sits there wanting to do equal justice, a picture of this beautiful piece of anatomy? Think of the neck now, if you will, for a moment. Here is an ingeniously constructed conduit. A sound knowledge of the basic characteristic of the head and neck region is essential in order to develop an understanding of the diseases and the injuries to which the neck is so particularly vulnerable. Why? This knowledge shared with intimate enthusiasm between the testifying doctors and the lawyer can have the direct effect of making every single juror, or impressing the fact upon every single juror, of an appreciation that this is no isolated neck under discussion belonging only to the plaintiff—but it is their necks. That they are heirs to the very same anatomical piece of engineering art—and that their necks are just as vulnerable and but for the grace of God there they sit on the witness stand. The question then is one of identifying the plaintiff with the juror. Living, as we do, with all parts of our body moving about, with a built-in lubrication system at each joint; having the wondrous flexibility with which we are endowed; we really don't give much thought to anything more than an occasional cold, or excluding the members of this audience, an occasional hang-over. How that body functions normally and how it is brought to disfunction and disease by trauma is the responsibility of both the doctor and the lawyer. No enlightened trial counsel would dream of failing to press into the record every phase and every facet of the liability elements. How about the medical facts? And why the reluctance of counsel or the courts if you will, to permit every legitimate demonstration of how and why that body functions as it does?

So, Ladies and Gentlemen of the Jury, let's both take another look at our necks! Let's both see and understand why this structure can be seriously damaged by even a slight impact and at low speeds!

Let's appreciate that this remarkable structnre is a conduit of rather small circumference above which is supported the head, weighing from seven to ten pounds. Now, the head is supported by this remarkably flexible six inch neck and this neck originates from an only partially movable thoracic or chest spine. So it has a fixed object of partially fixed, almost immovable, object below. It has seven to ten pounds above, and it has other things. It is important, therefore, to realize the magnitude of the acting forces developed because of the leverage of the neck. Think of it! It can flex. It can extend. It can rotate and it cau bend laterally in either direction. Isn't it a beautiful piece of work? It is a conduit which serves as the only communication between the head, the brain, and the body. It is a glorified passageway for every important emanation from the head to the body. It is a transbody cable in miniature full of important wires which carry the messages to and from every part of the body. Through it passes the oxygen and the blood to keep the brain alive, without whieh it dies and cannot be regenerated. It is an area of precious interrelationships between the brain and the body. The vital blood supply, the blood vessels, and the spinal cord and its vital nervous system are encased within it. It contains the bones and the movable joints which, supported by strong ligaments and muscles, permit this flexibility. It is designed and

engineered for efficient function. And any alteration in these joint mechanics spells trouble.

In this priceless conduit we see for the first time the emergence of the spinal peripheral nervous system or nerve roots; here demonstrated is the spinal cord; the various discs which we will not discuss; and what will be demonstrated in a moment—the emergence of the spinal nerve roots. From the cervical spinal cord and through the seven cervical vertebrae, the eight cervical nerve roots emerge through the foramina (foramina, of course, a bony canal especially constructed for this purpose). This canal is one of those beautiful pieces of engineering too. If you have not seen the neck open or seen it post mortem, it is amazing to see the delicacy with which this foramina, the opening for the exit of the nerve root, is constructed and that the fit is down to that thousandths of an inch so that when you finally get a traumatization to that particular area or any scarring or hemorrhaging in that area, you can begin to appreciate why, when that little hole, that little exit starts to close down, starts to lose its inner diameter, that immediately we are faced with a problem of pressnre to the precious nerve exit.

Without geting too technical, sufficient for now that we can demonstrate in a proper case that these nerve roots form into nerve trunks, which are large groups of nerves, passing into the arms, supplying sensory feeling, and giving innervation to the muscles we use. Here too, the so-called autonomic nervous system (which consists of the sympathetic and parasympathetic nerve centers, groups) has nerve centers and distribution in this cervical area. One segment of the sympathetic nervous system is located at the level of the sixth cervical vertebral body, and it supplies the fibers which pass to the eyes, the ears, the throat, and the arms. Abnormalities or irritations involving the sympathetic nervous system may cause dizziness, blurred vision, throat dryness and stiffness and swelling of the fingers.

Why do we talk about this? You all know. So that we may have a new appreciation of the client who comes in complaining of what you sometimes think are a series of bizarre complaints. Too easy it is to say, "Oh, you are all right. You will be all right in a couple of days. Put a little heat on it and all will be well." Too easy it is to do such a thing, and it is up to us as lawyers, to insist on explanations of the symptoms stated to us by our clients. Why does this happen, doctor? We are not satisfied that you pass us off with the explanation "whiplash injury." We want to know what happened to this man or this woman's neck that caused these symptoms. I believe my client is not malingering. My client hasn't the slightest idea of the distribution of the spinal peripheral nerves into the arms, and yet my client has certain complaints relative to fingers, to certain areas in the arms. Tell me, doctor, why does this happen? And having found out from the doctor why it happens, you must be in a position then to get it down to its most simple terms so that Mr. Juror Brown sitting there in that jury box knows what is involved. Again, as I suggest to you, we are not talking about the isolated neck of plaintiff on the witness stand, we are talking about a human being who has the same neck as each one of you in this audience.

Radiating Pain — Radiculitis—terms you read in your medical reports. This is a pain originating in one area because of injury or irritation but actually felt in another uninjured area. It is produced by what? Two types of things: Cervical muscle tightness which causes occipital or frontal headaches.

How often does your client, in describing his symptoms, tell you he has a headache which seems to begin in the back of the neck and come up over the side

into the front of his head, and he sometimes describes that pain as going behind his eyes. Accompanying that he sometimes talks about blurring of vision. The thing seems to recede from him—he cannot seem to concentrate on a particular piece of newspaper or news print or something in the distance. The neck with its multitude of supporting muscles, which I indicated to you in simple line drawings earlier, can exhibit radiation of this pain into several areas. Most common as I suggested, was the occipital and frontal area of the head, and less common in radiation to the upper back, shoulder blade, arms, and upper chest.

Then we have a different type of irritation. This is nerve root irritation of mechanical origin. This has been described as the Cervical Syndrome. This narrow bony canal I discussed with you, and its size, can be encroached upon, as suggested, and will most likely produce nerve compression and irritation. Since the important walls of this canal consist of the articular facets and the vertebral bodies, any displacement of the joints themselves and the growth of bony spurs or hemorrhage or edema will cause irritative nerve root symptoms to develop.

Now, we can distinguish one of these irritations from the other. In the pamphlet which I have left for you there has been included the work of my good friend and colleague, Dr. Hugh Garol, one of the outstanding neurologists in my area of the country. (EXHIBITS 32, 33)

This will be an anterior view. This will be the posterior view of the same situation. Where you have radiating pain or radiculitis of the type brought about through the compression of the nerve as it leaves the spinal canal and makes its exit, the neurologists have developed a definite pattern based upon their anatomical studies and post mortem studies upon cadavers. Most always it will follow this pattern. There are some which do not; and it will be noticed here that each one of these peripheral nerves from one to eight has a definite effect upon a definite area of the body. And that is why we as lawyers should know that it is quite possible to hurt the neck and to have a client come in complaining about various difficulties being encountered in ability to grip, about the tingling feeling of certain of his fingers, in numbness of certain of his fingers, and in a particular pattern, and I wish you would come up later and look at these. You will find that each one of these nerves finds its expression at a particular point.

When you have this nerve root irritation, it will most probably follow a pattern. However, there are a few individuals who are idiosyncratic, and if they show a bizarre picture, don't be too quick to condemn them. No client who comes into your office knows anything about the distribution of the spinal peripheral nervous system, and if such a client comes in and complains to you about pains in the various areas, why not acquaint yourself with the physiology so that some day you can with your doctor's help exhibit some simple drawing to demonstrate to the jury from whence emanate the spinal nerves and their affect upon the human body. I don't know your laws in this state. We have no difficulty in bringing to court this type of diagramatic demonstration.

Now, Ladies and Gentlemen, these same nerves which I have been discussing, as they emanate from their various parts of the cervical spine (and, of course, all the way down to the horse's tail) — these same nerves, when certain pressures are applied upon them, can be subjected to various injuries. They can stretch or they can be lacerated. Now, the cause is very simple. It is a forcible bending or twisting of the head toward the shoulders, and the symptoms, partial or complete loss of feeling, muscle weakness, and reflex changes in the part supplied by the

PREPARING NECK INJURY CASES

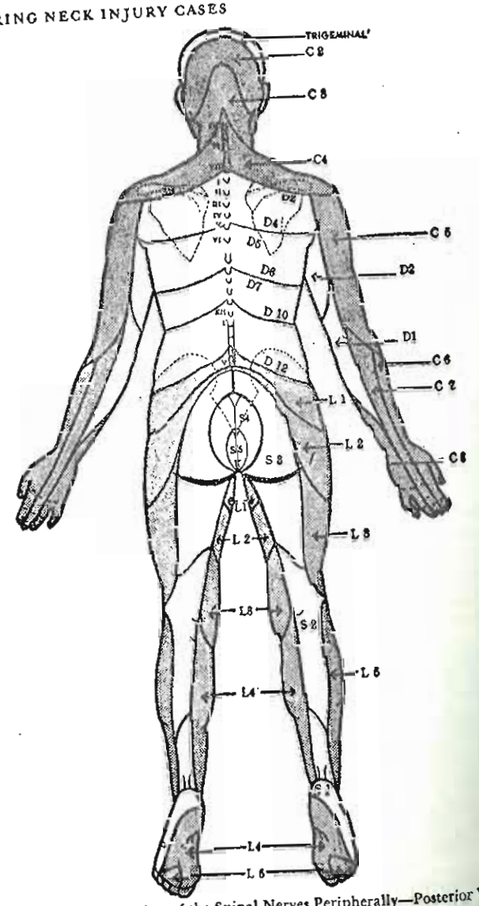


Fig. 33—Distribution of the Spinal Nerves Peripherally—Posterior View
Reproduced here through the courtesy of Hugh W. Garol, M.D.

particular nerve. There are two types of these. There are types with no interruption to the nerve pathways save for the reaction of the body to the injury, namely, that the body develops swelling and fluid and accumulation above the nerve, causing interruption of nerve impulses. This passes, thank God. But you can have an actual interruption of the continuity of nerve fibers by a tearing injury, much as if there were an actual cutting of the nerve. Recovery, even partial recovery, takes at least a year or year and a half, according to the best medical knowledge on the snbject, and complete recovery of the torn or lacerated nerve really never happens.

The objective signs: ONE, nerve paralysis, and these can be checked and should he periodically by the EMG, the electromyogram, which registers the electric currents generated in muscle. When the nerve supply to the muscle is partially or completely lost, the electromyogram changes are demonstrable. In my pamphlet there is a whole paragraph dedicated to the discussion of electromyography, which I leave at this point for your interest on some other occasion.

Now, we begin to have a concept of this wonderful piece of human anatomy—this only means that the body has of bringing the brain impulses to the rest of the body and making that body operate. Tell Mr. Juror how important those structures are. And what is more, we can see a fracture in an X-ray. But I have seen post mortem necks, my friends, which were never diagnosed as fractured and in which there were fractures that were never seen by an X-ray. Now, those who are interested in the radiological field are working hard to develop new X-rays techniques which will bring to the viewer the presence of fractures often denied by some on the theory what they can't see "ain't" there. And, remember, there are all sorts of anatomical structures within that neck, as I have already pointed out, which can be hurt and which are impervious to X-ray. The injury to muscle is not readily seen. The injury to ligament is not seen. Injury to other soft tissue is not seen. The embarrassment of the blood supply, for example, and the potential injury to the ascending vertebral artery, one of the main arteries carrying blood to the base of the skull is not demonstrated.

Now, all these things may be traumatized. When we get to the mechanics of the injury, the jury can be made to realize this fact through one form of testimony or another, for example, through the testimony of a physicist as to the amount of pressure being applied to this delicate piece of engineering during a rear end crash, often hundreds of pounds of pressure is explained to the jury, they can begin to understand why this thing like a sensitive, delicate watch can be upset, and there are those medical men in the world today who more and more are beginning to appreciate that stresses applied to the body of any fashion must necessarily bring reaction, because fundamentally for every action there is reaction.

I am going to pass up for the moment the question of cervical discs. Unquestionably there has been much talk about them, but the possibility and probability in a proper case of an excursion of this material into the spinal canal with the sequelae with which you are so well acquainted will have to be discussed sometime in the future. And recall this, that because of the mechanics of the injury itself, this whipping back of the head and the neck—you have got two structures involved. We cannot pass lightly by the suggestion that almost invariably along with your whiplash injuries where you have had any period of unconsciousness, and by that I mean anything from a minute up, that the question and investigation as to potential injury to the head and its contents must ever be present in your minds and not discounted. Recalling this backward-forward motion, these excursions of the head, it is understandable that when the direction of the skull movement

abruptly changes by virtue of rapid acceleration or deceleration that changes may cause an altered brain function, the degree of which will depend upon the severity of the trauma. So that when your client somes to discuss his condition with you and sometimes after six or seven weeks, he says, "Mr. So-and-So, I don't seem to be hearing so well," don't pass it off. If he comes to you and talks about blurring effects in his vision, don't ignore it, because there is an intimate relationship between the sequelae known to you arising from head injury and the sequelae arising from a neck injury, and the two are very much interrelated. I will say this for the record, so that you may make reference to it without my going into it now at any great length, See:—"Inner Ear Evaluation of Head and Neck Injuries" by Dr. Abraham I. Goldner, which will be published in the proceedings of the last NACCA Conference, July, 1957, held at New York City. Dr. Goldner, a week ago, made it clear that the sympathetic nervous system linked up as it is with problems of hearing and the vestibular apparatus which give us our sense of balance cannot be ruled out in this type of injuries or in injuries to the cervical spine. There is respectable opinion, Gentlemen, and medical literature will bear it out, that these injuries may reasonably result in the disturbances of hearing and sound. There may be disturbance in the mechanism of hearing in which the sensitive internal ear and the connecting nerve of hearing, which is the auditory or eighth cranial nerve, is involved. The type of deafness which sometimes results from the severe injury to the cervical spine and head is a perceptive type of deafness, and medical literature and our medical brethern join in telling us that this is a deafness in which the prognosis is usually poor. Now, the eighth cranial nerve, or auditory nerve, actually is two nerves wrapped up in a bundle; one has to do with our sense of hearing, and one has to do with our sense of balance, and how often those who suffer this type of neck injury will say to you, "I get dizzy and I feel like I am going to fall down; I don't seem to be able to sustain myself in balance." Don't laugh it off. Don't rule it out as a possible sequelae of the injury in question because this beautifully complicated and wonderful piece of engineering is one of the most sensitive, vulnerable places in the whole human body, despite the fact that the good Lord, to protect our wonderful spinal cord, gave us some nice, heavy, big, strap muscles in back of the neck. You can well imagine if these heavy muscles get hurt the amount of pounds of pressure being applied to the inner mechanism.

In regard to eye injuries, for the record I will cite:

"Traumatic Neck, Head, Eye Syndrome, by Dr. Harvey E. Billig, Jr., reprinted from the Journal of International Collegc of Surgeons, Vol. XX, No. 5, November, 1953, for your further consideration. Next "Opbthalmolic Aspeets of Whiplash Injuries (these are all new writings, by the way), by my friend J. Myron Middleton, reprinted from the International Record of Medicine and General Practice Clinics, Vol. 169, No. 1, January, 1956, Dr. Middleton told me that the sympathetic nervous system is placed in double jeopardy every time there is an injury to the neck of this mechanical type, because this sympathetic nervous system traverses the cervical region twice, once as it ascends to the ciliospinal center within the spinal cord, and again as it ascends to form the bracheal plexus, and any interruption, of this function of the sympathetic pathways to the head which can occur in whiplash injuries to the cervical spine may produce the well known Horner's syndrome. And the Horner's syndrome is strictly a matter of ophthamology and injury to the eye.

Gentlemen, there will be a five or seven minute recess, and we will continue

(recess)

Coming to the second part of our session, one more story of the English Colonel who was very attached to his troops, and he asked his battalion major to call out the entire battalion. They were called to attention in their splendid new uniforms. The Colonel came over to address his battalion. He stood up in front of them, typical, English gentleman, long walrus mustache, impeccable in his taste and dress, and said: "Officers, non-commissioned officers, and men, I have an announcement of great importance to make to you this morning. Last night at approximately 4:38 a.m. my beloved wife gave birth to a 13½ pound baby boy. Officers, non-commissioned officers, and men, I thank you." (laughter)

VI ARTHRITIS – A CONSIDERATION IN CERVICAL INQUIRIES

One of the things that faces you gentlemen so many times is the question of arthritis. I am not talking about fractures and things at this moment because they will take too much time, but when you get into the field of arthritis and after effects, there are many, many types. Sufficient to say that medical literature knows about them and describes them.

There are those of our medical brethren who are so dedicated to the idea that arthritic changes reflect only the degeneration of the human body by wear and tear and that trauma in this regard is of really no medical significance or consequence, they are prepared to look at a new-born baby and pointing their impressive surgical fingers at the tiny baby say "Good God, there lies a dying man."

No term in medical nomenclature has been more misused or is more likely to befog the medical-legal picture. Obviously it is impossible to pursue either direct or cross-examination effectively before arriving at a proper definition. As the term is usually heard in court, it represents a sort of medical doubletalk. This must he charged to the fact that the medical dictionary definition of arthritis means inflammation of the constituent parts of a joint—the cartilage, the synovial membrane, ligaments, and the synovial fluids. In that sense, arthritis is a disease with definite symptoms and with varying effects. On the other hand, one may have neither symptoms, disability, nor suffering, yet X-ray taken, say of the lungs, of the stomach, or the back or of the neck for a fracture, may reveal conditions which have been there for years.

How does this become acute in court? The plaintiff, a man past middle age, who has been steadily employed and in good health, suffers an accidental injury to the neck. His medical history thereafter indicates severe pain in the neck, restriction, limitation of motion, flattening of the cervical curve, other such common classical symptoms of the neck injury, and these disable him from his occupation temporarily; or, in a very severe case, permanently. His condition is diagnosed as arthritis. X-rays were, of course, taken. As in our earlier illustration, the defendant points out that these X-rays show various bony changes, knowu as lipping or bridging or spurring, along the margins of the vertebrae as illustrated. In other words, callus formations have now created at the margins of the vertebrae what the medics call osteo arthritis. We at once see the narrowing of the disc space between the vertebrae which is indicated by reference to the normal disc space in that same vertebral column, above and below, and here we have a narrowing of the disc space, or eating away, and the growing of these spurs. I have seen in post mortem views a neck in a human being with so much of this degeneration present that two and three vertebrae have been solidly fused—actually fused by bone. And the man didn't die because of any pain injury to his neck or his back. He died of other causes. And if you would ask him while he was alive, he might have told you that he had some stiffness in his neck but he never had any symptoms to which he paid any

attention or for which he was ever treated in his life. Since these bony changes, it is argned, could not possibly have formed between the time of the accident and the taking of the X-ray, and since by definition the suffix "itis," "arthritis," means inflammation, which can cause bony deposits, the defendant insists that the plaintiff has been a sufferer from arthritis for years and that the accident has little, if anything, to do with his disability. Now plaintiff's counsel must dispel the confusion which stems from the "itis" part of this diagnosis, with its implication and assumption that plaintiff was already suffering from an inflammatory and presumably a painful disease. It is counsel's task to reduce the X-ray and its revelations to their proper dimensions; to demonstrate that X-ray is not a criterion of whether the plaintiff is or is not suffering from arthritis and to make clear the distinction between a disease process and a normal, developmental, painless process of growing older, with its consequent changes.

I want to talk with you briefly about the individual victim of trauma as applied to bones and joints about whom you have often seen medical reports which read somewhat like this:

"It is my opinion that this patient received strain to the cervical spine in the site of pre-existing arthritic change which caused her a considerable amount of neck pain and cervical headache."

Or it may come in this fashion:

"The patient had a marked degenerative arthritis of the first phalangeal joint in the right foot."

Or like this:

"There is some area of mild degenerative changes in the lumbar spine--the joint space of the right hip is somewhat narrower than the left."

Now, let me share one little thought with you.

Although the law has by constant refinement arrived at a fairly clear picture of the so-called "reasonable" or "reasonably prudent" man so often involved in tort litigation, it appears almost impossible to pin down a definition of the so-called normal man so that we may, where reliable medical opinion confirms the diagnosis of symptomatic arthritis, determine whether we face a case or condition sui generis, or whether in a particular case the tortfeasor has selected a so-called idiosyncratic individual with degenerative changes already present in bone structure, joints, etc., and thus predisposed and needing but the slightest stimulus to let loose the accumulated waters into a wave of arthritic complaints.

I have pondered this matter for some time and I ask you to consider with me WHO IS THE NORMAL MAN? If we assume hypothetically a man 40 years old —a productive wage earner who has, prior to the trauma in question, pursued a vigorous work-day life without any significant complaints relative to an arthritic condition and who has, with the good Lord's permission, as it were, withstood most of the ordinary assaults upon his body with equanimity and in good health, is not such a man a normal man, a normal 40-year-old wage earner with a normal 40-year-old body, and a normal 40-year-old back and neck, and, therefore, possessed of a normal 40-year-old spine and joints?

If we now impose trauma upon such a hypothetical individual, is not that trauma the competent producing cause which turns an asymptomatic (no symptoms) individual into a symptomatic individual, is not such an injury, if liability exists, a compensable injury--not only upon the basis of aggravation but

but at least philosophically and logically, and, if you please, medically, a direct causitive factor.

Is there a man or woman in this audience, over 35 or 40 years old, save for the most rare exception, whose body right now, if submitted to proper X-ray, will not reflect the actual wear and tear, degeneration, brought about by the mere act of living?

Every movement I have made up here, of my arms, my legs, or my body or my neck, is in itself a type of trauma, and it imposes stress upon certain structures which respond to that which the brain dictates. My brain says—lift the arm, drop the legs, extend the body, flex the body, twist the body! Trauma! Stress! Every one of these movements is a form of stress, and, therefore, a form of trauma, but these are not traumatic effects which necessarily incapacitate me or you or otherwise disable us as individuals from doing our every-day work. This was dramatically brought to my mind most recently in a case on trial wherein the doctor for the plaintiff testified that although the patient was 35 years old, he had a right knee which was somewhere between 45 and 50 years old. I thought this an excellent piece of description because in truth and in fact the injured joint, its capsule and its structure, reacted to trauma with a form of stress known as inflammation, pain, stiffness, etc.

How often have I heard the question put somewhat in this fashion to the doctor on the opposite side of the fence: "Doctor, from your observation of the X-rays and your clinical findings after examining Mr. Brown, have you any opinion as to whether the sypmtoms presented by him and of which he complained to you would have come about in any event without the accident or trauma in question?"

And how many times the answer is, "In my opinion, yes." But I have yet in my experience to have a doctor tell me precisely WHEN in his opinion such a patient would have become symptomatic without the presence of trauma—in other words, assume the predisposed individual "with some hypotrophic or osteoarthritis present within the body." What medical man can with reasonable medical certainty and integrity state that upon a certain date such an individual, barring the trauma, would with reasonable medical certainty have become symptomatic; and in the face of this how is it possible to rule out tramua as a direct cause, or if this won't be conceded, at least as a precipating cause of the injury in question?

And let me add here parenthetically that from my discussions with you, I appreciate some of your problems in developing the medical aspects of your cases. I am advised that although you have medical men in your community and in your state, who are learned, well-trained and experienced in various specialties, that there is an actual dearth of neurologists. Too often you apparently have to go out of your state to obtain the necessary medical investigation.

Would that you could develop, as we have in other parts of the country, medico-legal seminars during which your problems and those of the medical practitioners could be discussed freely and fully and where each of the professions could lend to the other something of its knowledge and techniques. I have spoken to some of your officers about developing such a program and I hope that you will invite me to assist you.

VII. POSSIBILITIES AND PROBABILITIES

Because it is inescapable that our medical brethren must still conjecture as to the sequelae of injuries to the cervical region, we necessarily face many situations where the meticulous expert, although quite willing to testify in terms of "possibilities" and "this might well have taken place," and similar language, will not testify with "reasonable medical certainty"—this does not mean that we should ourselves become skeptical of the nature and quality of their testimony or shy away from its potential legal implications.

The good men I have met, and that is most of them—the experienced neurologists and orthopedists, who really study in their fields as you do in yours, will tell you regarding pathology following injury to the neck that the best they can indulge in is "reasonable conjecture"—and why? Because the neck is so rarely operated—it is so rarely opened. The times I have been privileged to see the inside of a neck the man who owned it was gone and dead. As one of my distinguished medical friends said, and this is a direct quote: "We don't know what really happens to the smooth surfaces of the joints in the neck, because there is so little surgery done there. But we do know what's happening in the knee, which is a joint; we know what is happening in the capsule of the hip which is a joint. We know what happens in the joint of a finger, and from all this and on the basis of known physiology and anatomy, the reactions of these joints in the neck may be reasoned with acceptable certainty." Now, think, if you had a session with a group of doctors and you started to discuss with them what happens to the joint of the neck, and they said we have never seen a joint of a neck except in an anatomy book or in a cadaver when we were back in school twenty years ago, and you suggest, "Doctor, I would like to paint this picture to the jury so they can understand it." If you can't see what is in the neck, can you by looking at some other part of the body which you do know, tell us what happens to that part of the body which you do know, tell us what happens to that part of the body so that we may reasonably prove or presume what happens to the neck in areas we don't see every day of the week as you do the knee or the chest. Even the heart. The heart is more explored than the neck. Think of it! Until these people get in the neck more often and see what is going on, conjecture must be present. Let me cite you another example. In my little pamphlet here I report some matters which followed after reviewing the studies of an English doctor, and this gentleman tells us from a vast study of his cases, (and the cases as reported are cited in the article) that he has seen cases post mortem where there has been an actual searing and scarring of the spinal cord by virtue of a giant dislocation or sublaxation with spontaneous reduction. We can illustrate this. Here is a dislocation (See Fig. 36) with torn ligaments. These are the ligaments in the back of the neck. As actual ripping away of the ligaments, and notice that one vertebral body has slipped forward on another, and it is these forward movements which put the stresses here and which ripped this structure and which caused this overriding. The English gentleman tells us that in his cases nature had itself reduced the dislocation spontaneously so that when the X-rays were taken after the neck was injured the bones were in proper alignment and the X-ray didn't show a thing—yet the damage was done. The damage has been done to the ligament. Supposing the tear weren't here—nothing else to excite your pathological inquiry. And suppose the bone is in perfect alignment and this patient still snffers. He still complains about the symptoms he has and legitimately has. Who will say as to whether in many cases which you and I see there has not been this spontaneous reduction of a

sublaxation or dislocation with injury to the soft parts, and we will never know! But we do know about cases that are reported by this gentleman in London in which there has been a giant dislocation of this sort, a searing laceration or cutting of the spinal cord and death with no other evidence of trauma to the neck itself. Think of that! And yet, it could have been two weeks ago, a radiologist appearing in a San Francisco court in a case I was trying said he had taken ten thousand X-rays and he had never seen a case of sublaxation or dislocation unaccompanied by fracture, and that every case of sublaxation had to have a fracture. This sort of thing flies in the face of known medical texts and the thinking of responsible medical investigators. So you have to meet with your doctors and discuss these problems. Doctor, did you know such and such a doctor in the Journal of Bone Surgery reported such a situation? Did you know so and so, and so and so, and so on—you dig this out. Don't be afraid of being called a doctor! One of the most charming compliments I received as I was coming down the aisle one of your young people said to me, "Doctor, do you think so and so and so?" I make no pretense to it. What has come into this humble mind of mine has come by living with these doctors and pleading and cajoling and urging them to meet with us to tell us what they know about the human body because that is what we are dealing with, and God help us if we do it ont of ignorance. What a crime to our clients! That is why I always laugh to myself when one of these butch haircut boys in the courtroom stumbles around messing up the medical terminology, simulating ignorance—asking: "Doctor, what is this word here? Snddenly he can't say electromyography, or electroeneephalogram. What kind of fraud is this on the court? Who would admit to it except someone who had no other defense to the case except to stumble around so that the jury might feel sorry for him? Sorry? —that they sent a little boy on a man's errand? We play for keeps in that arena! And we play with the lives of people—and their injuries! Said Dr. Rosenbaum in his book, page 91, for the record, one of the most puzzling features of injuries to the cervical spine is the lack of correlation between the degree of vertebral displacement and the severity of the spinal cord lesion. There are cases with no radiographic evidence of bone injury in which the cord has been irretrievably damaged with gross dislocatiou; or others with gross dislocation may have no paraplegia at all. Fascinating thing, isn't it? Well, let's get back to our "possibilities and probabilities."

Thus our presumptive conclusions regarding hleeding and hemorrhaging in the joint capsules, scarring and tightening of tissue, injury to other soft tissue—and other injuries impervious to X-ray!

I don't know the law of your state, and if it is not the law, you are the gentlemen who can make it the law. Don't rule out the importance of medical evidence based on possibility. You are well supported with good law which permits its reception in evidence. This does not mean that the standard requiring that the injury and its residuals, and permanence and non-permanence, shall be proved with less than "reasonable medical certainty," but rather, that expert evidence of possibility coupled with lay testimony may in its ultimate point to the achievement of the standard of reasonable medical probability.

Such is the law in California.

The Bauman Case, 42 Cal. App. 2nd 144, in *Hody vs. Allied Chemical Co.*, 122 Cal. App., 2nd 351, which is "an aggravation of cancer" case, we have this: A man and woman drove by a big factory, and noxious fumes and odors assailed them both and knocked them out. That case ment to the jury on the possibility

of the aggravation of a preexisting cancer. If you have your pencils there, I will now give you annotations to ALR which cover this subject quite fully: 135 ALR 516; 175 ALR 274; 136 ALR 967.

VIII. MECHANICS OF THE INJURY

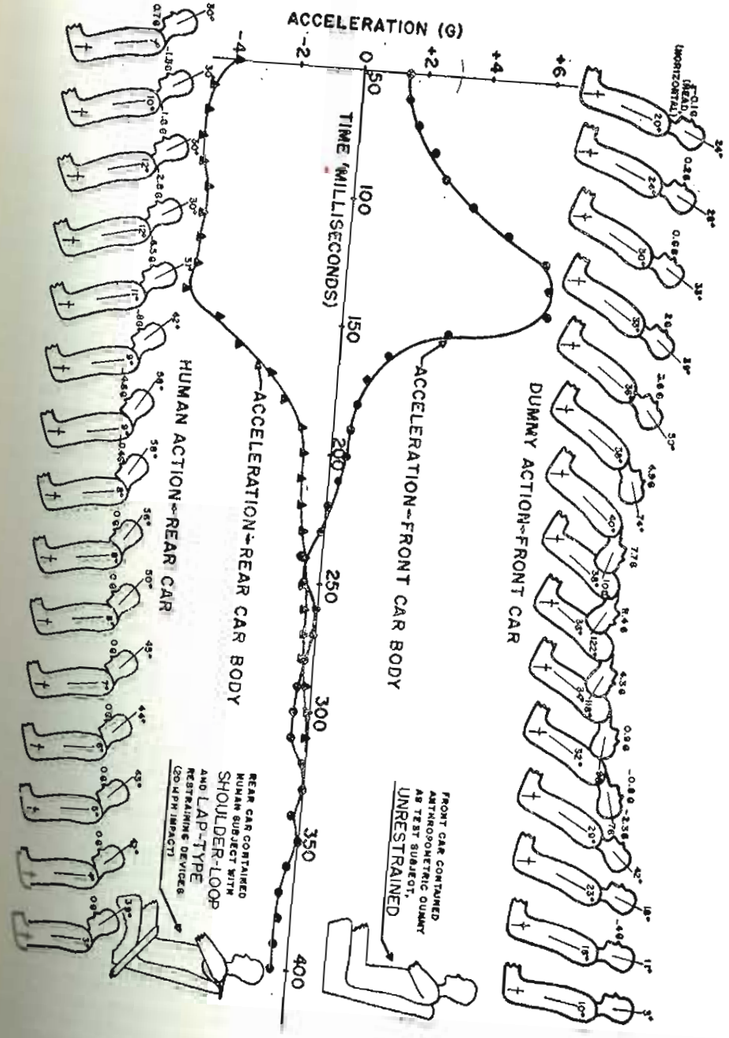
We come now, Ladies and Gentlemen, to a discussion of the rear end crash. It's really a very simple thing, and maybe it will bore you if I discuss what happens when one automobile hits another in the rear, but shall we take about ten minutes on that? O. K.?

There have been a lot of studies done on this matter. For the record, I will cite some of the material so you can consult it at your leisure. "Some Aspects of Passenger Restraining Devices and Safety Research Problems," Andrew J. White, Motor Vehicle Research, Incorporated, April 11, 1957; next, "Behind the Scenes in Scientific Car Testing," same author. This was published aud is available from the Motor Vehicle Research Project, and this pamphlet is numbered 167, "The Truth About American Cars," and is also obtainable from the Motor Vehicle Research, Incorporated, at Lee, New Hampshire, Andrew J. White, Director; Motor Vehicle Research Report No. 1, I suggest to you that you do some reading about the American automobile and what can happen to it with all the fancy gadgets they put on it and yet with so little safety for the American drivor. Professors Mathewson & Severy, two highly intelligent research men at the University of California, at Los Angeles, bave done a whole series of research projects of their own and they came up with some intriguing things about a year and a half ago. I have cited their work in the appendix to my published article.

Let us take a look at what happens in the rear-end crash.

Remember, please, gentlemen, that when I discuss time elements in connection with the rear-end crash I am talking about milliseconds or thousandths of a second. When I use the term "G force," I am talking about a formula of acceleration of gravity, and a G force is an acceleration of gravity which equals 32.2 feet per second per second. For example, a force of two G's will give an acceleration of 64.4 feet per second per second; a force of 10 G's will result in an acceleration of 322 feet per second per second. If one is in a vehicle which is being accelerated at a speed of 10 G's, a mass of one pound will have an apparent weight of 10 pounds. The forces effective upon the body will be the same as though the body weighed ten times that which its actual rest weight would be. Mr. White reports that the restraining effect of safety belts which they experimented with, some of which cost anywhere from $3 to $25, leaves much to be desired; that in connection with those, he defied the American manufacturers or any of them, to take the place of the anthropomentric dummy used in the test with this type of restraining device and strike a barrier at speeds of fifteen miles an hour or less. He offered $5,000 in cash to anyone who would submit himself to this experiment in person. Not one of them has taken up the bet! We saw this anthropomentric dummy, equipped with all sorts of electronic and electrical impulses and devices, knee joints, almost a buman thing —the most wonderful dummy you ever saw. We saw that belt just pull away like this—the dummy's head going forward in this fashion.

The head went through the windshield and then dummy's body came back in slow motion, eased back in its seat; then the whole seat went back toward the rear end in this fashion. It was fantastic! And the Dummy's head whipped back in this fashion—then it came back—and the cloud of dust was still settling—then it



went back again like this, and finally the dummy, almost like a human being, finally sagged, and his head dropped, and he was apparently a fatality. I swear to you if you ever see a picture like that you will never drive a car more than 45 or 50 miles an hour, even on these modern highways.

Now, what has happened to the American car? We have put longer tails on them. This helps a little bit. We have all kinds of fancy springing devices. This helps. And they are very pretty things to look at. Then we get in the comfortable front seat. Now, it wouldn't look very nice if you had a front seat that extended upwards which gave some rest to your head. The best you can get in a front seat is one that comes about up to your shoulders. We talked about safety belts and some of the new cars came out with them for about one year, and immediately they went from the market, and we have never heard any more about it. We put some crash padding on the visors, and we put some padding on the dash board; and this has been proved by Mr. White and his research people not to withstand a 2 G force. The belt wouldn't stay firmly in its anchorage. In the major crashes, Mr. White has pointed out that the people who are restrained by safety belts often died in the car, and the thing we were worried about—the people who were being thrown out—they may have been injured but they lived. There is much to think about in considering the safety devices of the American car.

Now, in order to make us lawyers nice and comfortable when we drive to our offices, they have got nice, thick seats in the front, with beautiful springing devices and nice soft leather, and here is what happens to us in a rear-end crash: We first have to take up some of the force in the plastic and elastic crushability of the car itself. Its springs, its rear end, and bumpers—all take up some of the force. And I assure you, gentlemen, based upon my understanding of current research, that if some of this force were not taken up in the rear end of this car, the forces which would he applied to the head would be infinite and there would he nothing to stop the head from rolling into the back seat, save and except what? Three sets of muscles! And when these muscles are now put to their greatest effort, when they exceed their command, all the other things I have already discussed follow. Just think what we expect this seven or ten pound head to do—to withstand the kind of forces which are applied in even low speed impacts.

Now, you sit there driving your automobile. Bango, an impact from the rear! Some of that impact energy is taken up in the car as it begins to crush in thousandths of a second. Then the forces are transmitted to the front seat where you, Mr. Lawyer, are sitting! And what happens? Why do so many people with neck injuries tell you their backs ache? Don't ignore them, because the only way the force from the rear can get to the neck and the head is through the spine and through the bottom of the spine. What happens now? As the force comes from the rear, the body depresses this beautiful, comfortable, "springy" seat. Excellent springs—but they are springs, and they don't want to stay depressed—while the body is accelerated and simultaneously these springs seek to restore themselves. And in a moment I will show you what that restitutional force does.

The first thing that happens is that there is a downgrade motion of the car from the rear end impact of about 1.7 G's. When the front of the car goes down, the human being comes off the seat three and more inches (some have gone as far as five and six inches). What's happened? You haven't got any support for your neck to begin with; And now, with all the forces being transmitted to your body, two things are taking place. You are pressing back into the springs, you are being lifted off the seat, your neck is being exposed even more above

the seat, and the forces strike first in the low spine; it is fast moving upwards while you are coming off the seat itself. Now, while these "springing" forces try to restore themselves and the impact force is still being transmitted and the neck is not yet fully hyperextended. As this new force is being transmitted by virtue of the restitution of the springs, it creates additional problems with all those forces coming up through the spine, through the neck, and to the head. Of course, you realize, once we are hyperextended, the laws of nature (reaction) require that we be thrown forward in a flexion attitude. What happens in that flexion attitude? Multiple things are occurring in a thousandth of a second. The head may make straight for the dashboard; it may strike the windshield. It may go up and hit the roof. The person may come down fully concussed or fractured. So these are the basic elements of the rear-end impact! The absorption of the forces without which you would he killed almost instantaneously and the neck broken! The movement of the body out of the seat, thus giving a greater whipping action to the head, and restitution of the forces of the seat before the head has whipped all the way back. Professors Mathewson & Severy diagrammed this event. They show that the front car with an unrestrained anthopometric dummy as a test subject—that the car itself reached its highest peak of acceleration at about 125 thousandths of a second. At that point there was 2 G's force being applied to the head and the neck, transmitted in the fashion I have suggested to you. By the time the car had reached its highest point of acceleration and was beginning to decelerate and had arrived at a point in time of 250 milliseconds, the head was now receiving from 11.4 G's force to 13 G's force in its complete hyperextension. In other words, the acceleration of the car is greater than the acceleration of the head. And then you see a gradual return to the normal upright position. (SEE FIG. 17) This is of interest because the time may come when you will have to tell an American jury why with $50 or $75 worth of damage to the back of an automible it was possible for this delicate mechanism to have sustained the injury that it did. And you can't do that sort of thing alone. For this reason, in cases where any question should arise, we reach into the field of experts where the men are who can testify to these phenomena and who are educated in the field of physics, so that they can tell us about the problem. We have gone to the University of California; we have gone to other universities; we have gone to the engineering schools and taken their physicists and engineers. We have taken them our engineering problems and said, "Study this, then let us have conferences with you so that you are prepared to tell us about the crushing effects, plastic and elastic, occurring in rear-end automobile crashes. How many pounds of pressure were applied in these milliseconds which only produce $50.00 worth of damage to the bumper but which did thousands of dollars worth of damage to the human neck. Think about that! You have excellent schools, excellent universities, fine engineers, You have found all the engineers you needed to take the minerals out of your mines; you found all the engineers and experts you needed to take the trees out of your forests. You have got them—all you have to do is *use them!*

Now, there are things we could talk about with regard to the mechanics. I will leave you perhaps with one thought from one of my dear friends in San Francisco, if I can find the note here. He is both a lawyer and an engineer, a patent man, and is a good physicist. He says the forces exerted are dependent upon the time it takes to transmit the momentum of the impacting car to the car that is standing still. There are a number of indeterminates in the time required to transmit this force. If the impact can be transmitted in an infinitely short time, the force exerted on the head would be infinite, but actually it takes time to transfer the

velocity of the impacting car to the stationary car. The solution of this problem would require a great deal of experimental knowledge of the springing of the car involved, the resiliency of the bumpers, and other factors, including the cushioning of the seat and the resiliency of the body of the victim involved. The greatest amount of force is exerted at the moment of impact. Even if the brakes were set—the impact is upon the springy portion of the body of the car—the springs at the moment of the impact are lax and exert very little restoring force, so that the initial accelcration is very high even though the brakes may be set. The force which causes the skidding is transmitted to the tires through the springs. The initial acceleration is the important point. Forces come down rapidly inversely in proportion to the time required to impart the acceleration to the body. Of course, this follows much of Newton's law. So much for a brief discussion of the mechanics of the injury.

We will also note here for illustration and possible use before a jury another one of those simple line drawings which illustrates what happens in a rear-end crash of this type. Remember, this is the only "whiplash" you ever talk about. Now, we can discuss that in the question and answer period. I have all sorts of technical data here about the mechanics of the injury. If you will take your pencils a moment, I would like to give you all the references in A.L.R. 2d series to the problems in this type of injury. Now, all of these references are to A.L.R. 2d.

29 A.L.R. 2d - - - - - - - - - - - - - - - - 5
29 A.L.R. 2d - - - - - - - - - - - - - - - - 107
38 A.L.R. 2d - - - - - - - - - - - - - - - - 143
39 A.L.R. 2d - - - - - - - - - - - - - - - - 15
39 A.L.R. 2d - - - - - - - - - - - - - - - - 103

On questions relating to damages in these and other cases, see the compilation at 16 A.L.R. 2d, 3, (on excessiveness or inadequacy of damages.)

SOME CLOSING THOUGHTS

Now, I have some closing thoughts I would like to share with you, and then shall be quit of my pleasant duty. I want to talk to you for a moment about something which deals somewhat with the philosophy of the plaintiff's attorney. It is my thought that the attorney representing an injured client can't always wait for a complete, dedicated confirmation of a particular injury or its sequelae. Although he is often challenged by some as attempting to "create" injuries, the obligation on each of us persists, to present at the time of the trial all of the elements of injuries compatible with the trauma sustained. There has been much talk about the so-called impartial court appointed medical expert. Now, remember, that the diagnosis of a particular body condition, diagnosis and the therapy, lie in controversy. That there are no oracular methods of approach—no magical formulae to eliminate the uncertainty of the science of medicine, and that the nearest thing we can get in this world is an approximation to the truth. Thus our medical brethren will often in their own respective profession differ widely as to the elements of casuality, the importance and effect of a particular trauma to a specific anatomical area, and the existence or non-existence of the residuals and sequelae of the particular injury. I suggest to you that this is a normal and a healthy situation. I am not one who subscribes to the theory that a partisanship is the destroyer of truth and that only, as suggested by some, a court appointed, impartial, medical expert, wearing an invisible judicial robe and usurping the jury function and bearing the badge of honor of the court itself can be relied upon to

enunciate the final and the irreversable certain truth regarding the injuries sustained by a particular individual. And you know what happens when the court presents its expert to a jury? Brothers (to use a colloquial expression) you have had it! So, with that thought, and knowing that there is so much more to discuss, I want to tell you what a pleasant thing this has been for me and for Mischa. I am so delighted to be with people—the good people in the world! I love people, and, frankly, like most people, I want to be liked. I have been extremely pleased and I have enjoyed myself. I thank you for this privilege. I hope I can come again some day. As the old bartender, the old philosopher, said about a certain man who had been sitting on a stool from two o'clock until six o'clock at night, drinking straight whiskey, and who then got off the stool and fell flat on his face: "That is the kind of man I like; a man who knows when to quit." Bless you all.

MR. SULLIVAN: Thank you very much, Mr. Lou Ashe, for your most admirable and instructive address. We are very pleased and very grateful that you and your lovely fiancee, Miss Misha Syrovy, were able to be with us here at Sun Valley during our meeting.

Next, as you all know, the award of merit for the year 1957 was awarded to Mr. C. H. Potts of Coeur d'Alene. There is also an additional award. Mr. Bob Greene.

MR. GREENE: Is Mr. Potts present? We would like to award him the Idaho Supplement.

From Floor: He had to leave.

MR. SULLIVAN: We will see that he gets it.

We are very pleased to have with us a very distinguished member of the Idaho State Bar Association, a man who needs no introduction whatsoever, the Honorable Robert E. Smylie, Governor of the State of Idaho. (applause)

GOVERNOR SMYLIE: Mr. Chairman, Ladies and Gentlemen, our distinguished guest and his distinguished fiancee: I read the program this morning, and I noted that I was to make some remarks, and I trust when I finish, that will have been substantially correct. I am not going to take much of your time, because I have been fascinated by the discourse I listened to this morning. And I would have liked very much to have heard Mr. Ehrlich yesterday, but the armies in Utah, California, and Colorado (or rather, the air arm thereof) are in Boise, and the Governors were there for dinner last night and common courtesy required that I join them at the officers' club at Gowen Field.

One of the things that happened today I shall not let pass without expressing my deep approval of. I am awfully glad that you made your award this year to Claude Potts. I think for five or six years in the time when I was in the attorney general's office, I used to run with great interest through some of the cases that probably we looked at in that office more often then the rest of you do because they were cases quite intimately associated with the rights and privileges, powers and duties of the several arms of our state government and they were decided in the early and formative days of our constitution, when the late great Justice Aldhie and Justice Sullivan and Justice Stewart occupied the court; and before I ever knew Claude Potts, I knew his name quite well because for some strange reason, scattered all through those books, there is reference after reference after reference, hardly was there a case of consequence that dealt intimately with the

conduct of our government with which his name was not associated as counsel. So I think it is a great thing that our Bar Association has recognized a man who quietly, almost always in the private practice, made such a vastly substantial contribution to the growth and development of our state government.

The second remark I am going to make to you today is by way of asking for a little help. Those of you who read the newspapers—and there are times when I think we would all be better off if we didn't—will realize that the President made a speech at a conference in Williamsberg not so very long ago, in which he laid down a fairly challenging field of endeavor for the Governors to whom he was speaking. He suggested the formation of a task force designed to attempt, if possible, to arrest the developing centralization that has taken place over the last fifty or sixty years at the federal level of government and to attempt to restore the states of this nation to the position which it was originally intended that they occupy in the federal system of government.

My reaction to the President's speech initially was—could be summed up by saying what Governor Ribicoff of Connecticutt said, and then perhaps following it with a remark which Roscoe Drummond wrote in his column for the New York Herald Tribune, which was reprinted in the Christian Science Monitor. Governor Ribicoff said he was a little afraid this chore was a bit like trying to put the egg yolk back in the egg shell after you had broken it, that a long lot of history and a long lot of habit patterns had come along. Then Drummond pointed out this perhaps was the only time in history when the chief of the central executive central power had made such a suggestion and that perhaps this might well be the last best chance that the states would have to reachieve their position in this federal union of ours. And all of this would have been of purely passing interest to me, because resolutions in governors' conferences are not unlike resolutions in bar conventions, and as in bar conventions they normally result in the appointment of a subcommittee to sit and report again.

But unfortunately, or fortunately, and I am both honored and challenged by the appointment, I now am one of the committee or task force, and, more important—I don't know whether this was oversight or one of those accidents of geography—but I am the only member of the committee from west of Texas. And our problems here in the west are so many and so different that this imposes a considerable challenge and responsibility, because I am persuaded from having talked with the President about this problem, and with the members of his staff, who for two years have been charged with studying it, that they are utterly sincere in their endeavor to work out, if possible, some formula for redistributing the job of doing the things our people want done at the levels that are closest to the people themselves, and at the same time attempting to talk Congress into surrendering the tax sources, which would make it possible for the state governments to perform those tasks.

I suppose that before the work of this committee is over, there will be a large amount of legal research to do. There are three of us on the committee, Governor Daniel from Texas, Governor Coleman from Mississippi, who are former attorneys general, and I suppose for that reason a lot of legal work will tend to end up in our pockets, because governors think like everyone else—that attorneys general are lawyers, and that isn't always so, and so I would like to be able during the year or years to ask your commission to put together a special committee of counsel and advice which would be of assistance in working out some of the legal problems that my membership on this committee of federal-state

relationships will necessitate. If I could rely on you for that help, it would be of vast assistance to me and one which I would sincerely appreciate.

It is a real pleasure to meet with you and to pay tribute to the excellenee of our judiciary and to the great public service rendered by members of the commission. I thank you for your attention. (applause)

MR. SULLIVAN: Thank you, Governor Smylie. I can assure you the commission and association will be very pleased to give you any assistance that you call upon us for.

Before we take a brief recess, I wish to urge you all to return immediately for two reasons: One is the obligation and the sense of duty that you owe the association because we have some resolutions coming up that are very important to the lawyers and the association; the other is in the form of a bribe, we will then have a drawing for the rest of the volumes on the desk. We will have a ten-minute recess.

MR. SULLIVAN: The next order of business is a report of the Resolutions Committee.

MR. GUS CARR ANDERSON: As chairman of the Resolutions Committee, I appreciate the honor, although I am afraid the other members of this committee were not impressed with their duties. They are about the most scattered committee I have ever worked with. We usually had to poll them while they were going some place or coming from some place, but we did arrive at some resolutions to be presented to you. The following resolution was recommended that it be adopted by this Association:

BE IT RESOLVED THAT The Idaho State Bar Association express its most sincere thanks, appreciation and commendation to Willis E. Sullivan, President; Paul B. Ennis, Secretary; Gilbert C. St. Clair, Vice President, and Clay V. Spear, Commissioner, and the various committees appointed for the very efficient and excellent way in which they have conducted and managed this convention, with particular emphasis upon the very fine selection of speakers and the entertainment provided the members, their wives, and guests; further, that these officers be additionally commended for the thoughtful and earnest manner in which they have accomplished their duties in behalf of this organization during the past year.

Mr. President, I recommend the adoption of this resolution.

MR. SULLIVAN: You have heard the motion. Is their any discussion?

From Floor: Question.

MR. SULLIVAN: All those in favor say Aye. Opposed No. The motion carried.

MR. ANDERSON: I might say this resolution was handed to me already typed up. I don't know where it came from, but I guess it is in order.

BE IT RESOLVED That the Idaho State Bar Association extend to Governor Robert E. Smylie, J. W. "Jake" Ehrlieb, Lou Ashe, Brent M. Abel and Paul E. Anderson our most sincere thanks and grateful appreciation for honoring us by their personal appearances at our convention, and delivering to us their inspiring, interesting and instructive addresses.

Mr. President, I recommend the adoption of this resolution.

MR. SULLIVAN: You have heard the motion. Is there any discussion?

From Floor: Question.

MR. SULLIVAN: All those in favor say Aye. Opposed, No. The motion carried. (applause)

MR. ANDERSON: Here is another resolution.

RESOLVED That the Idaho State Bar Commissioners appoint a committee to consider the appropriate procedures to revise the Criminal Code of the State of Idaho and particularly to consult and work with the Idaho Code Commission in making arrangements to hire expert services for such accomplishment.

I recommend adoption of this resolution.

MR. SULLIVAN: You have heard the motion. Is there any discussion? All those in favor will signify by saying Aye. Opposed, No.

Motion carried.

MR. ANDERSON: Here is another resolution approved by your committee:

RESOLVED That whereas the Idaho State Bar has been sponsoring legislation for many years to effectuate constitutional amendments permitting the change by law of the jurisdiction of the probate and justices' courts and judges' qualifications;

NOW, THEREFORE, BE IT RESOLVED That an Idaho State Bar special committee be appointed to study and prepare appropriate legislation to be submitted to the 1959 Legislature of the State of Idaho to accomplish proper revision of the jurisdiction of the inferior courts and the qualifications of the judges thereof.

Mr. President, I recommend the adoption of this resolution.

MR. SULLIVAN: Is there any discussion on the resolution? As you all know, this was a proposal that has been sponsored by the Bar for a number of years and has been consummated by the amendment removing jurisdictional limitations on the lower courts. I do feel it is incumbent on the association to carry this program forward. Inasmuch as this is a legislative matter, it will require vote by local associations. If you would like to confer. Is there any discusion?

From Floor. Question.

MR. SULLIVAN: Shoshone County Bar Association, 19 votes. (no response)

Clearwater Bar Association, 63 votes.

From Floor: Clearwater Bar Association supports the resolution.

MR. SULLIVAN: Third District, 171 votes.

From Floor: Third District Association casts 171 votes in favor of the resolution.

MR. SULLIVAN: Southeastern Idaho Bar Association, 87 votes.

From Floor: Southeastern Idaho Bar Association casts its 87 votes in favor of the resolution.

MR. SULLIVAN: Seventh District Bar Association, 52 votes.

MR. GIGRAY: The Seventh District Bar votes in favor of the resolution.

MR. SULLIVAN: Eighth District Bar Association, 52 votes.

From Floor: Eighth District Bar votes 52 votes for.

MR. SULLIVAN: Ninth District Bar Association, 61 votes.

From Floor: Votes in favor of the resolution.

MR. SULLIVAN: Eleventh and Fourth District Association, 83 votes.

From Floor: Votes in favor of the resolution.

MR. SULLIVAN: The vote is unanimous; the resolution is carried.

MR. ANDERSON: Here is another resolution recommended by your committee.

WHEREAS, West Publishing Company, Bender-Moss Company, Bobbs-Merrill Company, Inc., Bancroft Whitney Company, and Finch's Stationery have courteously donated various legal publications for door prizes at the convention;

BE IT RESOLVED THAT The Idaho State Bar extend its thanks and appreciation to these companies for their gencrous prizes which contributed to the interest of those attending the convention.

Mr. President, I recommend the adoption of this resolution.

MR. SULLIVAN: You have heard the resolution; is there any discussion?

From Floor: Aren't there a couple of companies left off there?

From Floor: Also there was the desk set. Voter and Arrow Publishing Company should be included.

MR. SULLIVAN: With those on, all those in favor say Aye. Opposed, No. The resolution is carried.

MR. ANDERSON: This is a resolution that was approved by the committee:

BE IT RESOLVED THAT The Idaho State Bar Association extend to the officials and members of Sun Valley its sincere and grateful appreciation for the most efficient and courteous treatment extended to the members of the association, their wives and guests during our convention here.

I recommend its adoption.

MR. SULLIVAN: You have heard the resolution; without discussion all those in favor saye Aye.

MR. COX: Mr. President, I rise to a point of order and ask that we be recorded as abstaining on that vote.

MR. ANDERSON: With regard to this next resolution, this is a resolution that was recommended by the Southeastern Idaho Bar Association, and it deals with the pamphlet to be put out by the Idaho State Bar Association to traffic offenders and explains their rights. We do not have the pamphlets here so that you can examine them, but it does explain the rights of people who are hailed into traffic courts, and this resolution is based upon the idea we could be of

service to the people of the State of Idaho in advising traffic offenders of their rights.

BE IT RESOLVED That the pamphlet "Your Rights in Traffic Court" be published by the Idaho State Bar for distribution throughout the state from available funds of the association.

Mr. President, I recommend adoption of the resolution.

MR. SULLIVAN: You have heard the motion for adoption of the resolution; is there any discussion? I might mention I think this originated in Florida by an extremely active bar association and met with a great deal of success and very favorable public reaction.

From Floor: How much money is involved?

MR. SULLIVAN: I think it could be distributed through the police officers of the state for around $90.00. Will all in favor signify by saying Aye? Opposed, No. The resolution is carried.

MR. ANDERSON: I have one other resolution which hasn't been written but in talking to the members of the committee they stated they would recommend the following resolution:

BE IT RESOLVED That in order to express the appreciation of the State Bar Association for the excellent entertainment provided by Mr. and Mrs. Ray Cox and Mrs. Mary Walker that this Association tender some small memento of their excellent talent and the entertainment provided by them. (applause)

MR. SULLIVAN: You have heard the motion. Is there any discussion?

From Floor: The accompanist for Mrs. Walker should be included.

From Floor: Mr. President, for those who were fortunate enough to be at the Tram last night, I wonder if the Tram would like to be included in that resolution?

MR. SULLIVAN: I believe from the reports I have had I think the Tram has been adequately compensated.

From Floor: Question.

MR. SULLIVAN: All in favor say Aye. Opposed, No. The resolution is carried.

MR. ANDERSON: The following resolution was presented by the Unauthorized Practice Committee, and it is recommended to you for adoption:

PROPOSED RESOLUTION AND STATEMENT OF PRINCIPLES ON PROFESSIONAL RELATIONS OF ATTORNEYS AND CERTIFIED PUBLIC ACCOUNTANTS

WHEREAS, The Idaho State Bar Association and the Idaho Certified Public Accountants' Association have heretofore adopted and approved the statement of principles on professional relationships of attorneys and certified public accountants as promulgated and approved by joint committee of the American Bar Association and the American Institute of Accountants.

AND, WHEREAS, It is now deemed desirable to create a standing com-

mittee consisting of members of both the Idaho State Bar Association and the Association of Idaho Certified Public Accountants for the purpose of enforcing and furthering the purposes of said statement of principles,

NOW, THEREFORE, Be it resolved (1) That there be created a standing committee of each state organization to be known as Joint Committee on Professional Relations of Attorneys and Certified Public Accountants; (2) That each state association through the machinery of its own organization appoint three members to serve on said committee, one member to serve for a three-year term, and one member to serve for a two-year term, and one member to serve for a one-year term for the first or initial appointment, with membership on said committee thereafter to be for three years; (3) that the chairmanship of the joint committee of the two associations shall alternate each year between representatives of the attorneys and the certified public accountants and shall be chosen by the committee; (4) that said committee be empowered and directed to assume the following duties:

(a) To emphasize areas of cooperation between attorneys and certified public accountants;

(b) To educate the members of each group in their respective fields of practice to the end that the client may best be served; to carry out this educational function by the dissemination of written materials pertinent to the problems involved; by encouraging joint meetings and seminars and by promoting the appearance of representatives of the certified public accountants at meetings of the attorneys as speakers or discussion leaders, and of comparable attendance of attorneys at meetings of certified public accountants as speakers or discussion leaders;

(c) To provide a clearing house for information on questions which may be raised by membership of the respective state associations concerning attorney-accountant relations and to issue advisory opinions concerning the propriety and ethics involved in such relationships when in the opinion of the joint committee such advisory opinion would be helpful in promoting such relation;

(d) To refer breaches of statement of principles on the part of the members of either association to the governing or directing board of the association for action when such matters have not been corrected at the instance of said joint committee.

Mr. President, I recommend the adoption of this resolution.

MR. SULLIVAN: As mentioned in the resolution, the statement of principle was adopted several years ago by this association, also by the Association of Certified Public Accountants. The Association of Certified Public Accountants at their meeting held here about two or three weeks ago adopted this identical resolution. It is to implement the statement of principles. Is there any discussion?

From Floor: Question.

MR. SULLIVAN: All in favor say Aye; opposed, No. The resolution is carried.

MR. ANDERSON: There was presented to the committee for consideration a resolution concerning a new organization of the Bureau of Internal Revenue with headquarters possibly located at Denver. This resolution was presented

to the committee. The committee, after hearing several members on this proposal, not only recommended that it go against the proposed resolution, but it has been recommended that this association go on record as being against the formation of such a separate area with Denver as its headquarters, and I won't read the resolution to you unless I am requested to. Mr. Tim Robertson, would you care to say a few words why we should adopt the resolution against the creation of the new district of the Internal Revenue Service.

MR. ROBERTSON: I haven't seen the resolution you have referred to. However, several months ago some attorneys in Denver endeavored to launch a movement to organize a regional office or have a regional office of the Internal Revenue Service with headquarters in Denver to include the states, I think, of Utah, Idaho, Montana, Colorado, Arizona, and New Mexico. At present Idaho is in the regional office with its headquarters in San Francisco. Apparently the folks in Colorado, or at least in those other states of Montana, Colorado, New Mexico, and so forth, are served by several regional offices. Those in the north go to Omaha; those in the middle to Kansas City, and those further south are in the Texas region. Maybe those folks need a region, but I feel if Idaho got into such an organization—of course, we are in the Ninth Appellate Circuit with headquarters in San Francisco. In many ways we have maybe ten internal revenue codes that the American people live under in this country because the law has been construed differently in those courts and those conflicts have not been resolved. I think, as far as the folks in Idaho are concerned, we should have our regional office in this circuit where decisions of the Ninth Circuit Court will control and are familiar to the revenue agents involved. I speak in support of the resolution that you mentioned, but I have not read the resolution you propose. We affirmatively opposed any suggestion that Idaho be transferred to any Internal Revenue region outside of the Ninth Circuit. I think those folks in Colorado are endeavoring to get action through their Congressional delegates in Washington, and for that reason I feel our folks in Congress ought to know how this district feels.

MR. ANDERSON: With that explanation, the committee discussed this problem; somehow the resolution was overlooked.

BE IT RESOLVED That it is the sense of the Idaho State Bar Association that the State of Idaho remain in its present district.

I recommend its adoption.

MR. SULLIVAN: You have heard the resolution. Is there any further discussion? I might say that the same resolution was submitted to the Certified Public Accountants at their meeting, and, I think, rather graciously, they declined to act upon it because they did not wish to get in conflict with the sentiment of the bar. They instructed their board to follow and approve whatever action this association takes.

From Floor: Question.

MR. SULLIVAN: All in favor say Aye; opposed, No. The resolution is carried.

MR. ANDERSON: There was presented to your Resolutions Chairman after he had been fortunate enough to get a quorum of his committee together, and the job looked hopeless of getting them together again, so we have two resolutions here that were not acted upon, but in talking to the members they felt they

should be presented to this meeting here as a committee of the whole for such action as they might desire. The first resolution is:

WHEREAS, There is a clear and distinct line of cleavage between the practicing members of the Bar and the members of the Judiciary;

AND, WHEREAS, The Integrated Bar of the State of Idaho is by statute through the Commissioners of the State Bar an administrative and executive organization acting under and as an agency of the Supreme Court of the State of Idaho;

AND, WHEREAS, Such line of demarcation is a fundamental concept of an integrated bar;

NOW, THEREFORE, Be it resolved that the Integrated Bar Association of the State of Idaho secure passage by the next Legislature of the State of Idaho of an amendment to the Bar Association statutes providing that no elective or appointive federal, state, or county officer shall be qualified to be a commissioner of the Idaho State Bar Association.

I present it to you for what it is worth and for discussion you might like to have.

JUDGE GIVENS: I move its adoption.

From Floor: I second the motion.

MR. SULLIVAN: The motion has been made and seconded that the resolution be adopted. Is there any discussion?

From Floor: Question.

MR. GUS ANDERSON: I would like to make some comment on the resolution as it is now worded. The way it is now worded, it is something that would be presented to the legislature. I think the less we have to do with the legislature in dealing with our own internal affairs the better off we will be, and I feel we could accomplish the same purpose for which this resolution is aimed by amending the resolution by stating it is the sense of the Idaho Bar Association that no elective or appointive federal, state, or county officer shall be a commissioner of the Idaho Bar Association. I think we could put across the same idea without going to the state legislature for help in the matter. This is my idea on it. If someone wants to move an amendment at this time, perhaps it can be done.

MR. SULLIVAN: Mr. Anderson, do you move that the resolution be so amended?

MR. GUS ANDERSON: I move that the motion be so amended.

From Floor: Second the amendment.

MR. SULLIVAN: It has been moved and seconded the resolution be amended. Is there any discussion on the amendment?

JUDGE GIVENS: The amendment will be totally ineffective. The only way in which it can be made operative is by amending the statute because under the statute each district selects its commissioners the way they want to. The amendment would emasculate the idea. If that had been sufficient, there would have been no necessity for the original motion. If you are going to do it, do it. If not, forget the whole thing.

MR. SULLIVAN: Is there any further discussion?

From Floor: Question.

MR. SULLIVAN: The vote now is on the amendment to the resolution. Those in favor of the amendment—I don't believe for the amendment it need be by bar associations. This is the vote on the amendment only, that it be changed as Mr. Anderson suggested, not to recommend legislative action if that is the sentiment of the association. Those in favor say Aye; opposed, No. The No's have it. The amendment is lost. Is there any discussion on the resolution?

From Floor: Question.

From Floor: Just one thing on the resolution itself. I seconded the resolution. I believe in the second and in the resolution, there is one thing we have to consider now. We now have two members of the judiciary on the commission; I am wholly and firmly in favor of both of them; I want nothing done to disturb their present situation. We must accept the fact that this is something in the future. I don't want to change the membership of the commission at this time. I think that should be brought squarely before this court.

MR. BRESHEARS: It couldn't affect the tenure of office of those on the commission now because the resolution is that the legislature take the action.

MR. SULLIVAN: That is right.

From Floor: That is still only two years away.

From Floor: Question.

MR. SULLIVAN: The vote will be by associations.

Shoshone County Bar Association—19 votes. (no response)

Clearwater Bar—63 votes. (no response)

Third District Bar—171 votes.

MR. GREENE: The Third District casts 171 votes in favor of the resolution.

MR. SULLIVAN: Southeastern Idaho Bar Association 87 votes.

From Floor: Southeastern passes at this time.

MR. SULLIVAN: Southeastern passes. Seventh District—52 votes.

MR. GIGRAY: The Seventh District votes 52 votes in favor of the resolution.

MR. SULLIVAN: Eighth District Bar—52 votes.

From Floor: The Eighth District Bar Association passes.

MR. SULLIVAN: Ninth District Bar Association—61 votes.

From Floor: Ninth votes in favor of the resolution.

MR. SULLIVAN: Ninth 61 votes in favor of the resolution.

MR. SULLIVAN: Eleventh and Fourth District Bar Association—83 votes.

From Floor: Passes.

MR. SULLIVAN: Southeastetrn Bar Association—87 votes.

From Floor: Southeastern casts its entire vote in favor of the resolution.

MR. SULLIVAN: In favor of the resolution 87 votes. Eleventh and Fourth—83 votes. Do you wish a recess?

From Floor: Eleventh and Fourth are in favor of the resolution.

MR. SULLIVAN: Eleventh and Fourth are in favor of the resolution. Eighth District Bar.

From Floor: Are we voting the unit rule for our district?

MR. SULLIVAN: Yes.

From Floor: We have polled our delegation and after polling all those present, Eighth District casts its vote against.

MR. SULLIVAN: The Eighth District Bar—52 votes against the resolution. Is there any one here from Clearwater? Clearwater Bar. Do you want a recess? We will have a two-minute recess.

We are now in session.

From Floor: Under the unit rule Clearwater Association votes in favor of the resolution.

MR. BOGART: Mr. Chairman, we would like to make a motion to reconsider the amendment as passed. The reason for the reopening of the question is we would like to insert the word "hereafter" in the resolution prior to the word "elected," ("hereafter elected") so that it won't affect any of the members who are now elected for a three-year term if it is passed by the legislature within the next two years.

MR. SULLIVAN: I am sorry it is too late now to amend the motion; your amendment is out of order.

MR. BOGART: I am not making a motion to amend, I am making a motion to reconsider. I would like to make a motion to reconsider the prior motion as passed.

MR. MURPHY: I rise to a point of order. Has the vote been announced on the resolution?

MR. SULLIVAN: The actual tabulation of votes was not.

MR. MURPHY: I submit a motion is out of order until that announcement is made.

MR. BOGART: His point is well taken if the result hasn't been announced.

MR. SULLIVAN: For your information, the total tabulation was 417 votes in favor of the resolution, 52 votes opposed, 19 absent. Now would you like to make that motion?

MR. BOGART: We would like to make a motion to reconsider the prior motion as passed.

From Floor: I make a motion we table the motion to reconsider.

MR. SULLIVAN: Is there any second to the original motion?

From Floor: I second the motion.

MR. SULLIVAN: The motion has been made and seconded that we reconsider

the passage of the resolution. All those in favor signify by saying Aye; opposed, No. The resolution has failed.

MR. ANDERSON: We have another resolution in the same category. It was presented this morning.

WHEREAS, The Committeo on Professional Ethics of the Idaho State Bar has rendered an opinion to the effect that it is proper and not in violation of the canons of professional ethics for a District Judge to act as an administrator or executor of an estate, and

WHEREAS, It is the sense of the Idaho State Bar that it is improper for a District Judge to act in such capacity,

NOW, THEREFORE, be it resolved that the opinion of the Committee on Professional Ethics is disapproved by the Idaho State Bar, and that any District Judge of this state in accepting or acting in the capacity of executor or administrator of an estate or in any other fiduciary capacity not in line with his duties as a member of the Judiciary is guilty of an impropriety.

MR. BRESHEARS: I move the adoption of the resolution.
From Floor: Second the motion.

MR. SULLIVAN: The motion has been made and seconded that the resolution be adopted. Is there any discussion?

MR. COX: Mr. President and members of the Bar Association, this matter has been before the Eighth Judicial Bar. It was brought before the bar in a manner where free discussion was given to the entire bar and discussed by the bar. We were informed at that time that before any action would be taken on this interpretation of the judicial canon by the ethics committee that the matter would be placed before the judicial conference, and that it would not be placed before the judicial conferencc unless the local bar approvcd of the action. The local bar did approve of the action. We were assured the matter would be dropped then and there, and it is my understanding it has not been placed before the judicial conference for their ideas or approval or disapproval; therefore, I don't think at this time the state bar is propcrly treating this subject by speaking publicly or on the rccord with reference to something that has never arisen and a problem we understand will not arise, and I don't see why we should involve ourselves with the problem and I am—I was pleased the way the local bar association was consulted before the matter was ever placed before the conference. Since it hasn't been placed before the conference, the matter has apparently entirely dropped. I therefore move this resolution be tabled.

From Floor: Second.

MR. SULLIVAN: It has been moved and seconded the resolution be tabled. All in favor say Aye; those opposed, No. The No's appear to have it.

MR. COX: I will ask for roll call vote on that.

MR. SULLIVAN: All those in favor, please stand. Are you in the back of the hall voting? Seventeen votes. Those opposed, please rise. The motion to table is lost. Any further discnssion?

MR. BOGART: If I might make a few comments. The essence of this would mean if any one of us would be appointed to a judicial post, if our parents

appointed us as executor of his estate, we could not act in that capacity. I think you should consider that before we vote.

MR. SULLIVAN: Any further discussion. Are you ready for the question?

From Floor: Question.

MR. SULLIVAN: All in favor, signify by saying, Aye. Those opposed, No. The Aye's appear to have it, and the motion is carried.

MR. ANDERSON: There has been called to the attention of the Chairman of the Resolutions Committee two resolutions from the Idaho State Bar Legislative Committee; they are as follows;

WHEREAS, many resolutions for legislative action are adopted on the convention floor of the Idaho State Bar from year to year without the benefit of thorough briefing and research,

AND, WHEREAS, As a result many proposals contained in such resolutions during the course of drafting of appropriate bills are discovered to be in conflict with existing statutes or for some other reason impracticable or unfeasable,

NOW, THEREFORE, Be it resolved that it is hereby declared to be the policy of the Idaho State Bar that when resolutions which are adopted and approved by the Idaho State Bar in convention for appropriate legislative action on the part of the State Bar Legislative Committee are found by such committee, in the course of preparing the appropriate legislative bills, to be impraeticable or unfeasible, then in that event the Idaho State Bar Legislative Committee shall submit such findings to the Commissioners of the Idaho State Bar, who may in their discrction direct said committee to withhold the submission of such legislation.

I had some discussion with Mr. Doane on this, and I think it is well taken. I move its adoption.

MR. SULLIVAN: It has been movcd that the resolution be adopted. Do I hear a second?

From Floor: Second.

MR. SULLIVAN: It has been moved and seconded the resolution be adopted. Is there any discussion?

From Floor: Question.

MR. SULLIVAN: All those in favor of the resolution, signify by saying Aye; those opposed, No. The resolution is carried.

MR. ANDERSON: We have one more resolution.

RESOLVED that the Idaho State Legislative Advisory Committee be continued for at least one further session of the Idaho State Legislature, but only upon condition that sufficient funds and facilities are available to the Idaho State Bar, and necessary and appropriate office space, stenographic services, and office supplies.

Mr. President, I move the adoption of the resolution.

From Floor: Second.

MR. SULLIVAN: It has been moved and seconded the resolution be adopted.

Is there any discussion? All those in favor, say Aye; opposed, No. The motion is carried.

MR. ANDERSON: These are all of the resolutions that the Resolutions Committee has. If there are any resolutions you would like to submit from the floor—

MR. BRESHEARS: Mr. Chairman, I have a resolution I would like to present.

MR. SULLIVAN: O.K., Mr. Breshears.

MR. BRESHEARS: After thinking about this matter for some time, I decided that I would on my own responsibility prepare and submit to this group a resolution; and after I have read it, if I may have a second, I will then give briefly my ideas on it.

BE IT RESOLVED that it is the sense of the Idaho State Bar that as a result of many recent decisions of the United States Supreme Court our national security has been impaired and the constitution has been so interpreted as to deny to the several states of our union the right to exercise their sovereign power over internal affairs as intended by the founding fathers;

BE IT FURTHER RESOLVED that this association protest against agreements with foreign powers which barter away the legal rights of those who serve our country in the military service upon the pretext that such agreements create a better relationship between this country and other nations.

Mr. Chairman, I move the adoption of this resolution.

From Floor: Second.

MR. SULLIVAN: The motion has been made and seconded. Mr. Breshears.

MR. BRESHEARS: I am firmly convinced that the founding fathers when they brought about the enactment and adoption of the Bill of Rights did not intend to forge a shield behind which those who have for their purpose the destruction of our form of government might hide. It seems to me that it is crystal clear to any one familiar with the facts of life that communism is not merely an idealogy or purely a political belief. It is a treasonable conspiracy to destroy our government, and why courts should be so solitous of cattle of that kind I don't know.

Further, it seems to me that courts are playing upon words when they say in substance that the teaching and fomenting of doctrines that will destroy our government are not in violation of the law merely because the people who advocate those things do not carry a bomb or a rifle in their hands. It further occurs to me, if I read my history correctly, that the men who wrote the Constitution of the United States at Philadelphia and those who brought about its ratification were most fearful that our central government would finally take over the sovereign power of the states. And if they could live to read the decisions of our Supreme Court that have been recently announced, I am sure that they would feel their fears have been realized.

I apprcciate the fact that this resolution is controversial, but we are lawyers, we should be deeply interested in this subject. And I am mindful of the fact that the immortal Lincoln publicly denounced the famous Dred Scott decision and said many times that he would take every legal means in his power to bring about a reversal of that decision; and I feel that this body should discuss and adopt this resolution.

From Floor: Mr. President.

MR. SULLIVAN: Mr. Moffatt.

MR. MOFFATT: I agree with my friend and neighbor Mr. Breshears on his views of communism. I cannot and will not conjecture as to what the founding fathers might say as to the present condition in the courts or elsewhere, but I shall forever defend the right of the conrt to say it as they see it. It wasn't very long ago a president of the United States was very upset about some decisions of the Supreme Court which held certain acts which he desired were unconstitutional; and the members of the bar who are now criticizing the Supreme Court severely criticized that president for attempting to do something—for criticizing the court. If the court is to err, and perhaps they have erred, I would prefer they err on the side of individual liberty whether it is for a communist or anarchist than to err on the side of big government and the right to put people in jail in any questionable case. And I seriously object as a member of the so-called integrated bar to be placed in a position of criticizing the opinions of the court which undoubtedly were honestly arrived at, whether wrong or right. Thank you.

MR. SULLIVAN: Judge Smith.

JUDGE SMITH: I would like to address myself to Mr. Breshears for just a moment. Ralph, in order to implement your resolution, it would be proper to have embodied in that resolution, it would seem to me, the various organizations, representatives and senators, committees of the American Bar, the American Bar Association president, the citizens committee of the American Bar, and whatever other organizations which you have deemed to be proper; that that resolution be submitted to them. I am wondering if you have thought about that. In other words, placing that resolutiou upon our records and leaving it there as Mr. Ashe said a few minutes ago, people resolute and leave it and it becomes a dead issue. I am asking you that question.

MR. BRESHEARS: I agree with you.

MR. SULLIVAN: Are you moving an amendment?

JUDGE SMITH: Yes, I do move such an amendment, and I want to say this in answer to Mr. Moffatt. I agree in large part with Mr. Moffatt. I agree wholeheartedly with Mr. Breshears, and I waut to say this, if at any time we take the viewpoint that the courts and the decisions of the courts are beyond critisism, we are entering into not only a socialistic attitude of government, but we are then entering into communism itself. And I for one, as a member of our court, want that clearly understood, that I want the decisions of our court criticized. It is very very important that they be criticized, and I want it understood that I am a proponent of criticism of these recent decisions of the United States Supreme Court. To me they are a shameful chapter in the judicial history of this great government of ours, and to me it points directly to a power behind the throne some place, of deliberately delivering our government into the socialistic trends of communism, if you please. That is how strongly I feel about this subject. And I am criticizing, and I intend to criticize, and I want you to criticize our own court and our decisions. That is something that belongs to this bar association. It is a right which is inviolate and a right which the populace of this great state and the United States should always hold inviolate.

MR. SULLIVAN: There has been made a motion that the resolution be amended so that if adopted it be presented to our congressional delegates, the

president, the committees of the American Bar Association, as enumerated by Judge Smith, is there a second?

From Floor: Second.

MR. SULLIVAN: It has been moved and seconded that the resolution be amended. Is there any discussion on the amendment?

MR. CARVER: It appears to me if the mover of the original resolution accepts the amendment there is nothing further required.

MR. SULLIVAN: Do you accept the amendment?

MR. BRESHEARS: Yes, I accept the amendment.

MR. SULLIVAN: Any further discussion on the resolution?

Mr. Blaine Anderson, I believe.

MR. BLAINE ANDERSON: I don't think we should be placed in a position as a group of criticizers. I hold it to be every man's right to personally criticize. I would like to say this too. How many of you are aware of the constitutional provision in Idaho which says in effect that it is the inalienable right of the people of this state to change their form of government, I think by necessary implication, by force, if necessary, when that government becomes oppressive. Now, we should not take any action which in any way limits the free expression of individual thought. I am not a communist, but I will say this: if any man believes in communism, I think that is his right, even in the United States, because if we limit his expression of thought, it is a short step to limitation of expression of any thoughts in this convention. I believe with Judge Smith we should criticize, but we should not be asked to criticize as a group. I think it places us in a bad light.

MR. HAMILTON: Mr. Chairman, I just learned something new, that we are suppose to criticize courts. I always thought as individuals perhaps we had the right, but maybe it is just in our country I have been intimidated. (laughter) The American people in my opinion, and I think you will agree with me, don't think a hell of a lot of lawyers. That if we as a bar association get up and collectively say that the Supreme Court judges of the United States, who may or may not belong to my political party, are trying to sell us down the road of communism or socialism, and we tell the people that and say that the judges of the Supreme Court of the United States have judged wrong, and we criticize them, I think the American people would say, "What the hell have we got left?" As individuals and politicians I think we can question the political and social thinking of our courts; but I think once our courts have spoken on the matter, and I am referring to our top courts, I think it makes us ridiculous to say here as attorneys that our courts are wrong. The people say then, "What is left?" I think we should seriously consider that.

MR. MURPHY: I doubt if there is any action this bar here could do that would have more singular importance than as to this resolution, as to whether we do vote yes or do vote no. Unfortunately, Mr. President, I am going to have to ask that my name be withdrawn from any voting on this matter as I am not familiar with the decisions whereof we refer. I have read one or two of the recent ones; in part I agree, in part I disagree; but I have not read them all. This resolution is very encompassing. It is aimed at a critism of our Supreme Court of which I have not read all the decisions which it refers to. If the maker of the resolution wish to pinpoint the particular decisions and that decision is before us and we know whereof

we speak, then perhaps we can talk intelligently on this matter. I feel that this is premature unless every man here has read those decisions.

MR. COX: Mr. Breshears, would you answer a question?

MR. BRESHEARS: Yes.

MR. COX: Mr. Breshears, would you care to elaborate. I noticed in your resolution that the terms are very broad and no specific action of the Supreme Court is pinpointed, and the resolution amounts, as I understand it, to a general condemnation of the Supreme Court. I would ask if yon would care to pinpoint some of the decisions which have given rise to this resolution of yours.

MR. BRESHEARS: I don't feel it is proper to direct a resolution against any particular decision of the United States Supreme Court, but I can give you some of the examples I had in mind. In the first place, we have a decision of the United States Supreme Court with respect to a number of communists who were convicted of violating the Smith act and they were—the conviction of those men was reversed, and in the decision of the court, in substance it was said that the teaching and the organization of the communist party and promulgating the theories and principles of the communist party were not in violation of that act for the reason that they were not accompanying those teachings with acts of violence themselves. In substance that is what the opinion holds. We have two decisions, I think, which deny to the states the right to enforce their own laws to discharge employees, governmental employees. We have several decisions which require the FBI to open all their files wherever defense counsel requests. This resolution is not for the purpose of pinpointing any particular decision but for objecting to the trend, and I don't feel it is out of place; how in the world are you going to bring about a change or a reversal of a trend unless you protest against it? And I feel as Mr. Moffatt feels, every court has the right to decide questions as they see them, but that doesn't deprive us as lawyers, nor does it deprive this organization the right to say, "Gentlemen of the Court, we believe you are wrong; we are trying to influence public opinion to bring about a change in that trend toward the left." And it isn't political; I don't care what the politics of the members of the court are. I am concerned with the fact that to me our national security has been jeopardized. I am concerned with the fact that the central government is encroaching upon the powers of the state to exercise authority over their internal affairs. And if you have read any of the decisions, you must have seen that in them in the last four or five years.

MR. FUREY: It seems to me that in presenting this matter and in considering it there are some premises to be drawn. One approach to the problem is the basis for some of the arguments that have been made; and another approach is the basis for some of the other arguments. In the first place, we must decide whether or not we are dealing with a political or a social, philosophical problem when we discuss the communist problem, or we have to decide whether or not the communistic problem consists solely of the fact that we are in a world of communists just as surely as if we were out there shooting at them and they were shooting at us. You have to take one or the other. For my part, I am convinced and have been for a long time we are in a war with the communists and we are completely outside the realm of political and social discussion when we discuss communism. If we are at war with the communists, then we have to look at our Supreme Court decisions and decide whether or not they are dangerous to our security or dangerous to our defense of our country in this war that we are having with communism, and I believe vehemently they are. I believe this trend Mr. Breshears speaks of that these Supreme Court decisions are endangering our security in this war we are

having with communism. If that is true, and I believe it is, it seems to me, and I firmly agree with the argument that has been made that we should never be put in a position of not heing able to criticize our Supreme Court decisions and try to get them changed if we can in future decisions. The thing to do, it seems to me, is see our criticisms are as effective as we possibly can. And I don't think there is any question in any one's mind but that criticism by the Idaho Integrated Bar Association presented to the American Bar Association would be extremely more effective than criticism by individuals, and for that reason, I am very much in favor of the resolution.

MR. SULLIVAN: Thank you, Mr. Furey. Mr. Green.

MR. GREEN: I may agree with Mr. Breshears and his ideas on the courts, but I also agree with Blaine Anderson and Willis Moffatt on group criticism and binding an individual ot criticize the court by group action. I do not think it should be done. I feel if we vote either way on this motion—if we vote against the resolution, it may imply we are in favor of the decisions, which I likcwise don't feel that an organization of this type should do. Therefore, I move that we table the resolution.

From Floor: Second.

MR. SULLIVAN: The motion has been made and seconded that the resolution be tabled. All in favor, say Aye; those opposed, No. The Aye's appear to have it. The motion is tabled.

MR. GREEN: In the Third District Bar Association meeting we have discussed for some time the possibility of redistricting the divisions that set forth the commissioners; that is, we are divided into three divisions now. The number of lawyers greatly outweigh, in the Third District, greatly outnumber the other two divisions; that is, we have well in excess of 300 in the Western division. As a result, the fringe areas like Twin Falls, Payette—the whole Seventh District, Caldwell and Nampa—are not adequately represented we feel on the commission. In Boise there are over 170 lawyers that actually control the Western Division. We are not going to propose a method of redistricting. We did discuss increasing the numher of commissioners to five, and making the Third District into a separate unit in order to enable other areas to have a commissioner. Therefore, I move the following resolution:

> BE IT RESOLVED That the Commissioners of the Idaho State Bar by its president appoint a committee to study and report back to this convention assembled in 1958 upon the advisability and feasibility of proposing legislation for the redistricting and possibly the increasing of the number of commissioners of the Idaho State Bar.

From Floor: Second the motion.

MR. SULLIVAN: You have heard the motion. Is there any discussion?
From Floor: Question.

MR. ROBERTSON: For the purposes of the record I would like to have it shown that the proposal of the Ada County Bar to create a separate district with the Fourth, Eleventh and Seventh Districts as another distriet, and that a fifth commissioner be elected at large, was approved at a meeting of the Eleventh and Fourth District. We anticipated that the resolution as submitted by the Boise bar would be presented to this meeting.

MR. GREEN: I would like to point out this, Tim. Actually, we cannot act until the next legislature, and we will be here next year and it probably would be advisable that some detailed study be done before taking action.

MR. ROBERTSON: My remarks are for the record, for whatever they are worth.

MR. SULLIVAN: The record will show the action taken by the Fourth and Eleventh District.

MR. CIGRAY: I wish to state the Seventh District at a meeting prior to the State Bar convention, voted against the adoption of this resolution. We do not want to be geographically split off by ourselves. Under the plan proposed we voted against it.

MR. SULLIVAN: Does the district oppose the resolution as proposed?

MR. CIGRAY: Yes.

MR. SULLIVAN: For the appointment of a committee? The resolution is that a committee be appointed by the commissioners to study the question of redistricting and to present their findings and conclusions at the next meeting of the bar association.

MR. CIGARY: We will talk about it.

From Floor: Question.

MR. SULLIVAN: All those in favor of the resolution, signify by saying Aye; opposed, No. The resolution is carried. Are there any further resolutions?

MR. BLAINE ANDERSON: It is my understanding that the statement of principles proposed by the Unauthorized Practice of Law Committee with real estate brokers would be presented. Am I correct or incorrect? We were asked specifically in a letter to ballot and poll our district bar for the purpose of voting at this meeting.

MR. SULLIVAN: Thank you. Just one moment. No resolution was in fact submitted by the committee. Do you wish to make a motion?

MR. ANDERSON: I wish to move the adoption of the statement of principles as submitted to the commissioners and as submitted at last year's convention dealing with defining the practice of law and the various respectivefields of endeavor of lawyers and real estate brokers.

MR. SULLIVAN: You have heard the motion. It there a second? Do I hear a second?

MR. GUS ANDERSON: I second the motion.

MR. SULLIVAN: The motion has been made and seconded that the statement of principles as presented to this organization and to local bars for coordination with real estate brokers be adopted. Is there any discussions?

MR. GREEN: The Third District Bar discussed this. We voted against the adoption of such an agreement because we feel, first, that the statutes set forth what constitutes the rights and duties of the lawyers in the real estate field. The law also prohibits the real estate dealers from practicing law. This agreement actually is designed to take away the rights of lawyers to engage in the real estate

business. It sets forth the definition. We don't need any agreement with the real estate dealers. The Third Distriet voted against this because we felt the real estate dealers are not to practice law. The agreement doesn't define what is practicing law. We feel the problem is all on the real estate dealer. We have no agreement to work out. In the accounting field we must delineate a line; but the real estato dealers cannot practice law. The lawyer is well qualified to do any act the real estate broker can do. We are against the resolution because it gives the lawyers nothing. And we don't want to take any right that the practicing attorney has away from him.

From Floor: Mr. President.

MR. SULLIVAN: Mr. Cox.

MR. COX: Will Mr. Green yield to a question?

MR. GREEN: Yes.

MR. COX: Hasn't the ABA acted in their last meeting—don't we have an adopted standard of mutual agreement with the real estate people?

MR. GREEN: I am not aware of it and certainly it is not with this agreement, because this agreement appears to have been drawn here. At onc time it was even disapproved by the realtors. It actually says nothing, but it says here lawyers can't be real estate brokers. Why take away the right that exists by statute?

MR. COX: Do you know whether the ABA has acted on this?

MR. GREEN: No, I have no idea.

MR. BLAINE ANDERSON: I think I can answer the questions. This statement of principles is substantially the same as has been in existence and approved by the American Bar Association—the National—Lawyers and Realtors Conference, and one other group—I think the National Real Estate Board. Contrary to what Mr. Green says this takes no right away from the lawyer. The statute of 54-2024 of the Idaho Code contains this exception—this is the licensing of real estate brokers—"the provisions of this act shall not apply to any attorney at law in the performance of his duties as such attorncy at law." This is substantially the same wording as in the statement of principles. I will agree with Mr. Green when he says this is not a panacea for all our troubles with the real estate brokers, but it is as necessary as is the statement of principles with accountants. It is a step in the right direction. Your Unauthorized Practice Committee sincerely feels if this is adopted, and the realtors have indicated they are now in favor, since this has been clarified for them too, that if the commission will follow our recommendation of disseminating this information to all lawyers and real estate brokers and salesmen it will go a long way in reducing unauthorized practice by that group.

MR. GREEN: Mr. Chairman, because of the lack of people who are here, because the Third District, after long study, has voted against this, I feel that before we should take any action that we should give it more thought and everybody should be well acquainted with what they are voting on here. I move to table the resolution.

From Floor: Second.

MR. SULLIVAN: It has been moved and seconded the resolution be tabled. All in favor say Aye; opposed, No. The Aye's have it. The motion is tabled.

The time is getting short. Is there any other resolution?

Thank you very much, Gus, for the activities of yourself and your committee.

Is there any further business?

From Floor: I move we adjourn.

MR. SULLIVAN: The session is adjourned sine die.

SELECTED PROBLEMS IN THE DRAFTING OF WILLS

By BRENT M. ABEL, San Francisco, California

Introduction

Adeptness at drafting wills is an everyday skill for lawyers. Nevertheless the complexity of current tax laws, and their heavy impact upon estates, have been responsible for making tax provisions important (particularly the marital deduction) and for increasing the number of instances in which trusts are desirable, even for clients of moderate means. Where trusts were a matter only for the wealthy thirty years ago, today a trust may well be an essential of a careful plan in any estate where it is important to shield from tax on the death of a surviving husband or wife property which has already been included in the taxable estate of the first spouse to die.

To have the advantage of a specific problem, this paper is devoted to a portion of a will in what is intended to be a typical estate of medium proportions, with side excursions where desirable to elaborate. Many of the points are elementary.

The Problem

Idaho and Montana Jones, husband and wife, have a son and daughter who are 15 and 13 respectively. Idaho has separate property worth $100,000, but Montana has none. Idabo has been successful in business and has accumulated about $100,-000 from his earnings during marriage, all in the form of listed securities. Idaho has approved a plan of which the objective is to take maximum advantage of the marital deduction, with the balance of his estate to go into a trust for the benefit of Montana for life, with remainder to the children after her death.

Idaho Jones has had no experience whatever with trusts and he is generally opposed to "tying up" his property. But you have advised him that a trust can be devised which will have great flexihility. For simplicity, only Idaho's will is considered below.

No doubt you would first advise him to make bequests of tangible personalty and an outright devise of the home to Montana. The material which follows deals with the questions which remain after the disposition of personal effects and the home.

1. MARITAL DEDUCTION FORMULA CLAUSE

The use of a formula-type clause to take advantage of the marital deduction has become well recognized. A recent Tax Court Case (Hoelzel, 28 T.C. 41, May 17, 1957) indicates (1) that a formula-type provision will qualify for the deduction, and (2) that the formula must be devised with utmost care.

The formula in the Hoelzel case:

> "a sum equal to one-half of the excess of the property included in my gross estate for the purpose of the federal estate tax over the deductions allowable . . .," reduced by the "portions of my gross estate which pass to my wife but do not constitute a part of my (prohate) estate at the date of my death."

The court recognized the formula as valid, but held that the marital deduction was reduced by the value of certain annuities payable to the wife for life, which (because the wife had a "terminable interest" therein) did not qualify for the marital deduction but were nevertheless included in the husband's gross estate.

One suitable formula which avoids the Hoelzel difficulty:

If my wife shall survive me, I give, devise, bequeath and appoiut unto her an amount of my property and estate equal in value to the maximum marital deduction allowable under the federal estate tax law applicable to my estate, less such portions of the following as *shall qualify for the martial deduction from my gross estate for federal estate tax purposes,* to-wit:

(a) The property given to my wife under the provisions of Article Four (meaning home, personal effects, cash, legacies, etc.) hereof; plus

(b) All amounts receivable by my wife as insurance under policies on my life; plus

(c) Property held by my wife aud me at the time of my death as joint tenants or in any other manner by virture of which the saine shall pass to my wife by reason of her surviving me; plus

(d) Any and all property and interests in property which shall pass or have passed to my wife and which are includible in my gross estate for federal estate tax purposes.

The gift provided for in this Article shall be satisfied out of assets of my estate or the proceeds thereof which are subject to and qualify for the marital deduction for federal estate tax purposes and not out of assets as to which no marital deduction is allowable. In the event that the federal estate tax law applicable to my estate shall make no provision for a martial deduction either because of amendment or repeal, then and in that event this Article shall be of no force or effect and shall be disregarded.

It will be seen that the underscored words require that, in applying the formula, there are deducted from the formula gift only those gifts to the wife made outside the formula clause which themselves qualify for the marital deduction.

A. *Income Tax Aspects of the Marital Deduction Clause*

The marital deduction formula clause fixes the marital deduction at a definite cash figure. If assets are used to satisfy the gift which appreciate in value between the valuation date and the date of distribution, a question arises whether the estate thereby realizes capital gain.

See: Revenue Ruling 56-270, 1956- 25 I.R.B. 22.

If they depreciate in value, may the estate claim a capital loss?

One way to avoid this problem, but one which provides only a partially satis-factory answer, is to insert in the formula clause a sentence such as this:

> "All assets used to satisfy this gift shall, for the purpose of satisfying the same, be valued pursuant to the valuation thereof as finally determined for federal estate tax purposes, without regard to their value at the time of dis-tribution thereof."

This has the effect of making the formula gift a legacy which is not definitely fixed in amount. That is, it is not the equivalent of a pecuniary legacy. Its defect lies in the result that, if appreciated assets are used to satisfy the gift, the widow will receive property worth more than the maximum marital deduction, which will be exposed to tax on her later death. If depreciated assets are used, there may be difficulty, on audit of the estate tax return, in obtaining the full marital deduction.

For the foregoing reasons, many attorneys now prefer to use a residuary bequest for the marital deduction gift, with a formula similar to the one set forth above but expressed in terms of a percentage of the residuary estate.

B. *Protecting the Marital Deduction Gift from Death Taxes*

Regardless of whether the formula provision is expressed as a pecuniary or a residuary gift, the marital deduction gift must be protected against death taxes. The deduction only applies to property which "passess or has passed" to the surviving spouse, and it obviously does not apply to property which "passes" to the Director of Internal Revenue.

Thus it is important, when the maximum marital deduction is the objective, to provide in the will that death taxes are to be paid out of the residuary estate, in some such manner as follows:

> I bereby direct and provide that any and all inheritance, estate, succession and similar taxes which may be levied or imposed upon or by reason of my death together with all interest, if any, that may accrue on account thereof, shall be paid by my executors out of my residuary estate.

If the marital deduction formula used is expressed as a percentage of residue, then the tax clause should direct payment of taxes out of some source other than the portion of residue making up the formula gift.

C. *Simultaneous Death Problems*

(a) *Simultaneous Death*

The Uniform Simultaneous Death Act provides a solution to the substantive problems arising where it is impossible to say which spouse died first. But it may be very important to obtain the marital deduction in such a case, which will *not* occur if the matter is left to the Uniform Act. In such cases (of which Idaho Jones' is an example), a provision such as this may be desirable:

> "If my wife and I shall die under such circumstances that there is no sufficient evidence that we shall have died otherwise than simultaneously, my wife, shall, for the purpose of this Article of my will, be conclusively presumed to have survived me."

This provision will increase the expenses of administration of the wife's estate, but it assures that the two estates will be taxed at approximately the same rate. In the Jones case, with this clause, the total federal estate taxes payable on both estates would be approximately $9,000, if simultaneous death occurs. Without it, the total federal estate taxes on both estates would be approximately $18,000. This difference should substantially overbalance the additional administration expenses.

This type of provision is recognized by the regulations.

See: Regulations Sec. 20, 2056(e) - 2(e).

(b) *Nearly Simultaneous Death*

The interest given to Montana Jones must not be a "terminable interest." An interest is "terminable" if the wife must survive by more than 180 days in order to take. It has been observed above that a definite federal estate tax saving, benefiting the children, will occur if Montana survives only for a short period. Accordingly, in the present case it is probably *undesirable*, as to the formula gift, to cut off the gift if Montana survives but dies within a short time after Idaho. For her death within the specified period would deprive Idaho's estate of the marital deduction.

But in many cases it *is* desirable to cut off the surviving spouse's interest if he or she does not survive by a long enough period to enjoy it. In such event, if the gift is to qualify for the marital deduction, the terminating condition must be the death of the surviving wife, within 180 days after the husband's death. Thus, a gift "to my wife, if she survives the distribution of my estate" will not qualify.

See: Regulations Sec. 20.2056(b) - 3d, Example 4.

D. *Community Property Problems*

Of course, if the decedent's estate consists solely of community property, there can be no marital deduction, because the deduction is limited to one half the adjusted gross estate (I.R.C. Sec. 2056 (c)), and, by definition, there is no "adjusted gross estate" if the estate consists entirely of community property (I.R.C. Sec. 2056(c) (2) (b))

If the decedent's estate consists of both separate and community property, the question arises as to whether the separate property must be used to satisfy the marital deduction gift. To this the answer is "no." It is therefore not necessary to provide in Idaho's will that the formula gift is to be satisfied with assets which were his separate property. The deduction is limited in amount to one half the "adjusted gross estate" but is not limited to property included in the adjusted gross estate.

2. RESIDUARY GIFT

A. *Property Covered in the Residuary Clause*

By the residuary clause, Idaho will certainly wish to dispose of all property owned by him and subject to his testamentary disposition, meaning the balance of his separate property and of his share of the community property.

How about powers of appointment? He may have such a power and not know it. Or he may acquire it under the will of some relative after the date of the will and before his death. A blanket exercise of powers of appointment may in exceptional cases lead to disastrous results, for tax or other reasons, but it is probably better to include such an exercise as a part of the residuary clause, on the theory that Idaho should give everything to his wife and children that he can.

How about his wife's share of the community property? Should he either (a) require, or (b) authorize, her to permit her half of the community property to pass under his will? If so, how should he do this as a matter of draftsmanship?

These are the questions discussed below.

a. *Balance of Separate Property and Husband's Share of Community Property*

The residuary clause applying to Idaho's separate property, his share of community property, and the exercise of powers of appointment might read as follows:

> I give all of the rest and residue of my property and estate, of whatsoever character and wheresoever situate, including all property over which I shall at my death have power of testamentary disposition by my will or by power of appointment (all of said property being hereinafter called for convenience "my residuary estate") as follows:— etc.

Caveat: Under California law, the foregoing clause disposes only of the husband's half of the community property, and not of the wife's half. Query, as to Idaho law.

It is convenient, for other reference in the will, thus to define the residuary estate.

b. *Widow's Election*

There may be definite advantages in requiring Montana, the widow, to elect to permit her half of the community property to pass into the residuary trust. This permits unified management of the entire community property for her benefit. But the election creates many tax problems and must be carefully considered from that aspect. Because many of the tax questions depend on the local substantive law, elections will be considered below only briefly.

1. *Types of Election*

Elections are of two types:

(a) An election endorsed on the husband's will prior to his execution thereof; and

(b) An election required by the terms of the husband's will to be made by the wife during probate of his estate.

In addition, it is possible for the husband's will to give the wife the option to permit her half of the community property to pass under the husband's will, without requiring that she do so as a condition of accepting the benefits of the husband's will.

(i) *Endorsed on Husband's Will*

This type of election does not affect the power of the husband to revoke the will during his lifetime, nor does it prevent the wife from changing her mind about the election while her husband is alive. If, however, he dies before she has indicated to him that she renounces the election, then the entire community property passes under the husband's will, including her half as well as his.

(ii) *Required During Probate of Husband's Will*

Under this type of election, the husband's will either expressly or by implication (and, of course, as a matter of draftsmanship it is preferable to express the requirement) requires the wife to decide, during the probate period, whether she will permit her half to pass under the will.

(iii) *Wife's Option*

Under the wife's option, she is not put to an election, but is *permitted* to add her half of the community property to the residuary trust by some such language as the following:

> Nothing in this will shall be deemed to prevent my wife, if she shall in her uncontrolled discretion see fit so to do, from electing and permitting her one-half interest in our community property to fall into and become a part of my residuary estate and to pass pursuant to the provisions of this will in all respects as if the same were a part of my residuary estate.

For the gift tax, income tax and death tax reasons mentioned below it is well, if this type of provision is used, to require the trustee to keep separate books with respect to the wife's share and to give the wife the right to withdraw all or any part of her share from the trust at any time.

(iv) *Advantages and Disadvantages of the Types of Election*

(1) *Income Tax During Probate*

In order to prolong the "split-income" aspects of community property for income tax purposes for the period of administration of the estate, either the post mortem" election by the wife, or the "option" for her, appear preferable to the election made during the husband's lifetime.

See: Wells Fargo Bank v. United States, 134 F.S. 340 (1955), appealed, but appellate decision not yet reported.

(2) *Gift Tax Questions*

The election made during the husband's lifetime, by the wife's endorsement on the will, becomes binding, under the law of most community property states, at the moment of the husband's death. At that moment, it can be contended that the wife makes a taxable gift of the remainder interest in her half of the community property, unless by the terms of the will she is given the power to withdraw her share from the trust. This is true also of the post mortem" election and of the wife's "option." Accordingly, under all three types of election, it would appear to be desirable, unless the possibility of gift tax is to be faced as the price of keeping the wife's interest within the trust, to include a power to withdraw or revoke exercisable by the wife as to her half of the community property. This suggests, and perhaps even requires, that the trustee keep separate books as to her half, and it is well for the will either to authorize or require this.

For a comprehensive discussion of the gift tax question

See: *The Tax Consequences of Widows' Elections in Community Property States*, 1951 Proceedings of the Tax Institute, University of California School of Law, by Valentine Brookes.

(3) *Death Tax Questions*

If the wife elects to permit her half of the community property to be held in trust, and is entitled to the income therefrom during her lifetime, her election is akin to a transfer with reservation of income for life. This is not necessarily undesirable, but again emphasizes the desirability of a requirement that the trustee keep separate books as to the wife's half.

3. TERMS OF THE RESIDUARY TRUST

Many of the difficulties with trusts revolve about the venerable concept that a clear demarcation must be maintained between income and principal. This is a sound premise if there is unquestionably enough income. But, if the trust is of moderate size, and the needs of the beneficiaries are heavy, as they will be when there are children to educate, it is not realistic to adhere to the traditional distinction. If Idaho were alive but totally disabled, the family would attempt to live within its income if it could, but if that were not possible, there would certainly be some resort to capital. Why should it be different because Idaho is out of the picture altogether? Even the time honored emergency clause has shortcomings for this purpose.

A trust in the following terms would appear to be well suited to the needs of Idaho's family, and should cover most of the problems that would arise even after Montana's death and while the children are young:

> The trustees may apply or devote all or any part of the net income or principal of the trust, or both, as the trustees shall deem proper, to the support, maintenance, education and welfare of my wife and my children and of the survivor and survivors of them and of the issue of any deceased child of mine, taking into consideration all resources and support (including, in the case of my wife, circumstances arising out of her possible remarriage) available to each of them for the purposes and known to the trustees. The trustees shall have full power and authority to determine the manner in which and the purposes for which said principal or income, or both, shall be so applied or devoted and if the trustees shall deem it necessary or expedient so to do, they may at any time or from time to time pay to my wife or any child of mine or to the guardian of any such child or of the issue of any deceased child of mine or to such other person or persons as the trustees may deem proper, to be used for the support, maintenance, education or general welfare of my wife or of such child or issue so much of the net income or principal, or both, as the trustees may deem necessary or proper for said purposes. The trustees are hereby authorized at any time or from time to time to apply or devote to the support, maintenance, education or general welfare of one or more of the beneficiaries a greater amount or proportion of said income or principal, or

both, than the trustees shall apply or devote to the support, maintenance, education or general welfare of the other or others of them and to take into consideration the fact that one or more of my children may have attained the age of majority. In general, it is my wish, but I do not require, that after the education of my children shall have been completed the trust shall be primarily for the benefit of my wife, unless she shall have remarried and the trustees shall in their discretion determine that she has adequate other resources for her support. The trustees shall have full power and authority to determine what part, if any, of the income or principal, or both, shall at any time or from time to time be paid out or applied as aforesaid, and every decision of the trustees either for or against any expenditure or payment under the power and authority provided in this paragraph, and any expenditure or payment under such authority, shall be final and incontestable by anyone. Any net income of the trust not expended in accordance with the foregoing provisions of this paragraph shall be accumulated and be added to the principal at such time or from time to time as the trustees shall determine.

On the premise that a primary modern objective of every father is to see to the education of his children, the following additional provision might be included:

As used in this will, the term "education" may include, but shall not be limited to,

(i) education at public or private elementary or high schools, including boarding schools,

(ii) undergraduate or graduate study in any and all fields whatsoever, whether of a professional character or otherwise, at public or private universities, colleges, or other institutions of higher learning.

(iii) Specialized, formal or informal training in music, the stage, in handicrafts or in the arts, whether by private instruction or otherwise, and

(iv) Any other activity, including foreign or domestic travel, which shall tend to develop fully the talents and potentialities of my children.

If the above residuary trust provisions are used in conjunction with the wife's election, it is important to integrate the requirement of separate bookkeeping with the provisions of the residuary trust. In general, depletions of principal should come first from the wife's share of the community property, to reduce the tax impact on that share upon her later death.

PRESIDENT'S REPORT

The opportunity which you have given me to serve as President of the Idaho State Bar Association for the year 1956-1957 is most gratefully appreciated. I have discovered that it is only by work on the Bar Commission, or closely associated therewith, that you can fully realize, not only the numerous and diverse problems that arise in an association such as ours, but also the extent of the opportunities which the organized bar has to improve the profession inter se, and to better and increase the service which we as lawyers owe to the public. It is unfortunate that so many members of this association take so little part in its activities. The young lawyers who are commencing their practice should be encouraged in every way to actively participate in the work of the Bar Association, which will result not only in their personal benefit but, more important, in a distinct advantage to the communities in which they live.

The most important project undertaken during the past year is the revision of the Rules of Civil Procedure, to bring them into substantial conformity to the Federal Rules of Civil Procedure, which have worked so well for over twenty years. The Idaho Bar Commission, with the assistance of the Idaho Code Commission, and with Mr. Erle H. Casterlin acting as adviser, printed and distributed to all attorneys the proposed Rules of Civil Procedure for Idaho. During the past year the Commission, accompanied by the able and expert Mr. Casterlin, met with every local bar association in the state for the consideration of these rules. The attendance at these local meetings was excellent and every local association approved the rules and recommended their adoption. It is indeed surprising, considering the revolutionary character of the rules, and the natural antipathy of lawyers, imbued with the principle of stare decisis, to change, that these proposed rules met with so little opposition.

Early this year the proposed Rules were formally submitted to the Supreme Court at a judicial conference, with the unanimous recommendation of all of the local associations in this state. The court fixed April 1, 1957 as a deadline before which individual attorneys could submit to the Court suggested changes and amendments to the Rules as proposed. Recently, upon a directive from the Court, the Bar Commission appointed a committee consisting of Ralph Breshears, chairman, Erle Casterlin, Karl Jeppesen, Judge Gilbert Norris and myself, to consider the suggestions and objections which had been submitted to the Court, and make its recommendations thereon. That is the status of the proposed Rules at the present time. It is fervently hoped that this matter will proceed without any undue delay and that Idaho will soon take its place in the rapidly growing ranks of states which have recognized the necessity for modernization of court procedure to accomplish a more effective administration of justice.

From time to time over the years efforts have been made to obtain a more adequate compensation for the Judges of the Supreme and District Courts of Idaho. These met with varying success, with occasional small increases. At the 1956 Annual Meeting, this association, recognizing the shameful fact that the salaries paid to the Judges of Idaho were the lowest in the nation, directed the Commission to make a determined effort to obtain substantial increases. The Chairman of the Committee on the increase of judicial compensation was Bruce Bowler of Boise, and he is entitled to special mention and commendation for the immense amount of work, thought and effort that he devoted to this purpose. It appeared early in the 1957 session of the Legislature that the State was facing a serious fiscal situation and that undoubtedly the goal sought by the Bar Association could not be obtained, and that some compromise would be necessary. Through the de-

termined efforts of many members of the Bar salary increases were obtained so that the Supreme Court Judges now receive $10,500 a year and District Court Judges $9,500, or an increase of $2,000 apiece.

For a number of years the Bar Association has recognized that a reform of the lower court system was desirable. The first necessary step to accomplish a renovation of the Justice and Probate Courts was amendments to the Idaho Constitution to eliminate the constitutional jurisdictional limitations. Through the advocacy of the Bar Association these constitutional amendments were effected at the last election.

In addition to the Annual Meeting, two legal institutes were conducted last year by the Bar Association. In the fall an Institute was held at Moscow, Idaho, at which three topics were presented: One on workmen's compensation and unemployment insurance, presented by B. W. Oppenheim, George Greenfield, David Hart and John Gunn; the second was on bankruptcy, by the Referee in Bankruptey, Paul Boyd ;thc third was on patent law by Greek Wells, a patent attorney of Spokane. This Institute was so favorably received that it was repeated this last April in Pocatello, with the elimination of the section on patent law. The turn-out of the Southeastern Bar was extremely disappoiuting, but all those who attended will testify to its great value to the general practitioner. It is planned that two more legal institutes will be presented in the coming year as part of the necessary progress of continuing legal education. Being held both in the Northern and Southern parts of the state the attorneys have little excuse for failing to attend. In the pressure of private practice it is difficult to keep widely read in current dcvelopments of the law; yet to keep abreast of modern judicial thought and legislation is a necessary prerequisite if an attorney expects to do justice to his clients. These Institutes provide capsule learning in an economical and painless form. They are conducted for the benefit of practicing attorneys and it would be a shame if this practice should collapse because of the lawyers' mental inertia.

The Idaho Bar Association at the state level will be wholly ineffective without the support and efforts of its constituent members. All lawyers have an opportunity and an obligation to participate in this work, and that, for the great number of attorneys, is on the local level. Therefore it is essential that the local bar associations maintain constant activity. Their meetings should be held regularly. Their committees should cooperate with similar committees of the State Bar. Long range programs should be developed each fall and the officers must see to it that they are carried out. In traveling around the state the Commission was occasionally disappointed to learn that the meeting which they attended was the first that had been held for a long time. Without the constant and effective operation of the local bar associations nothing can be accomplished.

As of this time the new Rules of Civil Procedure have not yet been promulgated by the Supreme Court. The first item of business for the coming year should be the following through of this program so that within the very near future the new Rules of Procedure will be in effect in this state.

After the adoption of the Constitutional amendments eliminating the jurisdictional limitations in the Probate and Justice Courts, your state legislative committee introduced in the 1957 Legislative Session a bill to provide for an interim committee to work out and develop an adequate judicial system for the lower courts. This bill failed.

The lower court reform is essentially a bar association project and, having successfully accomplished the first step, it should not now be forgotten. I would recommend that a committee be appointed to study and review this problem and work out a comprehensive judicial organization for these courts to be presented at the next session of the legislature. Because of the remarkable differences in area, population, and wealth of the counties of Idaho, this poses a most difficult task; consequently the sooner that work is commenced on this plan the greater are the chances for an adequate and workable system.

The pleasure of the experience of this office as well as the overcoming of difficulties as they have arisen have been tremendously enhanced by the support and cooperation of Gilbert St. Clair and Clay V. Spear, your other Commissioners. It has been delightful to work with them and I can never repay them for their assistance and support. It is well known by every member of this Bar that the whole machinery of the organization would slither to a wandering halt were it not for the ability and diligence of your Secretary, Paul Ennis. To him and to his efforts this Association owes special praise, for he already has recognition in the minds of all of the members of his accomplishments.

WILLIS E. SULLIVAN, President
Idaho State Bar Association

SECRETARY'S REPORT

Mr. President and Members of the Idaho State Bar:

In accordance with the established practice the Secretary's report is given annually to apprise the general membership of the Bar of the financial condition of the Idaho State Bar and to provide other statistical information relative to membership, admissions and deaths and to give a resumé of the actions of the Board with respect to disciplinary matters.

The books of account maintained in my office and which are regularly audited by the State Auditor reflect the following with respect to expenditures and receipts for the year ending June 1st, 1957:

EXPENDITURES
June 1, 1956 to June 1, 1957

Personal Services	$ 5,026.65
Travel Expense	5,295.57
Other Miscellaneous Expense	4,063.85
Capital Outlay	145.04
Social Security Transfers	103.47
General Fund Transfers	343.56
Total	$ 14,978.14

RECEIPTS

June 1, 1956 to June 1, 1957	$ 15,728.00
Balance June 1, 1956	22,052.10
Less Expense	14,978.14
Balance June 1, 1957	$ 22,802.86

The item of Personal Service covers all sums paid for stenographic and clerical services, including one part-time secretary and temporary employees and the salary of the Secretary. Travel Expense includes all costs of travel for the Commissioners, members of the Examining Committee and other standing committees of the Idaho State Bar and travel expense for speakers at the annual meeting and a portion

of the travel expenses for speakers at Continuing Legal Education Institutes. Also included are the expenses of the State Bar delegate attending the meetings of the House of Delegates of the American Bar Association. The principal items included in Other Miscellaneous Expense are printing costs of the Idaho State Bar News Bulletin and the annual proceedings of the Idaho State Bar, postage, and office expenses, such as telephone, supplies, etc. The Capital Outlay item mentioned is the cost of a Verifax duplicating machine. The Social Security Transfers represent the State Bar's payments as an employer. The item entitled General Fund Transfers represents the amount deducted from the State Bar Fund by the State Auditor's Office as a charge for rendering bookkeeping services, and such sum is deducted pursuant to Act adopted by the 1955 session of the Legislature.

Receipts for the year ending June 1, 1957, were approximately $738.45 less than receipts for the year ending June 1, 1956. Expenditures for the year were $749.86 less than receipts. The Balance on hand June 1, 1957, reflects a gain of $550.76 as against the balance on hand June 1, 1956. The balance on hand does not represent surplus for the reasou that substantially all of the income of the Bar is collected in the first four months of the year, whereas the greater part of expenses is incurred during the remainder of the year.

The status of the Bar Trust Funds, a special fund not controlled by the State by reason of the fact that reccipts are collected from sources unrelated to official funds, is as follows:

ASSETS

	6-1-56	6-1-57
Accounts Receivable:		
State of Idaho	$ 269.54	$ 296.29
Deposit in First National Bank	1,751.85	1,744.54
Total	$ 2,021.39	$ 2,040.83
Gain	19.44	
	$ 2,040.83	$ 2,040.83
Gain:		
Unexpended Bar Registration Fee— 1956 Meeting		$ 19.44

The membership of the Idaho State Bar by Division is as follows:

	1956	1957	Increase
Northern Division	136	134	1.4%*
Western Division	319	306	4.0%*
Eastern Division	152	148	2.6%*
Military Service	5	6	2.0%
Out-of-State Membership	22	26	18.1%
Total	634	620	2.3%*

Decrease

On the basis of Local Bar Associations the distribution of membership, which is the basis for determining voting power of each Local Bar under Rule 185 at this meeting, is:

Shoshone County Bar Association, 19; Clearwater Bar Association, 63; Third District Bar Association, 171; Southeastern Idaho Bar Association, 87; Seventh District Bar Association, 52; Eighth District Bar Association, 52; Ninth District Bar Association, 61; Eleventh and Fourth District Bar Association, 83; Sub-total, 588; Military Service, 6; Out-of-State, 26; Total, 620.

Since the last annual meeting of the Bar, the following deaths have been reported:

Clency St. Clair, Idaho Falls; John W. Jones, Blackfoot; Justice Donald B. Anderson, Boise; William B. Davidson, Meridian; Sherman D. Fairchild, Boise; A. H. Featherstone, Wallace; Cleve Groome, Caldwell; Walter H. Hanson, Wallace; Charles E. Harris, Montpelier; E. M. Holden, Boise; Frank F. Kimble, Orofino; Clay C. Koelsch, Boise; T. E. McDonald, Arco; C. J. Schooler, Boise, Addison T. Smith, Washington, D. C.; James E. West, Beverly Hills, Calif.

With respect to admissions to the Bar, two examinations were administered during the past year, one in September, 1956, and the other in April, 1957. In the first examination there were a total of nineteen applicants, eleven of whom passed, eight of whom failed. In the April examination, twelve took it, eight passed and four failed. Of the thirty-one applicants, niueteen, or 61.2% successfully passed the examination.

During the past year eleven complaints were filed against lawyers. Two of the complaints were dismissed after preliminary investigation established that the evidence was insufficient to support a charge of improper or unethical conduct. In four cases the Board is awaiting completion of preliminary investigation and report of the Commission to whom assigned. Formal disciplinary action has been ordered by the Board in connection with three of the complaints filed and Committees on Discipline, and Prosecuting Committees have been appointed with instructions to proceed. During the past year further action upon one complaint was terminated upon satisfactory completion of a period of probation imposed with respect to an attorney. One letter of private reprimand was issued by the Board. One attorney was reinstated by the Supreme Court upon the recommendation of the Board after an 18-year period of suspension.

LEGISLATIVE COMMITTEE

To the Honorable Commissioners of the Idaho State Bar
Gentlemen:

The following constitutes the report of the Idaho State Bar Legislative Committee for the period from July, 1955, to June, 1957.

The Idaho State Bar Legislative Committee has for years been charged with the responsibility of preparing and sponsoring the certain legislation in which the Idaho State Bar was interested from session to session. However, during the 1955 Legislative session, a new function was inaugurated which was entitled "The Idaho State Bar Legislative Advisory Committee."

This service, with which you are familiar, was designed primarily as a public relations program which was to consist mainly of rendering to the Committees of the Legislative free legal advice on all matters of Legislation pertaining to public affairs not affected with a private interest, and which would not deprive any lawyer from regular employment and which would supplement the work of the much too busy Attorneys for the House and Senate.

As a result of this service in 1955, the Legislative program of the Idaho State Bar met with very good success. At least it was the consensus of the Executive Committee at that time, that the work of the Advisory Committee was largely

responsible for the success of the State Bar Legislative program. However, nearly all of the services were rendered by Boise attorneys, and it was recommended at the convention at Sun Valley, Idaho, that the program, if continued, should be enlarged to include the volunteer services of lawyers located in localities throughout the state, as well as Boise atorneys.

During the 1957 Legislative session just passed, such a program was undertaken and very successfully accomplished, in that volunteer services of attorneys from every part of the state were obtained. At this point, the undersigned chairman would like to list the names of the attorneys who participated in the activities of both committees during the past session and he wishes to personally thank each of the named attorneys for their very constructive and conscientious assistance, which they so cheerfully rendered. The executive committee consisted of Willis E. Sullivan, Randall Wallis, Willis Moffatt, Bruce Bowler, George Greenfield and Calvin Dworshak, Paul B. Ennis, who acted as secretary for the committee, and the undersigned, as chairman.

The attorneys outside Boise, who so kindly volunteered their services during the session on the Advisory Committee, are as follows: Raymond C. McNichols, Ben Peterson, Hugh C. Maguire, Jr., Elbert A. Stellmon, George Kneeland, Wayne C. MacGregor, L. F. Racine, Jr., B. James Koehler, Jr., Professor W. J. Brockelbank, Theron Ward, Merrill Gee, Bert Larson, Kales E. Lowe, T. M. Robertson, and Dean Miller.

We wish to acknowledge the valuable assistance and time given to either or both of the above named committees by other Boise attorneys, who were called upon time to time to carry out special assignments. They were: Robert W. Green, Oscar W. Worthwine, Ralph R. Breshears, Frank Davidson, Robert H. Copple, Charles E. Winstead, Raymond D. Givens, Raymon L. Givens and Frank E. Chalfant, Jr.

The executive committee had its first meeting with regard to the thirty-fourth session of the Idaho Legislature on October 9, 1956. It met twice in October, three times in November, twice in December, and at least once a week thereafter, throughout the entire Legislative session. On several occasions, particularly in January, the committee met twice during the week.

The projects undertaken by the committee sitting as the State Bar Legislative Committee may be summarized as follows: (1) Ceneral assistance and direct cooperation and coordination with the special judges salaries committee, chairmaned by Bruce Bowler; (2) Assistance to the judicial conference with regard to the revision of the criminal code of the State of Idaho; (3) Increase of fees allowable to witnesses in judicial proceedings; (4) Increase of pay to jurors; (5) Clarification of Section 5-509, Idaho Code, relating to the publication of summons; (6) Amendment of Section 13-201, Idaho Code, relating to appeals from the District Court to the Supreme Court; (8) Amendment of Section 15-1001, Idaho Code, relating to elimination of publication of notice of petitions for specific performance of contracts with decedents; (9) Legislation to activate the office of Legislative Counsel; (10) Allowance to District Judges for actual and necessary expenses while on business away from residence; (11) Legislation with respect to the jurisdiction of probate and justice courts pursuant to the Constitutional amendments adopted by the electors at the last general election.

These projects were handled primarily by the committee in accordance with resolutions of the State Bar and Convention and were not prompted by any personal desires on the part of any lawyer, for particular legislation.

The accomplishments with respect to the foregoing projects, percentagewise, did not compare favorably with the activities of the previous session, but were as follows: (1) Substantial increase was obtained with respect to judges' salaries, both the District Judges and Supreme Court Judges receiving two thousand dollars annual increase. (2) The revision of the criminal code turned out to be a more expansive undertaking than first realized by the committee. The Criminal Penalties Committee of the Judges' Conference, under the very able leadership of District Judge Gilbert C. Norris, outlined numerous and extensive revisions which were desirable and necessary for expediting and increasing the efficiency of the criminal procedures in this state.

It was first thought that perhaps one or two omnibus bills might be drafted which could accomplish the major part of the recommended revisions. However, the matter was studied by Mr. Calvin C. Dworshak and he concluded in a very thorough and scholarly report to the committee that because of the Constitutional requirement of unity of subject matter, the criminal revisions as recommended by the Criminal Penalties Committee of the Judicial Conference could not be accomplished in a single or in just two or three acts, but that the same would require hundreds of separate bills in the absence of an act tantamount to a codification of the entire subject.

As a result of this study, the committee then concluded that time would not permit the necessary research and the careful legislative drafting required to accomplish even a small part of the program, but that one of the major difficulties confronting the judiciary of the State of Idaho, with respect to criminal penalties, was the present form of the Indeterminate Sentence Act. The committee consequently prepared, sponsored, and passed an amendment to the Indeterminate Sentence Act providing substantially, that the judges in the State of Idaho will not be required after the effective date of the new bill to sentence criminals to the maximum penalties provided by law, but that they may exercise discretion and sentence criminals to the penitentiary for a term of not less than two years, nor more than the maximum penalty provided by law, with respect to the crime involved.

This legislation was accomplished only after conference and discussion with the chairman of the State Board of Corrections and others directly interested in the legislation. The projects before numbered as 3, 4, 5, and 6, were enacted into law, the remaining projects, 7 through 10, were not accomplished, either because of conflict with similar Legislation proposed, or because of unfavorable consideration by the Legislative committee.

With respect to Project 11, the Legislative Committee learned that there was not sufficient study given by any of the lawyers proposing plans for revising the jurisdiction of the Probate and Justice Courts to have a crystalization of thought among the members of the Bar to warrant or justify any legislation at the 34th session. As a result, the committee recommended to the commissioners during the session that a proposal be made to the Legislature that an interim committee be appointed to study this problem and prepare legislation for the 1959 session. The commissioners approved the recommendation.

However, the Legislators did not see fit to pass the bill which was introduced proposing an interim committee, and, consequently, this particular program remains to be accomplished by appropriate action of the State Bar. After considerable discussion of the matter the concensus of the Legislative Committee of the State Bar was that perhaps a separate committee should be appointed at the 1957

Bar Convention to undertake the study and prepare the necessary revisions of the jurisdiction of these inferior courts.

An innovation in procedure was taken during the past session by the State Bar Legislative Advisory Committee in that selected lawyers throughout the State of Idaho were invited to come to Boise at their own expense to serve the Legislative Committees of the 34th Idaho Legislative Session on matters of research and bill drafting, and in accordauce with the principals set forth by the committee during the 1955 session. We were extremely happy with the response to the invitation and the above named lawyers from outside Boise were, in fact, swamped with work requested by the Legislators. It was later discovered that the Bar Commissioners were willing and able to help offset hotel expenses of those volunteers who submitted vouchers. Approximately $146.50 were expended on this program out of the general fund of the Idaho State Bar.

It was suggested that if the Legislative Advisory Committee is to be continued in the future, there should be some provision made by the commissioners for the necessary facilities, particularly office space, secretarial assistance, and supplies, so that individual law firms in the City of Boise, would not be imposed upon to furnish such facilities. In that regard, the committee wishes to thank the firm of Langroise, Clark & Sullivan, which literally turned over its offices to the volunteer attorneys on the State Bar Legislative Advisory Committee. It would be impossible to measure in dollars, the value of the services in this respect, that this firm contributed.

In conclusion, it should be mentioned that the members of the Executive Committee met and evaluated the activities of the State Bar Legislative Committee, and the State Bar Legislative Advisory Committee, and agreed on suggested resolutions which they felt should be submitted to the 1957 convention of the Idaho State Bar. There were certain doubts expressed by members of the committee during the session as to whether or not the State Bar Legislative Advisory Committee should be continued. However, it was pointed out that the last session was unusual in several respects and particularly with respect to the control of the Legislature being divided by the two parties—that is to say, with the Republicans controlling the House, and the Democrats controlling the Senate. Some very confusing circumstances and difficulties in coordinating Legislative programs resulted, and perhaps this had considerable effect on the appreciation of the activities of the Idaho State Bar Legislative Advisory Committee, by the Legislators.

The executive committee respectfully submits the following two resolutions for consideration by the 1957 State Bar Convention.

Resolution No. 1

WHEREAS, Many resolutions for Legislative action are adopted on the convention floor of the Idaho State Bar from year to year, without the benefit of thorough briefing and research; and

WHEREAS, as a result many proposals contained in such resolutions during the course of the drafting of the appropriate bills are discovered to be in conflict with existing statutes or for some other reason impracticable or unfeasible;

NOW, THEREFORE, Be It Resolved, That it is hereby declared to be the policy of the Idaho State Bar that when resolutions which are adopted and approved by the Idaho State Bar in convention for appropriate Legislative action on the part of the State Bar Legislative Committee, are found by such committee in the course of preparing the appropriate Legislative bills, to be impracticable or unfeasible, then in that event, the Idaho State Bar Legislative Committee shall submit such findings to the Commissioners of the Idaho State Bar, who may in their discretion direct said committees to withhold the submission of such legislation.

Resolution No. 2

Resolved, that the Idaho State Bar Legislative Advisory Committee be continued for at least one further session of the Idaho State Legislature, but only upon condition that sufficient funds and facilities are available through the Idaho State Bar for necessary and appropriate office space, stenographic services and office supplies.

In conclusion, the undersigned wishes to personally thank Mr. Paul B. Ennis, secretary of the Idaho State Bar, for the assistance he and his office staff rendered during the last Legislative session and particularly for taking over the chairmanship during the illness of the undersigned. I wish also to thank all individual attorneys who assisted the committee, but through oversight may have failed to be mentioned in this report.

Respectfully submitted,

DAVID DOANE,
Chairman, Idaho State Bar Legislative Committee

Report of Committee on Uniform Minimum Fee Schedule

Gentlemen:

As you are aware, our committee work is now in its third year and our project has divided itself into three different phases.

First, we attempted to work with the various Associations over the State in order to make comprehensive surveys and to determine the feeling in a general way toward a uniform minimum fee schedule. This first phase, in essence, involved what may be considered the education phase. We received some idea of the feeling toward schedules and we attempted to convey to the members of the Bar the value of fee schedules, and the fact that there was a very strong upsurge throughout America in favor of adopting minimum fee schedules.

Second, this phase was the actual promotion of the proposed uniform minimum fee schedule on an advisory basis. It was widely distributed and we attempted to encourage discussions and thorough consideration of the same throughout this year. The second year ended in the adoption of such a fee schedule on an advisory basis at last year's annual meeting.

Third, this phase of our work was outlined at the fall meeting of the Board of Commissioners and local Association Presidents and in our memorandum of November 30, 1956, to the various Associations. The work that we outlined for ourselves this year was to attempt to secure the most possible good from our advisory schedule. We proposed to do this by having the local Associations call attention to it in every possible way. First, we suggested that it be made the subject of a meeting of the Associations and possibly that the meetings be built around a debate of the schedule we have, proposed changes that might be suggested in a local area, or on the subject of the advisability of schedules in general. We also suggested that this matter could be placed in the hands of a small committee in each area of each association district, which committee could have

general discussions among themselves and with other members of the Bar in the area, and even go into various offices and discuss not only the question of usage of the uniform schedule, but also go into various other matters with individual lawyers and groups of lawyers such as hourly charges and bookkeeping and other office procedures. In this last respect we particularly recommended urgent attention to the minimum office visit charge.

We wish that we could say that our efforts during this last year have been as fruitful as could possibly be the case. We do hope that we have attempted, to the best of our ability, to accomplish the original objective, which was simply to assist in putting the members of the Bar in a more favorable financial position in the community; that is, to have their net income compare more favorably with others in the community, such as other professional people and also skilled workers. Our original surveys definitely proved that this improvement was direly needed.

Sherm Bellwood, Ray Greene and I have enjoyed this project and certainly wish it every success in the future. We sincerely wish the new committee the greatest of success in this field—we will assist in any way possible to attain such success so that lawyers' income will compare more favorably. There are numerous fundamental questions that still have not been delved into and we hope that someday they will be seriously considered so that our profession will become more rewarding to those who devote their lives to it.

Yours very truly,

Committee on Uniform Minimum Fee Schedule
WM. F. GALLOWAY, Chairman
SHERMAN J. BELLWOOD
RAYMOND T. GREENE

Report of the Committee on Continuing Legal Education

Mr. President, State Bar Commissioners, and Members of the Idaho State Bar:

Your Committee on Continuing Legal Education is sorry to report that we have been without the services of our Chairman, John A. Carver, Jr., since last Jannary when he resigned to take a position in Washington, D.C., with our Idaho Senator, Frank Church. Although we miss John greatly, we do wish him success in his new position.

Carl P. Burke of Boise was appointed to fill the vacancy on the Committee and to serve with Wesley F. Merrill of Pocatello and Thomas R. Walenta of Moscow, who was appointed chairman.

During the past year we have held two successful law institutes in widely separated areas of the state. The first was held in Moscow and the second in Pocatello.

The Second Annnal Idaho Law Institute, jointly sponsored with the College of Law at the University of Idaho, was held in Moscow on October 5 and 6, 1956. The attendance at the institute was excellent as we had lawyers from various portions of the state as well as the entire faculty and upper classmen of the College of Law.

We were pleased with the fine array of speakers and particularly with their excellent preparation and presentation of subject matter. A panel composed of

B. W. Oppenheim, of the Industrial Accident Board, David F. Hart and George A. Greenfield, both of Boise, spoke to the members on various areas of "Workmen's Compensation Practice" on Friday morning. This was followed by an address by Paul S. Boyd, Referee in Bankruptcy, United States District Court for the District of Idaho, on "Bankruptcy Practice" during the afternoon session on Friday. Greek Wells, of Spokane, Wash., concluded the institute on Saturday morning when he spoke on "Patent and Copyright Practice in the Office of the General Practitioner."

All the speakers had prepared and distributed mimeographed copies of their discussions which added materially to the understanding and reception of their talks by the members. Each speaker emphasized the practical aspects of his discussion which added to the "know-how" approach which was emphasized throughout the institute.

The Committee wishes also to express its appreciation to the wives of the Moscow Bar and Law Faculty for their splendid cooperation in entertaining the wives of the members who attended the meeting. The Clearwater Bar was host to the convention at a cocktail hour preceding the banquet on Friday evening. The institute was followed by the Washington State-Idaho football game which was attended by most of the members and their wives.

Plans are in progress for the Third Annual Law Institute to be held tentatively on November 15 and 16, 1957. Dean Stimson and his faculty have been most gracious hosts and it is always a pleasure to work with the College of Law in sponsoring these institutes.

The Annual Spring Institute was held at Pocatello on May 3, 1957, under the supervision of Wesley F. Merrill and J. Blaine Anderson of Blackfoot, Idaho. The subject matter and materials for this program were the same as that held in the fall at Moscow with one exception: John Gunn, Assistant Attorney General, spoke on the "Employment Security Act" in place of Greek Wells, Spokane, Wash., attorney who spoke at Moscow on "Patent and Copyright Practice in the Office of the General Practitioner."

Mr. Merrill reports that the attendance was good and the response to the speakers was equally fine. Entertainment for the wives of visiting lawyers was provided by the wives of the members of the Pocatello Bar.

It is the considered opinion of this Committee and it so recommends that the Idaho State Bar Association continue the law institutes. They supply in part a long-felt need by the lawyers to continue their legal education as well as serving as an instrument of good will throughout the state. We were particularly impressed by the reception afforded by the students of the College of Law to the institute in Moscow.

We welcome suggestions from all the members of the Bar as to subject matter for our institutes as well as improvements in the details of presentation.

Mr. Merrill and Mr. Burke join with me in expressing our appreciation for the loyal support and cooperation extended to the Committee by the Members of the Bar and particularly by Dean Stimson, the Law Commissioners and our Secretary, Paul Ennis.

Sincerely,

THOMAS R. WALENTA,
Chairman, Committee on Continuing Legal Education

REPORT OF THE UNAUTHORIZED PRACTICE COMMITTEE FOR THE YEAR 1956-1957

The Unauthorized Practice Committee is now completing its third year as a permanent standing committee of the Idaho Bar Association and a considerable amount of the activity of the committee still consists of basic organization and negotiation with other associations whose members are engaged in activities closely parallel to activities of the legal profession and which therefore cause the greatest number of cases of the nnauthorized practice of law.

For two years your committee has actively pursned a program designed to arrive at a basic agreement with the realtors of the State of Idaho and considerable progress has been made. The committee approached the problem using the Statement of Principles previously adopted and approved by the American Bar Association as a basis for agreement at the state level with the realtors. Your committee finds that both lawyers and realtors object to parts of these principles and it is apparent that considerable additional effort will be needed before a satisfactory arrangement and agreement with the realtors ean be reached.

Your committee has also approached the Certified Public Accountants of the State of Idaho with the proposal that a joint committee of the Bar Association and the Certified Public Acconntants Association be ereated at the state level to administer, interpret and enforce the Statement of Principles which have already been adopted by both our own organization and the Certified Public Accountants of this state as well as the National agencies of both groups. A resolution placing this proposal before the Association has been prepared and will be submitted at this 1957 convention.

In furtheranee of its organizational work and for the convenience of the members of the Bar in reporting violations of the committee a check list or form of complaint has been approved by the committee. Copies of this form are attached and will be furnished to all members of the Bar as soon as they are available. With this check list properly completed your committee will have adequate information to begin its investigation and subsequent prosecution. The better the information, the more rapid and effective can be the action of the committee and since you are all experts at gathering this type of information the committee requests your cooperation in giving as great detail as possible.

During the year just ended several complaints of a minor character were reported to the committee and disposed of either by personal contact by a committee member with the person involved in the violation or a letter written by the committee informing the violator that any future violations would be sternly dealt with. These measures were taken in cases where it was considered, under all of the circumstances, by the committee not to be advisable to prosecute. One ease before the committee has been recommended for a contempt citation against the offender. This recommendation was approved by the Bar Commissioners and pleadings are being prepared by the committee to carry out this action.

The Public Utilities Commission of Idaho revised its rules of practice and procedure during the last year and in the proposed draft of rules most anyone could appear before the Commission in a representative capacity. Your committee, with the cooperation of the Commissioners, met with Mr. Frank Meek, a member of the Public Utilities Commission and the proposed rules of procedure were altered to properly protect the rights of the public by requiring that only attorneys should practice law before the Commission. This particular instance is the best example

of the need for constant vigilance by members of the Bar to prevent the encroachment upon the practice from unauthorized sources.

Your committee hopes that basic compact agreements will soon be completed among the realtors, accountants, title insurance companies, banks with trust functions, collection agencies and insurance adjusters and that by education and information the unauthorized practice of law will be greatly reduced. It is essential that the public be informed of the importance of qualifications and regulations governing persons performing the duties of an attorney and that the public will suffer tremendous loss if these restrictions are ever relaxed. Your committee, as always, invites your comments and criticisms in the manner in which it has performed its function and also requests that you report violations to them for investigation without delay.

Respectfully submitted,
R. H. COPPLE

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