PROCEEDINGS

OF THE

IDAHO STATE BAR

VOLUME XVI, 1940
SIXTEENTH ANNUAL MEETING

POCATELLO, IDAHO
July 1, 2 and 3

OFFICERS OF THE IDAHO STATE BAR

PAST AND PRESENT COMMISSIONERS

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

OFFICERS, 1940-41
ABE GOFF, President
C. W. THOMAS, Vice-President
SAM S. GRIFFIN, Secretary
300 Capitol Securities Bldg., Boise, Idaho

LOCAL BAR ASSOCIATIONS

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

Clearwater Bar Association (Second and Tenth Districts), J. M. O'Donnell, President; Weldon Schimke, Secretary, Moscow.

Third Judicial District Bar Association, O. W. Worthwine, Boise, President; James Butler, Boise, Secretary.

Fifth District Bar Association, L. H. Anderson, Pocatello, President; F. E. Tydeman, Pocatello, Secretary.

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

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

Ninth District Bar Association, C. A. Bandel, Rigby, President; Mary Smith, Rexburg, Secretary.

Eleventh Judicial District Bar Association, F. C. Scheneberger, Twin Falls, President; T. M. Robertson, Twin Falls, Secretary.

PROCEEDINGS

Vol. XVI

SIXTEENTH ANNUAL MEETING

of the

IDAHO STATE BAR

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WALTER H. ANDERSON, President, Pocatello
SAM S. GRIFFIN, Secretary, Boise

COMMISSIONERS
ABE GOFF, Moscow; C. W. THOMAS, Burley

MONDAY, JULY 1, 1940

(Morning Session)

PRESIDENT ANDERSON: I esteem it a special privilege and pleasure to introduce the best mayor of the best town in the State of Idaho, the Hon. Rohert M. Terrell.

MAYOR TERRELL: Mr. President, ladies and gentlemen: As a rule the average lawyer is not an outstanding religious man. Yet I think I can demonstrate that the average lawyer does live up to certain tenants and teachings of the Holy Writ that should properly classify him as a pretty good religious man. There is a passage in the Bible to the effect that we should love our enemies and do good to them that despitefully use us, and I have noticed how mad lawyers get at one another immediately after some heated contest in court, how they act as though they could brain their adversary, and yet in the course of a day or two, those fellows are fraternizing just as though nothing had ever happened. Even though they might not have the highest regard for another member of the Bar, I have yet to see any lawyer, when one of his brothers gets into difficulty or when he runs into adversity, who won't go out of his way to do him a good turn, rather than to do something mean against him.

Lawyers once in a while get an adverse decision from, and they pay some doubtful compliments to, the court. But after it is all over, and the smoke of battle has cleared, there isn't any member of the Bar who doesn't have the highest degree of respect for the court.

A lawyer is traditionally a leader of thought and a leader in his

community. It should be that way in a government under law, such as ours is. If this be true, it also places a rather high degree of responsibility upon the members of the Bar. And there has never been, in my judgment and in my recollection, a time when that responsibility was greater than it is at the present time.

What can we do to prevent such organizations as Bund and other similar organizations that really are antagonistic to the fundamental principles of this government and yet enjoy under our Constitution the privilege of free speech, free assemblage, and freedom of the press? What can be done within the present framework of the law to prevent the abuse of those privileges that are so freely enjoyed in this country and that are taken advantage of by those peoples whose hearts and souls are not in tune with the fundamental principles of the American government?

While the present picture of the world is not a pleasant one to look at, I have noticed that when things seem dark and when no apparent way seems in sight to provide a way out, this old saying almost always comes to be true, "That the worst never happens." It is expressed again in "Every cloud has a silver lining." There is a natural law of compensation. It has been beautifully expressed in the Holy Writ. "Whatsoever a man soweth, that shall he also reap." It is sometimes expressed, also, as "Everything that goes up must come down"; that things tend to even themselves up. Now, this principle that seems to he running rampant in the world today that might makes right is not, in my judgment, going to forever endure. It cannot endure, for it is out of harmony entirely with the philosophy of him who thinks of the affairs of the universe as in the palm of the hand of a Divine Providence. We can't have any confidence in a Divine Providence if we did not believe that ultimately right will prevail. And notwithstanding the fact that the dictators and the totalitarian forms of government seem to be in the ascendency and that the principles for which they stand are succeeding more thoroughly each day. I can't help but believe that all of the affairs of tbe universe are within the hands of a Divine and beneficient Providence. and in His own way and in His own time, he will see that these folks will reap the fruits of the misguided policies which they are now following, and that the law of compensation will assert itself and the old Ship of State will right itself again.

I say again, in conclusion, and reiterate, that the lawyer, the typical logical thinker, the man that can take a body of facts and say, "This is relevant, this is irrelevant, this tends to prove a certain premise, this does not tend to prove or disprove a given premise," the lawyer who is trained to restrain himself and observe the big and the little things and from a mass of facts reach a rational conclusion. the man that now, particularly, has to become such an important part of this Government under law, the man who is looked up to

in his community as a wise reasoner, a man whose conclusions ought to be and usually are sound on public questions; I say to you that there never was a time in my judgment when that responsibility falls more heavily upon the shoulders of the lawyer or the judge than at the present time.

It is, therefore, natural that we should welcome into this community such a distinguished group of individuals. We hope that your discussion aloug all lines will be fruitful and of a great deal of satisfaction to yourself and of a great deal of good to the community and the State and Nation.

We extend you in the name of the City of Pocatello, therefore, a very hearty and cordial welcome. Thank you.

PRESIDENT ANDERSON: Thank you, Judge Terrell. The next order of business on the program is a summary of the past year, the report of the Secretary, Mr. Griffin.

SECRETARY GRIFFIN: Following the election of a Commissioner for the Western Division in July, 1939, the Board reorganized with Walter H. Anderson, Pocatello, as President, Abe Goff, Moscow, as Vice-President, and C. W. Thomas, Burley, as Commissioner. The term of Mr. Anderson expires with this meeting, and his successor as Commisioner for the Eastern Division is to be elected today by the members of the Bar for that Division.

LOCAL BARS:

In line with established policy several matters have been during the year submitted to the Local Bar Associations for study, and these matters are on the program of this meeting for determination. It is hoped by the Board that the Local Associations bave given mature, serious consideration and reached definite conclusions since these have large influence in determining the course of action of the Bar.

The need of activity of the Local Bar Associations cannot be over-emphasized, because it is only through these Associations that opportunity is given to contact every lawyer in the State, and to every lawyer is given opportunity to express his views. **Every lawyer is a member of his Local Bar Association, and there is a Local Bar Association for every lawyer,** since under authority of a Rule of the Supreme Court, the Board has organized such Associations covering the entire State. Attend your Association meetings even if you cannot attend the annual meetings of the Bar, and you will thereby at least have presented your ideas, objections or suggestions so that your representatives at the annual meeting can vote the sentiment of your Bar.

The problem of voting at annual meetings has been a troublesome one. Originally, each lawyer in attendance at the annual meeting cast his own vote. The result was that decisions were

made by those attending the meetings, and since the members resident near the locality of the meeting usually predominated in number the decision was really only that of the locality.

To overcome this, after the official organization of Local Bars, a Local Bars' Section of the annual meeting was set up, consisting of delegates from Local Bars, who alone could vote. Many members who were able, or interested enough, to attend annual meetings were thus deprived of a vote.

At the annual meeting last year it was directed that a Committee study and suggest a rule to obviate these difficulties and provide for a vote representative of every lawyer in the State. Such Committee presented to the Board such a rule, which after study and after sending the same out to each Local Association for study, was approved by the Board, submitted to the Supreme Court, and the court has requested that this meeting determine upon its adoption. You will note that opportunity to pass upon this rule was given every lawyer through his Local Association, so that each of you here, or not here, today could have expressed your views on it. Four Associations approved the proposed rule: No objections were received; the other Associations have not replied.

In substance the Rule provides that at annual meetings members present constitute a quorum, each having one vote, and minor questions are determined by majority vote.

But upon motions and resolutions relating to, or affecting statutes, Rules of Courts, policy of the Bar or government of Local Associations, each Local Bar Association is entitled to the vote of its numerical membership, cast by its members present at the annual meeting. For instance, if the Fifth District Bar Association has a membership of 75, and 10 members are present, those 10 members cast 75 votes; and likewise with the other Associations.

The Rule further provides that normally all such questions are voted upon at the last day of the annual meeting. The reason for this is so that discussion can be had, and time allowed for decision, prior to the vote. You will note from your programs that all matters are discussed the first two days of this meeting and are again scheduled on the third day for vote. It is believed that this will result in more considered judgment upon the important items of the Bar.

In accordance with the Rule the memberships of the Local Associations, as shown by the records of the Secretary are:

First Judicial District Bar Association	27
Clearwater Bar Association (Second and Tenth Districts)	58
Third Judicial District Bar Association	122
Fifth Judicial District Bar Association (Fifth and Sixth Districts)	75

Seventh Judicial District Bar Association	52
Eighth Judicial District Bar Association	32
Ninth Judicial District Bar Association	52
Eleventh Judicial District Bar Association	78

DISCIPLINE:

Reinstatement after previous suspension was denied in two instances. One reprimand was administered by the Court upon recommendation of the Board after trial. Two suspensions were adjudged by the Court upon recommendation of the Board after trial, and a third has, after trial, been recommended but not yet acted upon by the Court. One trial has been ordered but not yet had. Five complaints were dismissed; one investigation is pending. In one case an attorney admitted in Idaho, but resident elsewhere, was suspended in such latter State. and having endeavored thereafter to practice in an Idaho Court notice was given such Court. In one case of illegal practice by a layman the illegality of such practice was explained and such practice ceased.

EXAMINATIONS:

Two examinations were given, one in December and one in June. Certificates permitting examination were granted to eighteen applicants, denied three. Twenty-five applicants (including repeaters) were examined, of whom eleven passed, one failed, and the papers of thirteen remain to be graded following this meeting.

The matter of formation of a separate Bar Examiners Board is still being studied by the Board, following approval of the principle thereof at the last annual meeting.

MISCELLANEOUS:

The Board has held six meetings during the year. At the direction of the Board the list of Lawyers Directories approved by the Committee of the American Bar Association was sent to every lawyer of the State for his information. Francis Bistline of Pocatello, was requested to draft an Act for establishment of a Legislative Drafting Bureau, as requested by the last annual meeting. and it will be presented to the Bar at this meeting. Information relative to the study for reducing costs of and standardizing examination of abstracts, and report of the Committee on Rule Making Power, were sent to all Local Bar Association officers for presentation to such Associations. The Recommendations Committee, consisting of Paul Hyatt, Lewiston; Kenneth Mackenzie, Idaho Falls; and E. B. Smith, Boise, which is charged with the duty of receiving suggestions for and formulating the program for the meeting, prepared this program, and met with the Board respecting it.

FINANCES AND MEMBERSHIP:

Statement of receipts and expenditures follows:

Appropriation

RECEIPTS (as of June 15, 1940)

Balance July 1, 1939	$4,197.27
License fees collected	4,080.00
Costs collected	33.00
Examination fees collected	252.50
Total	$8,562.77

EXPENDITURES (as of June 15, 1940)

Office expense	$1,474.99
Travel	707.77
Meetings	140.40
Publication 1939 Proceedings	488.65
Examinations	189.73
Discipline	226.19
Audit	75.00
Refunds, duplicate license fees	15.00
Total	$3,317.73
Balance in Fund June 15, 1940	$5,245.34

LICENSED ATTORNEYS:

Northern Division	112
Western Division	239
Eastern Division	123
Non-Resident	23
	497
Judges	22
Total membership Idaho State Bar	519

DEATHS:

The following deaths have been reported since the last meeting:

Richard M. Angel, Fairfield.
W. Orr Chapman, Twin Falls.
Harry L. Fisher, Boise.
Clare S. Hunter, Boise.
Chas. S. Kingsley, Boise.
Charles W. Pomeroy, Pocatello.
Thomas F. Terrell, Pocatello.

PRESIDENT ANDERSON: At this time we should give some consideration to this voting rule, a copy of which has been distributed among you, and ascertain what the pleasure of the convention is with respect to that matter before any question comes up to be voted upon. The rule is contained in the following report:

REPORT OF SPECIAL COMMITTEE ON
LOCAL BAR ASSOCIATIONS

Your Committee recommends as follows:

That Rule 185 be amended by adding subsections (d) and (e), as follows:

(d) At the annnal meeting of the Idaho State Bar members present shall constitute a quorum, each member shall have one vote, and questions (except those provided in subsection (e), shall be determined by majority vote of the vote cast at the time of the taking thereof.

(e) Motions and resolutions relating to, or affecting, statutes of the State of Idaho, Rules of Courts, the policy of the Idaho State Bar, or the government of local har associations shall be determined on the last day of the annual meeting of the Idaho State Bar, unless the Board fix a different day therefor, by the vote of all the members of the Idaho State Bar cast as follows: each local bar association, organized and existing as provided by Rules 186 and 187, shall be entitled to as many votes as there are bona fide residents, members of the Idaho State Bar, within the territorial limits of such association at the time of such annual meeting, and the members of any local present at such annual meeting shall cast the entire vote of the members of such local.

Dated March 8th, 1940.

P. J. Evans
J. W. Graham
Oscar W. Worthwine
Chairman.

The Chair will now reorganize Mr. Oscar Worthwine, the Chairman of the Committee that made this report.

O. W. WORTHWINE: The explanation that the President has made and the consideration that you have given to this rule undoubtedly has informed you what is in it. I think organizations in Idaho have found difficulty in giving proper representation in voting in their state-wide conventions, and the idea behind this rule is this: That at a meeting such as this, when we are voting on important questions of policy, recommending statutory changes or in the rulings of the Supreme Court, the members of the local Bar where the meeting is held should not dominate the meeting. Generally, the plan is that such matters be voted on the last day.

It is not final that all such matters must he voted upon the last day. Generally that is the plan—to have the vote follow two days of discussion. As to the way this thing will work out: members of the Bar present vote according to the number of the members of the Bar in good standing in their Local Bar Association. So the gentleman here from Coeur d'Alene, for example, isn't here alone; his voting strength is determined hy the members of his local Bar.

Concerning instructed delegates, I take it that each man has the right to vote his own way, but if he happens to know the sentiment of his Association, he will, I presume, vote in accordance with that, but he can vote his own vote individually.

Last year on the plan of elected delegates then in force, members who were not delegates discovered on the last day that they had no vote standing. As members of the Bar they should have a right to express themselves, we think. When the time comes to vote, the secretary will call the roll of Local Associations and the members from the Local Bar Association present will get together and decide how they want to vote the whole number of members. I have had many years of experience in similar organizations, and I hope that the Bar accepts this method so that we will give the entire State adequate representation at these meetings.

PAUL HYATT: Under this rule can one Local Bar Association vote as a unit? Here are about five or six or seven of us with fifty-eight votes; Would we divide that equally among us if we are voting differently?

MR. WORTHWINE: It is merely that you vote it as a group. If five of you are here with fifty-two votes, you should divide the vote if there is a difference of opinion among you.

PRESIDENT ANDERSON: As I understand it, the Supreme Court has left it to the members of the Bar whether or not this rule should be adopted. What is your pleasure?

MR. WORTHWINE: I move that this rule be adopted at this time and that the proceedings of this convention be governed by it.

A. C. CORDON seconded the motion.

JESS HAWLEY: I think we should take up this matter of instructed delegates. I move that the rule be amended so that there shall be no power of the Local Bar Association to bind the attorneys of that District, present at the annual meeting, by instruction. It came up at Boise, and there was quite a divergence of opinion there.

O. O. HAGA: I second the motion to amend.

E. V. BOUGHTEN: It seems to me that that would defeat the very purpose of this rule. I understand that my district has thirty-

two members in good standing. We would have a meeting where some of these things here discussed are brought up and the sentiment was quite unanimous, say, in connection with some of them, and the delegates were instructed to vote for or against. Now, to adopt this amendment would deprive my district of its voice in this session. It seems to me that, as stated by our secretary, the purpose is to give every lawyer in the District an opportunity to have his views expressed. I think that this amendment should be defeated.

JESS HAWLEY: There seems to be something plausible about Mr. Boughton's statement. I suggest that basically this Association was founded upon the unit of the individual. No association pays the expenses of the individual attending; no association gives him any power or right. As a member of the Bar, he has a vote. He attends one of these meetings, hears the discussions, and the wisdom of a certain course appeals to him as an individual. He can't take back immediately to the members of his local association the arguments on the question.

At a recent meeting in Boise, report on a matter was given and we passed a resolution; then we wondered what we had done. Some thought it had reference to the rule-making power of the courts. Some had an idea that it had reference to the amendment of the statutes in order to permit the Supreme Court to amend the judicial code. The majority had no proper concept of the report, and not until it had been accepted did we find that we did not understand it. We had hurried to that meeting; in order to get a number out, we made a golf tournament out of it. In addition, as an attraction, they had a dinner to which everyone was late in coming. It lasted until after nine o'clock; everyone wanted to go home. No one wanted to hear any talks.

If we had instructed those individuals who were spending their own time and money to attend here, we would instruct them without any knowledge whatsoever of the question. And those of us here would cast the Third District Bar vote after the Boise meeting under such instructions as were given us there. I very sincerely feel that it is the concensus of opinion that it would be a very poor idea to try to bind the voting power of the District by such means. And I think it was our view point that the individual should give such thought to recommendations presented as they thought should be given and should determine how to vote after a discussion at this meeting, where it is gone into more deeply, thought of more profoundly.

It was with that idea that a number of us propose that there be no such binding charge put on the delegates here. And that, while there may be recommendations that would be factors, the vote of the delegates not be bound.

A. L. MERRILL: I am quite convinced, after hearing Mr. Haw-

ley, that whether or not there should be an instruction given to the delegates depends upon the type of delegates sent. Probably that should not be taken away from the local Bar. Positively, I am against any idea of any instructed delegation. On general principles, I think it is fundamentally wrong, yet at the same time, I am wondering whether or not we might take that right away from the local Bar. I doubt if it is being misused. Let it be just as it is. Let the local Bar Association listen to the arguments, just as we are listening to them today, and then refuse to instruct. I rather expect that twenty times out of twenty-one, say, they will refuse to instruct. But at that, they should have the right of instructing if they want to.

O. O. HAGA: I understand that every lawyer in the State of Idaho is a member of the State Bar and that we appear by virtue of the fact that we have paid our dues and are entitled to practice, not as delegates representing any organization. I don't believe in that stand. I believe that here is the place where the matter should he thrashed out, where information of value is given, and when it is given, and only then, are we able to vote on it intelligently. So I am opposed to instruction of delegates. I don't understand that my Bar Association can instruct me how to vote. I come here not as a delegate, but as a member of the Bar. I think that those who are interested in having the State Bar formulate some rule or some plan as to whether those of us here are delegates, we should not be instructed to go and vote for something we don't believe in. This convention has gone on record as to the rule making power. A local organization, without having gone deeply into the subject, may instruct its organization to vote against the rule-making power. I am in favor of the local delegation submitting to the recommendation of the organization, but I think whoever is here should vote his own vote.

A. L. MORGAN: After having listened to the very clear statement of Mr. Haga, I am prompted to ask if we are here as individual members of the bar, which we are, and not in a representative capacity, then why should an Ada County lawyer, or five or six or eight of them, in the years that are to come, cast 122 votes and an equal number from Kootenai County, the 8th Judicial District, cast thirty-two votes in their individual capacity?

PAUL HYATT: I agree with Mr. Merrill that the local Bars will probably never tell you how to vote. They can't all get here; we can't get them all together. I think that those of us who can come should give expresion to the opinions of those who can't get here. I think we might just as well drop this amendment.

A. L. MORGAN: If the Clearwater Bar wants to instruct the delegation, how are you going to prevent them from doing it? For that reason I am opposed to the amendment because I don't believe that it would be effective in any way. We might pass it but in our county we are going to do as we please about how we will

vote when we get down here.

E. V. BOUGHTEN: In the Kootenai District Bar Association, the situation is slightly different. Upon receipt of the program for the District Association meeting from our secretary, our Bar Association met in the Annual Meeting. The recommendations or suggestions were carefully considered. We had a business session. They did take definite action. Now, it wouldn't make any difference to me whether this amendment carries or not. What action my District would take to bind the representative of that District, I would feel that I should vote as they recommended.

PRESIDENT ANDERSON: Is there anything more to be said, All in favor of the amendment, let it be known by saying "aye". Opposed, "no". The amendment is lost.

Now we come to a consideration of adopting the rule as presented by the committee. All those in favor of adopting the rule, let it be known by saying "aye". Opposed, "no". The ayes have it, and it is adopted.

The next order of the program is the appointment of the canvassing committee for the Eastern Division election: Harry Hanley of Grangeville, S. E. Tydeman of Pocatello, and W. B. Bowler of Boise.

This is the time set apart on our program for what we choose to call the President's Address.

At the end of this convention, I will have come to the end of the sixth year on the Idaho State Bar Commission. This, in a way, is my valediction as a member of our Commission, and by way of farewell, let me say that I am deeply grateful to all of those with whom I have worked in your interest for kindness bestowed upon me and considerations received during all of that time, and I have found every member of the Commission, past and present, including our efficient secretary, to be gentlemen, thoroughly learned, and actuated at all times by the purest motives in reaching all of the conclusions during the time that I have been honored by serving with them. I deem it a pleasure and a privilege to have been permitted to be associated with them.

Today we witness the most internecine cataclysm that has ever transpired upon the face of this earth, and the sad part of the rebaptism of European soil with youthful blood is that it settles not any principle, and vindicates no right; it will not make the world safe for democracy; but is all brought about in the furthering of the ambitions and aspirations of a strutting gasconading house painter and ex-convict, who is drunk with power and insane with ambition.

I ask you to join with me in turning back the pages of history that we may review some of the outrages that were perpetrated

in the Land of the Free during the last World War, in the name of patriotism. We readily recall how little even in this country our constitutional guaranties meant at that time. I myself have seen in the limits of this city some of the grossest outrages perpetrated upon inoffensive men that could be witnessed. I recall a prominont citizen of this city who was seized by some self-styled patriots —who were but little removed from a screecbing, howling mob— and marched to the corner of Main and Center Streets and there forced to kneel and kiss the American Flag; all instigated by an irresponsible person of no standing whatsoever, and of less patriotism. I can now bring to mind a picture of a young man, whose mentality was little above that of moron, who was seized and locked and chained to a light post at the same intersection, and there jeered at, sneered at, and abused. Things like these, and worse, occurred throughout the length and breadth of our land.

I believe that any democracy is able to protect itself in and out of war within and by the law. Patriotism should not be a thinly veiled excuse for the commission of all sorts of outrages. In the name of patriotism Germany has confiscated property, persecuted the Jews, and driven them from their homes, has hurled minatory hyperboles in the faces of the great nations of the world.

I desire to boast not of my stand during that vain war, but I hope I may, with pardonable pride, mention the fact that then I stood where I stand today—squarely for our great Charter of Liberty; I believed then and I believe now that our constitutional rights mean just as much in war as in peace. I did not believe then, I do not believe now, that the greatest document that was indicted by the hand of man is a fair weather charter, that only protects men in peace times, and may be cast upon a midden at the will of any hysterical mob that may be formed at the behest of any irresponsible person who may be a passerby in the street. For that stand I was maligned, abused, discussed, and threatened on the floor of the defense council. I was heralded as a red, if not a pro-German. I was looked npon as such for years thereafter—until a national administration made by so-calIcd radical tendencies appear reactionary.

Shortly after the end of the World War there began a series of attacks on our Government; our Constitution; some of which were more or less veiled. The Kuhns, Bridges, and Crowders were not idle. Even a great chief executive of our nation relegated the constitutional guaranties of liberties to the days of the horse and buggy. It was recognized that before there could be a successful advent of Philip Dru, Administrator, in this nation, the courts must be discredited, and eventually destroyed as an independent functioning branch of our government. An effort to make the Supreme Court of the United States bow to the will of the executive branch of Government will stand out in bold relief on the pages of history as a hlot that time eternal cannot eradicate. Such books as

"Law and the Modern Mind", "Lawless Judges," and "Look at the Law" have all cooperated in the movement to discredit the judiciary.

When I think of the pusillanimous efforts of these and others of the same ilk, I can hear Cicero's imperishable truth echoing down the corridors of time, that

> "Nothing is more ennobling than for us to plainly understand that we are born to justice and that law is instituted not by opinion bnt by nature."

I doubt not that if this country enters the present conflict of carnage, that is crimsoning Enrope's soil with human blood, that the same hysteria will prevade the minds of the people of this country, and there will be many, who, in the interests of some foreign vaunting, vanglorious dictator will seek to set aside and trample underfoot our law and the constitutional protections and safeguards. If there is any class of men in this country that can and should try to maintain the equilibrium of the people, in the times that try men's souls, it is the legal profession; and I believe it is a patriotic duty of every member of the Bar to endeavor to see to it, and use his utmost efforts to bring about a maintenance of law and order, the sustaining of the Constitution, and the granting to everyone, regardless of race, color, creed, or nationality, the protection that the ambit of the Constitution affords.

It is an easy matter for some designing individuals, who would like to see the reins of government of this country in the hands of a dictator to work an entire discard of the Constitution when the people are in that frame of mind.

If the people of this country trample underfoot the mandates of our organic law, that has been vouchafed to us at the incalculable cost of oceans of blood and billions of treasure; if we allow—nay, aid, unwittingly—the passing of the government of the people, by the people, for the people, from the face of the earth; then the immortal Lincoln's eloquent and eternal Shiboleth of liberty and freedom at Gettysburg, will become as a sounding brass or a tinkling cymbal.

If we deny to another his rights under the Constitution; we deny ourselves those same rights, "For they are slaves most base, whose love of right is for themselves and not for all the race."

In my judgment the legal profession has a sacred trust in its hands, and it is largely for the members of the bar to attend that the laws are maintained and the Constitution sustained.

In conclusion, I cannot do hetter than to use the words of the World's greatest emancipator:

"What constitutes the bulwark of our own liberty and independence? It is not our frowning battlements, our bristling seacosts, or

army, and our navy. These are not our reliance against tyranny. All of these may be turned against us without making us weaker for the struggle. Our reliance is in the love of liberty which God has planted in us. Our defense is in the spirit which prizes liberty as the heritage of all men, in all lands, everywhere. Destroy this spirit and you have planted the seeds of despotism at your own doors. Familiarize yourself with the chains of bondage, and you prepare your own limbs to wear them. Accustomed to trample on the rights of others, you have lost the genius of your independence, and become the fit subjects of the first cunning tyrant who raises among you."—Abraham Lincoln.

PRESIDENT ANDERSON: The next matter is the discussion by Mr. W. H. Davidson of Boise of "Uniformity of Title Examinations." Mr. Davidson is chairman of that committee. I will appoint a committee on that subject to listen to this discussion and offer suggestions on Wednesday morning. I am pleased to appoint W. H. Davison of Boise, R. D. Merrill of Pocatello, and E. V. Boughten of Coeur d'Alene. Mr. Davison.

W. H. DAVISON: Last year following the Boise meeting, a committee was appointed on this subject, F. M. Bistline of Pocatello, James H. Hawley of Boise, Ward Arney of Coeur d'Alene and myself. At no time have we been able to get together as a committee, although I have had quite a lot of correspondence with Mr. Arney and have met with Mr. Bistline. A few months ago, James Blaine of Boise was added to the Committee and handled most of the recent correspondence.

We have had to act more as individuals than as a committee. Correspondence with Mr. Arney has done much to work out this proposition of simplifying the examination of abstracts. What was in the minds of the committee has been to try and agree locally in each community on what we can eliminate from the abstracts and still be safe; certain plats, certain additions where we can agree that we can accept those additions. In Boise I don't think there is a plat that is less than 35 years old.

Now, we keep examining those additions time and time again and it does work hardships on the young fellows especially. Generally, we have agreed on practically all of them. The majority of the attorneys in Boise could agree on them as acceptable. It fills the young fellows with fear that if they overlook something back sixty years, somebody else with more experience will turn the title down. Some of the other attorneys are just as bad. They are always actuated by fear. So we have tried to get each community and our District Bars to get together and find out what they can do for their own localities.

It was my privilege to go over into the Seventh District. There they decided on what I think is the proper method. They decided to appoint a committee from each locality and let them work out their own problems. And they have reported.

They are going to save themselves a lot of trouble and their clients a lot of expense in abstract costs if they carry these things out and it is to that end that we are working. Boise, in just the last few days, has passed their own recommendations. I think they are on good lines. I have in my hands a report that has just come from the Ninth District, but came too late to be mimeographed and distributed. It is rather brief; it takes up the Nampa report, and I think a few suggestions of their own. But I think most of you who have read these reports know what we are trying to do; and whatever committee is appointed for this coming year, I think should attempt to carry on to get action in local communities.

It isn't our purpose in Boise to tell you fellows in Pocatello what you shall and what you shall not approve. But on the other hand, if the attorneys in Pocatello agree that they will accept certain tenants, I think that if we are examining one of those abstracts and turn it down, we have a lot of nerve. It will save more of time and expense, and if we don't do something the abstract business will be supplanted by title insurance or some other form.

I have this suggestion of my own. As each community does act, it should be sent to the secretary of the State Bar, and distributed to the secretary of the local Bar Association. If it is a suggestion of new legislation or changes, they would be handled in the same way.

We had many good measures that would be helpful in connection with titles proposed at the late legislature. Mr. Bistline being a member of the legislature can explain those better than I. On the whole, they were all good. So, if members of your committee know your legislators and if you are informed of what we are trying to do, you individually can do something with your representative in the legislature and help get some of these measures through.

ROBERT KERR: A meeting of the Ninth District was held and the consensus of our group was that we were the oneriest bunch of lawyers in the state; we couldn't agree on anything. Our local committee reported as follows:

We agree with the recommendations of the committee of the Seventh Bar Association contained in their report signed by F. A. Hagelin, Frank Estabrook, and George H. Van De Steeg specifically pointed out as follows: Paragraphs numbered (1), (4), (5), (6), (7), (8).

As to paragraph (2), we agree with the recommendation if the individual examiner shall so approve. However, in this regard we believe that the judgment of the individual examiner should prevail.

As to paragraph (3), we believe that title should not be approved upon affidavits but are willing to accept ex parte affidavits re-

garding martial status and affidavits of identity, due precautions being observed to advise clients that in cases where affidavits are accepted the validity of the title depends largely upon the truth of such ex parte affidavits. We do not approve the attaching of affidavits to an abstract of title. If affidavits are to be used in connection with abstracts of title, all affidavits relied upon should be recorded and such recorded documents placed in abstracts under examination.

As to recommendation for legislation which we have approved as aforesaid, we believe that the matter should be handled very carefully, for our experience has been that as a general proposition the legislature is extremely dubious about passing laws which are recommended by lawyers as a group.

Finally, your committee recommends that it is its opinion that in every locality there are peculiar conditions which exist, and that a general rule cannot be adopted by a bar association which would be acceptable to individual examiners in their particular localities . This situation would also exist in case a member of the bar living, we will say for illustration, in Bear Lake County, would be called upon to examine an abstract of title to property situated in Nampa or Coeur d'Alene or Rexhurg even. In the latter city many questions arise relating to special assessment proceedings for local improvements. If carefully prepared laws should be passed by the legislature, no douht some of the things which careful examiners object to, could be eliminated, but the experience of your committee is that non resident attorneys examining for loan companies cause property owners more trouble than local examiners of title.

The chairman of this committee respectfully refers to the paper on the subject prepared by him and delivered at the annual meeting in 1937, found at page 29 of the 1937 proceedings.

Respectfully suhmitted.

OTTO McCUTCHEON, Chairman.

MR. KERR: I might say that this committee's report was not approved in its entirety hy the Bar Association. We can get along pretty well over there, but once in awhile some outside lawyer steps in and won't accept our recommendations. We're not worrying much about the local fellows. It is pretty well understood among ourselves. But we find that a lot of loan companies try to teach us our law. We would like to hear how you fellows can handle this. They won't pay any attention to the Legislature or anything else. For instance, they refused to approve a title for the loan until a claim way back in 1890 was released or quieted.

It is just a practical matter. But the local association was afraid that it couldn't approve the recommendations of the Nampa Bar in regard to legislative proceedings because it was concerned about due process. We were desirous of getting the Ninth Judicial

Bar Association in meeting to approve finally the reported suggestions of the Nampa Bar. Finally, we realized that we couldn't get together on any definite procedure ourselves.

F. M. BISTLINE: The matter was mentioned there both by Mr. Davison and Mr. Kerr with regard to the attitude of the Legislature toward bills pertaining to matters of title; as a member of Legislature during the last several seasons, I'll say this is defense of the Legislature. For the most part, the Legislature is perfectly willing to act favorably upon any recommendation along those lines, if properly presented. There was one bill that came in with regard to affidavits, prepared by a committee of the Boise Bar and passed unanimously hy both houses, and was then vetoed by the Governor. And I understand that the ones who drew the bill asked the Governor to veto it.

In submitting these things, be sure that that is what you want, because the Legislature will, in matters pertaining to our profession, pass the recommendation of the Judiciary Committee of the Houses. I am reminded of a bill prepared by a lawyer and sent in to the Judiciary Committee. In general the import of the bill was that where an action was instituted to quiet title and a favorable judgment entered, any lawyer who refused to approve the title would pay all costs of suit and all damages. I think he was representing the layman's point of view there. This is a matter that I think is of utmost importance to the profession. Some of these outside attorneys, particularly in connection with one of the government agencies, are refusing to accept titles in quiet title action on constructive service until a year after the entering of the decree. Probably most of you have run into that. It seems to me that that could he amended, reducing that to six months or even a shorter time. I think that the legislature might work on that.

E. B. SMITH: In view of the statement made by Mr. Kerr that these reports have not been unanimously adopted by his association, I would recommend to Mr. Kerr that he strike the so-called fear complex feature from the report.

PRESIDENT ANDERSON: There is a sub-division of this same discussion. "Practical plans of Reducing Costs for Standardizing Examinations of Abstracts," and Mr. George H. Van deSteeg of Nampa will present this to you.

MR. VAN deSTEEG: Mr. President, Members of the Bar: We didn't expect that that report would be adopted by the District Bar Association or the State Bar Association when we made it, and personally, I can't go along with that report and couldn't at the time that I signed it. There are questions involved which I think merit a great deal of consideration and careful thought, and there are some there that I think should be refused. I will read that report, although each of you has a mimeographed copy.

In Idaho, to the present time, real property transactions have been generally closed by what is called the lawyer-abstract method, namely, an abstract of title prepared by a duly authorized abstract and title company, which is then examined by a lawyer who writes a letter of opinion thereon.

This method, so far as I know, has given quite general satisfaction until recently, when considerable complaint and dissatisfaction has arisen, so much, in fact, that the Grange endeavored to obtain legislation at the last session of our legislature looking toward State guaranteeing of titles.

Analysis of the dissatisfaction discloses that it stems from the cost almost entirely, not the cost of the examination, but rather the cost of the abstract. Today an abstract complete to any piece of property in Nampa will cost you well over $100.00, as much in many instances as a vacant lot is worth.

If we lawyers are to retain this abstract-title business, and we need to retain it, for the field of legal business instead of expanding with the growth of the nation seems to be gradually contracting, it is up to us to do something about this matter, for if we do not do it, it will be done for us eventually and in such manner that we shall lose the business, probably to a new bureau created in our state government.

The matter apparently is not limited to Idaho alone, for it has been under consideration by the American Bar Association for several years, and very seriously, and along the lines hereinafter suggested.

Now, what can we as lawyers do about it? This question was taken up by the 7th Judicial Bar Association at our meetings last year, with the result that local committees were appointed, one for Nampa, and another for Caldwell. The Nampa Committee, consisting of Mr. F. A. Hagelin, Mr. Frank Estabrook and myself, held several meetings at which we called in other local attorneys, the final outcome of which was a report containing specific recommendations. Presently I will read it in full. Before doing so, I want to say that the report, although signed by each of us on that committee, was not and is not necessarily thereby approved by each of us. Rather, we signed it and submitted, in order to get something before our District Association as a basis for consideration, discussion and eventual action. Well, we succeeded in getting plenty of discussion, argument, and diversity of opinion. And the report is submitted here today, not as something to be approved and adopted as it stands, but primarily as a starting point from which to proceed.

REPORT OF THE NAMPA COMMITTEE

1. We recommend that each transaction in the abstract be examined with reference to the law in force at the time of such transaction.

2. We recommend that the statute of limitations be applied and accorded the proper respect.

3. We recommend that we eliminate all affidavits, except affidavits as to marital status during period 1907 to 1911 and wherever discrepancies appear in the names of grantor and grantee in the chain of title.

4. That the legislature should be requested to pass a law providing that, if a decree recites that due service of process was had upon all defendants, such recital to be conclusive of such fact, and that a copy of the law be included in the abstract in lieu of court proceedings.

5. That the legislature should be requested to validate all decrees of the probate courts prior to a period of five years preceding such validating act. Thereafter court proceedings should be omitted.

6. That the legislature should be required to enact a statute similar to section 15-1121 I. C. A., which act should specifically apply to decrees of distribution and decrees allowing final accounts in probate matters.

7. That the legislature should define the word "heretofore" as used in the short form community probate. Sec. 14-114 I. C. A. "Heretofore" should not require probate proceedings during the period when the law provided that the community property passed to the husband without probate.

8. That the legislature pass a law providing that, after a period of five years from the date of the execution of sheriff's deed on foreclosure sale, the foreclosure proceedings should be conclusively deemed to be regular and correct and thereafter an abstract of such proceedings should not be required.

9. That abstractors should now omit the instruments relating to the action of Eldredge against the Boise-Payette Water Users' Association.

10. That abstractors should merely make reference to the fact that irrigation districts, highway districts and cemetery districts have been formed in the territory where the property covered by the abstract is situated. We can see no need for abstracting the proceedings in connection with such districts.

11. That the abstractor should insert only a brief memorandum of the substance of contracts executed with light and power com-

panies. It is not necessary that these instruments be set forth in full.

12 That in reference to matters peculiar to Nampa and vicinity, we recommend that court proceedings in the following actions he omitted from abstracts:

(a) The estates of John Satterfield and Hascal L. Taylor, deceased.

(b) The estate of Robert Noble, deceased.

(c) The foreclosure proceedings in the suit of Whitbeck vs. Ramsay and Nampa Land and Improvement Co.

(d) The estate of John McKenzie, deceased.

(e) The Guardianship of John A. McKenzie and Myrtle McKenzie, minors.

(f) The Strode estate and the Strode vs. Cox foreclosnre action.

13. We recommend that the following matters be disregarded wherever they appear upon abstracts, for the reason that we deem the same to have become established by lapse of time and the operation of the statute of limitations:

(a) Judgment against Pringle C. Jones, et al.

(b) The action or proceedings whereby the heirs of James C. Evans, deceased, divided the property among themselves without probate.

(c) The transaction whereby R. E. Green, Administrator with the wills annexed of John Satterfield and Hascal L. Taylor, deceased, exchanged certain lands with Robert L. Gibson, Administrator with the will annexed of the estate of John McKenzie, deceased, Maggie L. Gibson, as Guardian of the persons and estates of Myrtle McKenzie and John McKenzie, minors, the children of John McKenzie, deceased, Robert L. Gibson and Maggie L. Gibson, formerly Maggie L. McKenzie, husband and wife.

14. We recommend that, where the owner of property has redeemed the same from foreclosure sale, an abstract of the court proceedings in such action be omitted from abstract.

15. We recommend that abstracts of court proceedings be omitted in all mattere and actions after the expiration of a period of twenty-five (25) years from date of final decree.

16. We recommend that in probate matters, where the property of the estate is located in two or more counties, the abstract of property in the distant counties contain only such instruments

as are required by statute to be recorded in such distant counties.

17. We recommend that the Bar Association designate the specific instruments necessary to be abstrated where abstracts of court proceedings are required as part of the abstract. The instruments to be abstracted in full and those to he only partially abstracted should be designated for the guidance of the abstractor.

18. Short form community probate. If we prepare our decrees so as to have court find specifically the parts required by the Statute and that no transfer tax is due, then omit all proceedings except only the decree from abstracts.

It will be observed at once that these recommendations fall into two classes: those of local application, and those of general application. As to the latter we found great diversity of opinion among ourselves, and these should no doubt be given further careful study.

But as to the matters that are local to Nampa and vicinity we found a complete agreement on the part of our bar. For example, take the matter of the Satterfield and Taylor estates. An abstract comes to me for examination and I find that it shows only a deed from R. E. Green, as Administrator of said estates, executed by him pursuant to confirmation of the sale by the probate court. The full proceedings of said estates are not abstracted. Now I know in advance that those proceedings, if shown, are regular because I have hereunto examined them dozens of times. Then what is the sense in demanding that they be incorporated in the abstract? Why not waive them? Simple because the next examiner of that abstract may require them and then my client comes back to me and raises particular hob with me because I didn't require them. It serves no useful purpose for me to argue with my client that the title is good; that it is unnecessary to comply with the objections raised. Even though I guarantee to defend the title in court, it doesn't help the situation. I am simply in disgrace with my client. Even though the fact of the matter is that the objections raised as to marketability of the title would be kicked out of the window by any district court on a contest, that is of no avail. The line of least resistance is simply to fix things up at the least expense.

And there you have the crux of the whole matter. It is the uncertainty as to what the other examiner is going to do or say that forces us into examining every abstract so as to "construe the same against the title".

And in this respect we lawyers are to blame for the high costs of abstracts, and not the abstracters. In self defense we have become over technical. We have come to treat picayunish irregularities as substantial defects and made then the subject of an objection against the marketability of the title. And we get away with these objections because the line of least resistance forbids taking us into

court and forcing us to make them good.

Now what is the cure, if there is any? What can we do about it? It would seem that if we could establish some sort of uniformity throughout the state, so that we might all of us have some degree of certainty as to what the other fellow was going to say about these title questions arising in every day practice, we ought to get somewhere.

Let us suppose that we lawyers at Nampa arrive at certain specific agreements on specific title questions. That is O. K. among ourselves. But where is our protection against the outside lawyer, whether in Idaho or outside of the State? There isn't any unless we provide it, and how are we to do that?

Let us determine that we, as lawyers, are going to have the conrage of our convictions. Let us made an end to being mere robots and chronic dissenters in these title matters. I think it can be done in this wise.

The place to start is with the local bar in each community. Let the State Bar Association suggest to and request the local bar of every community to appoint a competent committee to make a search of all title matters peculiar to that particular community and vicinity, with a view to ascertaining and agreeing upon matters of title that can be safely eliminated from abstracts, as we have done at Nampa. But these committees might very properly, and should, go farther than we have thus far gone at Nampa. Let such committee examine the basic or fundamental titles. Most likely, up to a certain point in the chain of title, the instruments are common to the whole townsite, or to the specific addition involved. But even to this point there are numerous affidavits purporting to correct errors and irregularities. The local community examiners are perfectly familiar with the title up to this point. Then why not agree to accept it up to that point; agree not to question the title back of that point; waive the entry upon the abstract of these affidavits which are known to be of record? You know the affidavits exist and are of record; you know that they are deemed to satisfy all objections; what is the use of demanding that they be sent forth in the abstract?

Furthermore, in many instances where a tract of land has been platted, and then sold out in lots, there are defects common to the entire tract. They have already been corrected by, in many instances, a multitude of different and separate affidavits, some purporting to cover only a certain lot or lots, and perhaps only up to a certain date. Yet the abstractor sets all of them out upon the abstract. While the persons are still alive and in being who know the facts and can make these affidavits, it would seem possible to prepare one affidavit covering the entire tract and the entire period of time, obviating the entire objection in such single affidavit. File

such blanket affidavit and then adopt a local resolution that in future it will be accepted as satisfactory, and that all other affidavits may be disregarded and eliminated from abstracts.

Then there is the case of a large tract of land which is covered by a general cloud which requires an action to quiet title to remove. If such an action has been properly brought and prosecuted to final judgment and decree as to any part of the tract, why not agree that we will recognize it and accept it as sufficient to obviate the necessity of further action to remove that cloud. In other words, agree to waive it. If there exists a good decree holding that such cloud is merely apparent, and not real, what is the use in obtaining a further decree saying the same thing?

When the local committees have done this work, it is thought that they should make their report and recommendations to their respective District Bar Associations. There the matter should again be carefully considered, and a recommendation made by the District Bar as to each and every matter and thing contained in the report of the local committee, and the whole then forwarded to a committee appointed by the State Bar Association. This committee in turn should make its specific report and recommendations to the State Bar Association, where final approval and adoption should be had.

Once we get the sanction of authority of the State Bar Association, we will have something to stand on. If an objection be made to a title and it is an objection which by resolution of the State Bar Association has been held to be inconsequential, that should be waived, or that does not affect the marketability of the title, we are in position to confront the world. It will give us the necessary authority upon which to make a stand. I venture to say that there will be very few instances where we will find it impossible to obtain a waiver of objections where we can show the objector that the State Bar Association has passed on the matter and by proper action or resolution held it for naught.

Of course, we must also provide for the dissemination and distribution of all these matters thus adopted and resolved to all attorneys within the state and probably to all abstractors. In these matters we should cooperate and consult with our abstractors. In Nampa I have found them only too happy and willing to work with me. For several years in my own practice, I have adopted the policy in cases where I can call for court or probate proceedings, of writing out for the abstracter and designating specifically the instruments I want him to set forth in full, those he need only abstract briefly, and those he need not mention at all. If you don't do that, your abstractor will simply play safe and shoot the whole works, and you pay for it.

Perhaps we should also consult and cooperate with counsel for the Federal Land Bank, and other lending agencies doing business

in Idaho, ascertaining their views on these matters before we finally adopt them.

Now, perhaps you may feel that all this is impracticable to work out among a bunch of men of such divergent views as lawyers have. The answer to that is simply this: It has been done; it is actually being done in some of our States. This program has the sponsorship of the American Bar Association, but being peculiarly a state matter, it is urged that each state bar association get to work on it.

Connecticut commenced in 1936 and has probably advanced farther with it than any other state. But Iowa, Kansas, Arkansas, Florida, New Jersey, Mexico and Texas are now working it out.

In Minnesota the Hennepin County Bar Association got together among themselves after this manner. At each meeting some member gave a prepared talk, supplemented with authorities, on a specific point arising in title examinations. It was then discusssed and fully considered and action taken by resolution. Thereafter, all members of that local bar followed the standard so set by the Association. And the state bar association has adopted that procedure and is now engaged in approving it and making it statewide. If it can be done elsewhere, why not here in Idaho?

It seems to me that we should give this matter the most serious consideration and do something about it. This practice we have fallen into of construing every abstract against the title has become a burden upon the public. How many instances, if any, are we aware which actually resulted in a loss which is traceable directly to these ethereal and ephemeral objections? Personally, I do not know of any. Yet, consider the aggregate cost we force upon the public by our charges for preparing affidavits, the extra recording expense, and the additional abstract expense.

UNIFORM BLANK FORMS

Incidental to the subject under discussion, I feel that it would also serve a useful purose if we were to make a study of our blank forms, with a view to standardizing them. Every printer has his own form. Some of them are needlessly lengthy, thereby increasing the cost of recording and of abstracting. Minnesota has a "Uniform Conveyancing Blanks Act" enacted by its legislature at the behest of the Bar Association. The American Bar Association in 1939 recommended that each state give consideration to this matter.

And we lawyers can be helpful if, in connection with our present conveyances, we will be more careful. Particularly, in respect of marital status, we can obviate the necessity of a future affidavit if we will insert the names of both the husband and wife as the grantees in a deed, or as the case may be, let the deed state the

specific status of the parties, such as a widow, or widower, or divorced husband or wife. One can generally ascertain the facts from the parties and if they be then incorporated in the deed, it will probably obviate a future affidavit to meet an objection.

Finally, the matter of the form of our letters of opinion has also been given some consideration. Each of us uses his own form, or no particular form at all. It has been suggested that it would be better practice if we adopt a uniform form which should cover the following subjects:

DESCRIPTION
An acccurate description of the exact property covered.

EXCLUSIVE OF WATER RIGHTS, etc.
State the facts here as to water rights.

PURPOSE OF THE EXAMINATION
Whether for a loan or an absolute transfer.

RECORD TITLE OWNER.

TAXES AND ASSESSMENTS.

JUDGMENTS OR SIMILAR LIENS.

MORTGAGES.

OBJECTIONS TO THE TITLE.

MARKETABILITY.

It is also thought that the local committee appointed in each community might well serve as an advisory committee, to which questions arising in abstracts might be submitted for purpose of consultation with a view to obtaining uniformity in that community and the adoption of a standard, later to be submitted to and approved by the District Bar, and thereafter by the State Bar Association.

Finally, as to those matters contained in the report above set forth which are of general application and involve legislative action, for one man or one committee to thoroughly study and brief all of them is too much to expect or to ask. Why could not the State Bar submit these singly to different members of the bar throughout the state with the request that they be briefed, and suitable recommendations submitted. Thereafter, such action should be taken by the State Bar as might be deemed proper in respect thereof.

All this is, of course, going to entail considerable work and it will take some time. In Connecticut they have already been at it for over three years, but they have made very satisfactory progress. As lawyers we shall be doing the public a great service if in Idaho we also undertake the work of standardizing the preparation and examination of abstracts.

MR. R. F. FULTON: I am speaking not only as an attorney, but as an abstractor.

As an attorney, I have in the past years, although at the present time I do not do it, made a great many title examinations. We did not always go into it as the attorney does at the present time. We did not require of an abstractor everything that is asked at the present time. That has not been the fault of the attorneys. It results from the fact that all over the State farm loans are made by either the Federal Land Bank or by insurance companies or loan companies, which are operating out of the state.

The examination of the titles in such cases are made by attorneys outside of the State. I find now that the attorneys outside of the State do not pay any attention whatever to what the attorneys of this State may have said in the past in regard to the title. For instance, if a person was negotiating to buy a farm or a farm loan the lawyers, at least in my community, come up against these outside corporations and the attorneys who do not pay any attention to the examinations by an attorney of this state. In fact, I have known instance after instance in which an attorney, knowing this title was good, has recommended that the deal be closed and the outside attorney has turned down that title, and an action to quiet title was requested.

The abstractor is going to put everything in his abstract that he thinks the attorney is going to require. Personally, I can see no reason on earth why probate proceedings and court proceedings twenty-five or thirty years old would have to be incorporated in these abstracts, but the attorneys ask for them and the abstractors will put them in.

Abstracting costs too much. The parties buying these abstracts feel that they are paying too much, and I don't blame them for feeling that way, but they do not see the difficulty which we encounter in the matter. We cannot say, the local attorney cannot say, what's required. They require everything to be shown in the abstract. Probate Proceedings, District Court proceedings of all kinds must be shown in full. All of these matters cannot be remedied by action of our Legislature. I doubt very much whether the Legislature could enact a law which would make an improvement on anything after the expiration of five years, say. And there might be minor errors which could be within anytime of twenty-one years. They would have to be considered. I do not believe that this association could at this meeting, determine anything. I have read the report of the committee, and that is good. But it must be carefully considered. We know that each outside company has its special form of certificate which it requires of an abstractor. I have never seen any two of them which were alike.

They have required a certificate going back and re-certifying to the entire abstract on their form of the certificate, in addition to

the form adopted heretofore in that abstract. Now, I believe that this Association could do something toward preventing the high costs of abstracts in towns and in cities. I do not see how they are going to control the farm loan situation or abstracts for farm property, which is probably what has brought the resolutions about which have been introduced in the Granges all over the State objecting to the costs of abstracts.

We will have to go further into the matter. I believe that the local situation might be controlled but not the general farm loan situation which is what is making the greatest objections all over the State today. Thank you.

PRESIDENT ANDERSON: Mr. Wilbur Campbell of Grangeville desires to read a prepared report submitted by Mr. John W. Cramer of Lewiston who is not here.

MR. CAMPBELL: Pursuant to the suggestion of the committee appointed to check into the matters of simplifying abstracts of title, The Clearwater Bar Association designated the undersigned as a committee to offer, on behalf of our Association, suggestions for the consideration at the Idaho State Bar Meeting at Pocatello. Due to the press of business and the military situation, the undersigned was prevented from personally presenting these matters to the meeting.

The report of the committee makes various suggestions for improvement in abstracts of title. The matter of eliminating various items from the abstract, however, must take into consideration the law with reference to abstractors and abstracts. Section 53-102 I. C. A. as amended makes properly certified abstracts prima facie evidence of the existence of the record of instruments mentioned in the abstract, and that such record is as described in said abstract. The case of Jorgensen vs. McAllister, 34 Ida. 182 discusses the sufficiency of the certificate. The case of Hillock vs. Idaho Title etc. Company, 22 Ida. 440 discusses the character of abstract business. Among other things the Court states that an abstract company duly authorized to transact business and selling abstracts of title thereby represents to purchasers of such abstracts that its employees are competent and qualified to make examinations of the records and that they are expert therein and that such a purchaser may safely rely upon the statements and representations contained in the abstract and the certificate thereto.

It would appear, from these and subsequent cases, that the abstractor is liable on his bond for errors and omissions in the abstract. To make the proposed changes effective, not only would legislation have to be adopted along the line suggested in the report, but the statutes with reference to abstractors would have to be amended to protect the abstractor in the preparation of his abstract. If a decree reciting the due service of process is made conclusive of such fact, then the law should provide that an abstractor need only

abstract the decree. If this matter is borne in mind as legislative changes are made and the abstract law is properly amended, the Bar would find itself in position to use the abstracts, as reduced, as competent evidence in our Courts.

Generally, the suggestions set forth in the report of the 7th District Bar appear to cover the situation with worthwhile suggestions. However, it is felt that a few comments may assist in working out these matters. Referring to number 3 of the report concerning elimination of affidavits, it is suggested that probably the better course would be to adopt a law permitting the explanation of defects in title to be done by affidavit. This would avoid many quiet title suits where the elimination of affidavits explaining discrepancies would require such action with additional cost to the client.

Paragraphs 4, 5, 6 and 8 appear to be in the right direction, except that it should be accompanied by the necesary authorization for an abstractor to eliminate proceedings other than the judgment or decrees.

Iu connection with paragraph 10, it is also suggested that abstracts of tax delinquencies where the same has been redeemed, particularly where this has occurred many years before the date of certificate, should be eliminated. It would appear that the only tax proceedings necessary to be shown were those of recent date where the title is dependent upon a tax title.

Referring to paragraph 14, the abstractor should be protected by statutory authority to eliminate the same.

Paragraph 15 should be supplemented by an exception so that judgments, decrees, orders of sale and orders confirming sale will be shown.

To effect the suggestions in paragraph 17, legislative action will probably be necessary. An abstractor would not be properly protected by including in an abstract only such instruments or parts of instruments as a committee of the Bar may recommend. It is suggested that the legislature be requested to adopt a law authorizing a committee of the Bar to determine what showings shall be necessary in any particular proceeding and that after approval by the District Court, that such recommendations be recorded and that a brief reference thereto be incorporated in the abstract, in lieu of the proceedings or portions thereof that are thereby eliminated.

Respectfully submitted,

JOHN W. CRAMER.

PRESIDENT ANDERSON: Is there any further discussion on this abstract matter? If not, we are adjourned until 2:00.

MONDAY, JULY 1, 1940

(Afternoon Session)

PRESIDENT ANDERSON: The next matter on the program is Schools for Practicing Lawyers. A committee is suggested to be appointed to give this matter some study and report back on the third. On that committee, I name O. O. Haga, Paul Hyatt, and H. B. Thompson.

At this time, we will hear from Mr. O. O. Haga of Boise on schools for practicing lawyers.

O. O. HAGA: Mr. President, Members of the Bar: Schools for practicing lawyers, or law institutes, have become important because of the modernistic drift of the law. The laws which the lawyers of today must interpret and apply are far from being that simple legal system that was for centuries the basis of the Anglo-Saxon law.

Today the client is concerned with a complex and confusing mass of statute law and regulations, directing and regulating substantially every act in our social and economic life. Well does every lawyer know that, to perform his duties properly, he must be in constant touch with the changes in the law as they are made from day to day, with the decisions as they are rendered by many courts, state and federal, and with the rules and regulations of constantly increasing administrative agencies and bureaus created by state and federal law.

It may be interesting to look back to the economiums that we at one time read about the common law.

The learned Hooker, writing of the law of his period, said:

"Her seat is the bosom of God, and her voice the harmony of the world; all things in heaven and earth, do her homage; the very least as feeling her care, and the greatest as not exempted from her power."

BLACKSTONE, Speaking of the law as he knew it, said:

"A science which distinguishes the criterions of right and wrong; which teaches to establish the one, and to prevent, punish, or redress the other; which employs in its theory the noblest faculties of the soul, and exerts in its practice the cardinal virtues of the heart; a science which is universal in its use and extent, accommodated to each individual, yet comprehending the whole community."

And the great BURKE, eulogized it in these words:

"The pride of the human intellect, and the collected wisdom of ages; combining the principles of original justice, with the boundless variety of human concerns."

And a great American law writer said:

"Sage after sage, through a long lapse of time, has paid it the tribute of lofty panegyric. It has not only been said to embody 'the gathered wisdom of a thousand years,' but also to be in sober truth, the perfection of reason."

Since the period to which they referred, momentous changes have taken place in our social and economic life and in the relationship between the citizen and his government. On every hand there seems to be a demand for transition and change. No institution seems too old or venerable to escape reappraisement. These changes call for frequent, if not continuous, mental readjustment by the members of the legal profession, in order to keep up with the new State and Federal legislation.

An important committee of the American Bar Association recently made an extensive survey of the economic condition of the Bar. The survey showed that there was an unfortunate downward trend in the average income of a large part of our profession. This downward trend challenges the best thought of the Bar. Perhaps we have been standing idly by when we should have been alert and concerned. It may be that the loss of business is due in part to the fact that the lawyers have been slow to acquaint themselves with the new legislation and to equip themselves to render to the public the service that the new social order demands.

Whether for political reasons or because of the resistance of the Bar to the innovations in the law, and to new regulatory legislation, there has developed a tendency in the new legislation to set up extensive legal staffs in the new bureaus and new administrative boards. They give advice and information that should be given by the lawyer to his client. The services rendered by the legal staffs of these bureaus and boards encroach upon the legitimate field of the lawyer. The only justification that can properly be urged for giving such service at public expense is the fact that the lawyers do not promptly prepare themselves to advise their clients as to their duties and responsibilities under the new legislation.

The furnishing of such legal service at public expense means more public servants, —more public employees. The system is fundamentally unsound. It is costly to the Government. It adds to the taxes which the general public must pay. Services thus rendered to a few must be paid for by all taxpayers. It is an invasion of the field of the legal profession, comparable to the competition of the Government with private business. I still believe in the soundness of the old principle that legal service should be rendered by the lawyer at the expense of the client who is affected by the particular statute or rule.

It was to meet these new conditions that the American Bar Association undertook the promotion of legal institutes, seminaries, legal clinics, or post-admission schools for the practicing lawyer.

The first institute promoted by the Association was a joint effort with the School of Law of Western Reserve University at Cleveland in July, 1938. It was a legal clinic on the new Federal Rules, which would take effect in September of last year. That institute was a three-day course immediately preceding the convening of the annual meeting of the American Bar Association. It was in the heart of the summer vacation, yet 488 lawyers from 41 states and the District of Columbia enrolled for the course. Those in attendance included leaders of the American Bar and many federal judges.

The occasion naturally attracted much interest. The Rules were important and it was necessary for those practicing in Federal Courts and for the Federal Judges, especially, to become familiar with their provisions. The talent in charge of the institute consisted of members of the Committee who had for nearly four years been engaged in the drafting of the Rules. At the head of the list was the Hon. Wm. D. Mitchell, former Attorney General of the United States, and Chairman of the Committee. He was assisted by Dean Charles E. Clark, then Dean of the Law School of Yale University, now a Judge of the Circuit Court of Appeals of the Second Circuit, and by Mr. Sunderland of the University of Michigan, Major Tolman, Secretary of the Committee, and editor of the American Bar Association Journal, and other distinguished lawyers who were members of the Committee.

This institute was regarded as such an outstanding success that it was followed later that same year by similar institutes in the City of Wasbington, in the City of New York, and in a number of the larger cities in the United States, all given over to the study of the new Federal Rules.

Inspired by the success of these institutes, many Bar Associations proceeded to conduct institutes on other subjects, and the American Bar Association followed by appointing a general committee on Advanced Legal Education, under which sub-committees were set up on Program and Personnel, and on Organization and Development of schools or institutes for members of the Bar.

During the past year upwards of 150 such institutes, schools or lecture courses for practicing lawyers have been held. From a survey of what has been accomplished in this line, we may now draw fairly definite conclusions as to the best procedure, programs, talent, and time for legal institutes.

These necessarily vary with the size of the city, the community, and the nature of the practice in the community in which the institute is held. No institute can be said to have been a success unless attended by a substantial number of the local members of the Bar.

It matters not how fine the program or how distinguished the talent may be, they will avail but little unless the lawyers attend. The program must recognize the needs of the community. What would draw a large attendance in one community, may be an utter failure in another community. The first consideration must be: What will bring the Members of the Bar to the Institute?

I desire to review briefly some of the institutes that have been held during the past year:

WASHINGTON, D. C.

In November the Washington, D. C., Bar arranged for an institute that was attended by approximately 500 lawyers. It was held primarily to consider the Practice and Procedure before Federal Administrative Boards and Bureaus, such as the National Labor Relations Board, Federal Communications Commission, the Wage and Hour Division, Social Security Board, and other boards and bureaus created principally under recent Acts of Congress. The program stressed the How and What, and not the Why, of the new boards and the new legislation. It dealt wholly with practical problems, forms and procedure which the lawyer, who practices before such boards and bureaus, should know.

The speakers, generally, were either a Chief Executive Officer or General Counsel of the boards or bureaus—those who would obviously be most familiar with the law and procedure involved. One speaker from each board gave a practical resume of how business was conducted before it. Another discussed the preparation of the case, the importance of the record, and the practical problems involved in presenting the case and in perfecting an appeal.

Those in charge of the institute were men who had attended many institutes themselves, sometimes as instructors or speakers, and their procedure was planned with care. They adopted the innovation of having a three-man panel appointed in advance from members of the Bar, on each subject to be discussed. That panel was charged with the duty of asking questions of the principal speakers so as to make sure that every point that would be of interest to the practicing lawyer would be brought out and made clear, in the event it was not otherwise fully covered by the speaker or by questions from the floor. That procedure has since been followed in many other places and it is considered as of real value, especially where new subjects, with

which the Bar as a whole is not familiar, are under discussion. The members of the pauel who are responsible for clarifying, by appropriate questions, the points discussed by the speakers must necessarily give some study to the subject under consideration. However, members in the audience should be encouraged to ask questions and to present whenever practicable, concrete cases and obtain information on the particular point or question in which the interrogator is interested.

BOSTON:

In the city of Boston, during the past year, a course of 14 lectures was given under the auspices of the local Bar association. They were given in the evening and at such times as would be most convenient for the attendance of the members of the Bar and it is reported that attendance varied from 400 to 800.

NEW YORK CITY:

In New York City, from July 8 to July 19, this year, courses for practicing lawyers are being given by a non-profit educational institution, of which Harold P. Seligson is director. The Board of Trustees of this institute consists of 24 members of the leading law firms of New York City. This is the third year such an institute is being held.

MICHIGAN:

A somewhat similar but not so extensive a course was given by the University of Michigan in June, this year.

CALIFORNIA:

The Stanford Law Society, in cooperation with a committee of the San Francisco Bar Association, has now, for four consecutive years, given in the City of San Francisco and usually during March, April, May and June, courses of from 10 to 15 lectures. The time approved as most convenient has been Wednesday evenings, from 7:15 or 7:30 to 9:15 or 9:30, with a 10 minute intermission between the hours. A charge of from $2.50 to $5.00 has been made for the course, to cover the incidental expenses incurred. The lecturers have been either members of the Law Faculty or distinguished lawyers who were regarded as experts on the subject which they presented. And the subjects have been of a highly practical nature.

These courses have been highly endorsed by the Chief Justice of California and the President of the American Bar Association.

The State Bar of California, during the past year, sponsored a number of institutes throughout the State, each consisting of 5 lectures, one lecture each evening with from 1 to 2 weeks intervening between the lectures. They were held from 7:00

or 7:30 to 9:00 or 9:30. Tho lecturers were selected by the State Bar Committee. The most outstanding attorneys in the State willingly contributed their services in this work. In some cases the subjects were handled by the judges of the court. The local Bar Associations cooperated in arranging for the meeting and paid the traveling expenses of the lecturers to and from the meetings. No other expenses were incurred.

The Secretary of the State Committee in charge of this work reports that:

"In each area the lecturers have been enthusiastically received and we feel that the lawyers greatly appreciate the efforts of the State Bar to assist them in keeping abreast of the rapidly changing legal panorama."

KANSAS:

The Kansas State Bar Association sponsored during the past year a series of courses covering 17 subjects. That association reports that the following plan has been found most successful.

Convene at 3:00 P. M.

First speaker takes about 45 minutes, followed by round-table discussion, which continues until about 5:00 P. M.

Recess, during which members may relax and become better acquainted.

Dinner at 6:30, with not more than 15 minutes devoted to discussion of Bar Association matters.

This is followed with a 45 minute address by the second speaker, and round-table discussion.

Adjournment at 9:00 P. M.

IOWA:

Iowa has done more than any other state in the matter of bringing legal institutes to the smaller communities. This has been done under the direcion of Burton J. Thompson, who is Chairman of the Sub-committee of the American Bar Association on the Organization and Development of Legal Institutes.

Mr. Thompson is an enthusiastic advocate of such institutes. He also reports that the institute should commence at 3:00 o'clock in the afternoon, continue until 5:00, with recess, then dinner at 6:00. Resume the program at 7:00, and adjourn at 9:00.

BOISE:

The Third District Bar Association of Idaho held an institure on April 10. The subjects for discussion were the Federal Securities Act, the Federal Trust Indenture Act, and Chapter 10 of the Chandler Act, relating to the Reorganization of Corporations.

In this case we were fortunate in securing expert talent without any expense whatsoever to the Bar Association.

These subjects were presented by the Regional Director of the Securities & Exchange Commission in charge of the Northwestern states, headquarters at Seattle; assisted by 2 members of his legal staff, one dealing with bankruptcy matters, and the other with the Trust Indenture Act. The discussion was participated in by an attorney from the Washington office of the General Counsel of the Commission.

The institute was attended by upwards of 60 members of the Third and Seventh Judicial Districts. We followed generally the hours approved by the Kansas and Iowa State Associations.

The Bar of the Third District had another institute on June 14, on the Wage and Hour Law. Again we were successful in having this subject presented by experts without expense to the local bar. The subject was presented by an attorney from the Regional Office of the Wage and Hour Division at San Francisco, and by the Chief Inspector for the Division, with headquarters at Portland.

At both of these institutes question from the floor were invited and the attorneys had the opportunity of presenting practical problems in which they or their clients were interested.

The approved practice, —the one which has proven the most satisfactory, is for the speakers to prepare their talks in advance and prepare abstracts thereof in a lawyer-like manner, with citations of the cases supporting the discussion. These are mimeographed by the association before the meeting and distributed before the address.

The abstracts or briefs are frequently of considerable value to the members in refreshing their recollections of the important points brought out in the discussion.

In this State, I think the Idaho State Bar should appoint a Committee on Advanced Legal Education, to co-operate with District and Local Bar Associations in the development of Legal Institutes. It has been found practicable in other states for the State Bar Association to obtain speakers on subjects which they are especially well qualified to discuss, and to arrange for such speakers to deliver addresses at institutes in a number of districts, but leaving it to the local associations at all times to determine what subjects should be discussed and when the institute should be held.

I recommend that provision be made for the appointment of such

a committee by the Idaho State Bar.

PRESIDENT ANDERSON: Thank you, Mr. Haga. Has anyone else anything to offer respecting the matter under discussion?

The next matter coming up is "Recent Changes and Trends in Constitutional Law by Federal Decisions" to be discussed by Mr. Ray D. Agee of Twin Falls.

MR. AGEE: Mr. President, gentlemen: My subject deals with changes in constitutional interpretation by recent Supreme Court decisions. A reference to the decisions of the last two terms of the Court will disclose that the field is too big to be covered by any one article. I am limiting this discussion to the increase and centralization of governmental power in the Federal Government—particularly in Congress—by these recent decisions. I shall deal primarily with the increase of that power by invasion of the powers reserved to the States by the Constitution.

It is necessary to revert for a moment to the object sought to be accomplished and preserved by the Constitution. The ultimate object of this great document is indelibly written in the Preamble:

> "We, the people of the United States, in order to form a more perfect Union, * * * and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

To secure those blessings, it was the purpose and intent of those adopting the Constitution to establish a fundamental law of the land, which would endure throughout the ages, whereby this country would be governed by laws—not by men. The Constitution was to be a permanent and indestructible gage for the purpose of testing the acts of those who were to be entrusted with governmental powers. If their acts were within the four corners of that instrument, they were to be accepted. If not, they were to be rejected.

Our ancestors knew that government is necessary, and realized that government and freedom are naturally antagonistic; that, in order to have government at all, the people are obliged to surrender some part of their freedom; that government feeds on freedom and to the extent that governmental powers increase, so to that same extent individual freedom must diminish. Experience had taught them that, if the powers of government ever became centralized, whether vested in one, a few, or many, freedom would vanish.

To safeguard against the centralization of governmental powers in either the national or state governments, the powers of government were carefully divided between the two by the Constitution. Certain enumerated powers were delegated to the national government and all other powers were retained to the States and people.

> "The powers not delegated to the United States by the Constitution, nor prohobited by it to the States, are reserved in the states respectively, or the people." (Const. Amend. X).

As a further safeguard against the centralization of power in the national government, the people, by the Constitution, delegated to that government only those powers, which are necessary for the purpose of carrying on the general national government. It was given no general inherent powers. For over 120 years, the powers given to the national government were held to be limited to those specifically delegated to it and those necessarily implied therefrom. Until very recent months, this limitation upon the powers of national government was recognized and applied by the Supreme Court in an unbroken line of decisions. As late as May 18, 1936, in Carter v. Carter Coal Co., 80 L. ed. 1160, the Court said:

> "The proposition, often advanced and as often discredited, that the power of the federal government inherently extends to purposes affecting the nation as a whole with which the states severally cannot deal or cannot adequately deal, and the related notion that Congress, entirely apart from those powers delegated by the Constitution, may enact laws to promote the general welfare, have never been accepted but always definitely rejected by this court. Mr. Justice Story, as early as 1816, laid down the cardinal rule, which has ever since been followed—that the general government 'can claim no powers which are not granted to it by the Constitution, and the powers actually granted, must be such as are expressly given, or by necessary implication.' * * * In the Framers Convention, the proposal to confer a general power akin to that just discussed was included in Mr. Randolph's resolutions, * * * The convention, however, declined to confer on Congress power in such general terms; instead of which it carefully limited the powers which it thought wise to entrust to Congress by specifying them, thereby denying all others not granted expressly or by necessary implication. It made no grant of authority to Congress to legislate substantively for the general welfare. * * *.
>
> The general rule with regard to the respective powers of the national and state governments under the Constitution, is not in doubt. The states were before the Constitution. Those who framed and those who adopted that instrument meant to carve from the general mass of legislative powers, then possessed by the states, only such portions as it was thought wise to confer upon the federal government; and in order that there should be no uncertainty in respect of what was taken and what was left, the national powers of legislation were not aggregated but enumerated—with the result that what was not embraced by the enumeration remained vested in the states without change or impairment."

The powers of government retained to the states are also limited by the Constitution. (Art. 1, Sec. 10).

The Constitution places a further check upon the centralization of national governmental powers in any one department of that government. These powers are carefully distributed among three great co-ordinate departments, —legislative, executive and judicial.

The Constitution thus creates a beautiful mechanism of checks and balances upon governmental power. The State governments are a check upon the national government. The national government is likewise a check upon the States. Neither has the right to invade or supersede the governmental powers of the other. In the national government, which is inherently the strongest, a further check is made upon the exercise of governmental powers by any one department of that government. Each department is made a permanent guard over the other two. Each is limited in its powers. Each is relatively independent of the others. Each is a check and control over the others. No one department of that government is given the power to control the other two. And, as an ultimate check upon all governmental power, whether it be the national government, the state governments, or any department of those governments, by that instrument, the people reserved to themselves the ultimate governmental power, or rein of control. All of this to permanently secure the blessings of liberty to those who adopted the Constitution and their posterity. With all these checks and balances, they could not forsee that a child of their creation—Congress—would at some future time become so all powerful that it would usurp unto itself the control of all governmental powers, including those so carefully reserved to the people.

It must ever be remembered that the Constitution is the instrument of the people—not that of the national government nor that of the States. It is the solemn covenant of the people that liberty and justice must ever prevail. This distribution of governmental power was not incorporated in the Constitution by chance. It was intentionally placed therein for the obvious purpose of keeping the powers of government distributed and foreclosing centralization of governmental power. Our forefathers knew, as we know all too well today, that the centralization of governmental power is the relentless enemy of freedom. It was thought that each of these governmental agencies would be jealous of its powers; that each would carefully protect and preserve its own powers and zealously guard them against invasion by all others; that each would be constantly on guard to prevent all others from straying beyond the limits of the Constitution; and thus liberty and justice would be protected and preserved.

The sacred trust of preserving the liberty of the people, by enforcing the Constitution, was delegated to the judicial department.

In this trust, it has only one duty to perform and that is to test the acts of all other governmental departments by that instrument.

> "There should be no misunderstanding as to the function of this court in such a case. It is sometimes said that the court assumes a power to overrule or control the action of the people's representatives. This is a misconception. The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the government has only one duty, —to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends." (U. S. v. Butler, 80 L. ed. 477).

Whether or not liberty is to endure depends upon the continuous and untiring vigilence of the Courts in enforcing the Constitution. To the extent that the judicial department falters or weakens in its mission, to that same extent the liberty of the people is imperiled. The sacradness of the trust thus conferred upon the judiciary can be no more clearly expressed than in the words of that eminent jurist, John Marshall:

> "Avert, sir, to the duties of a judge. He has to pass between the government and the man whom that government is prosecuting; between the most powerful individual in the community, and the poorest and most unpopular. It is of the last importance that, in the exercise of these duties, he should observe the utmost fairness. Need I press the necessity of this? Does not every man feel that his own personal security and the security of his property depends on that fairness? The Judicial Department comes home in its effect to every man's fireside; it passed on his property, his reputation, his life, his all. Is it not to the last degree important that he should be rendered perfectly and completely independent, with nothing to influence him but God and his conscience?"

Both the framers of the Constitution and those who adopted it recognized that the judicial department of the government was naturally the weakest and that the legislative department was inherently the strongest, and that the former might become dominated by the latter:

> "The Constitution was framed on the fundamental theory

that a larger measure of liberty and justice would be assured hy vesting the three great powers, the legislative, the executive, and the judicial—in separate departments, each relatively independent of the others; and it was recognized that without this independence—if it was not made both real and enduring—the separation would fail of its purpose. All agreed that restraints and checks must be imposed to secure the requisite measure of independence; for otherwise the legislative department, inherently the strongest, might encroach on or even come to dominate the others, and the judicial, naturally the weakest, might be dwarfed and swayed by the other two, especially hy the legislative." (Evans v. Gore).

In order to strengthen the judicial department, the Constitution provides that the national judges shall hold office during their good behavior and that they shall receive for their services, a compensation, which shall not be diminished during their continnance in office. (Const., Art. 3, Sec. 1). It was the purpose, by this provision, to make the judiciary entirely free and independent from control by the legislative department and thus insure strict adherence in the preservation and enforcement of the constitutional provisions.

It is self-evident that, if the recent trend of constitutional construction tends to increase the powers of the national government by invasion or destruction of the powers reserved to the states, then such trend is toward the centralization of power in the national government in contravention of tbe purpose of the Constitution. Each increase of congressional power is an attack upon liberty. Each invasion or destruction of the powers reserved to the states is a hreaking down of one of the checks upon concentration of power. Each concession of power to congress, by the Supreme Court, whether it be to the detriment of the powers reserved to the States, or otherwise, likewise tends to invade the Constitutional guarantee of liberty to the individual. It must always be remembered that government feeds upon liberty and that, as governmental power increases in any particular branch of government, to that same extent the liberty of the individual must diminish. The extent of the danger to liberty is governed only by the limits to which the federal power is permitted to go.

With this thought in mind, I shall now proceed to analyze some of the decisions of the Court, which to me clearly show that the powers of the national government have been so extended, to the detriment of the States, by the recent decisions, that we are rapidly approaching a completely centralized form of National Government, if we have not already reached that state; that, under these decisions, for practical purposes the powers reserved to the States have heen substantially abolished and that now, instead of being independent governments as contemplated by the Constitution, the governmental powers of the States are existing only by sufferance

of the Federal Government. Most of the authorities to which I shall refer involve the power of Congress to regulate interstate commerce. I am not limiting my discussion to this particular field, hut to the broader principle of the increase of power in Congress and the centralization of governmental power in the Federal or National government by the invasion of the powers reserved to the States by the Constitution. I know of no clearer manner of showing this trend than by comparing the decisions of the Supreme Court prior to the year, 1939, with those rendered in that momentous year of the Court.

Prior to the year 1939, it was the decided opinion of the Court that Congress had no power to regulate either manufacture or production within a state; that these matters were purely local and were within the powers reserved to the States; and that, prior to the time these local products actually reached the channels of, or directly affected, interstate commerce, Congress had no power to regulate them or interfere therewith.

In Kidd v. Pearson, 32 L. Ed., 346, decided October 22, 1888, the Supreme Court had under consideration a state statute, which prohibited the manufacture of alcoholic liquors. The manufacturer contended that the liquors were manufactured for the pnrpose of shipping in interstate commerce and not for the purpose of sale within the state, and hence the act was unconstitutional. In determining this question, the Court said:

"No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacturer and commerce. **Manufacture is transformation—the fashioning of raw material into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. * * * If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufacture, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest, and the cotton planter of the South, plant, cultivate and harvest his crop with an eye on the prices at Liverpool, New York and Chicago,** The power being vested in Congress and denied to the States, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these

delicate, multiform, and vital interests—interests which in their nature are, and must be, local in all the details of their successful management. * * *

It was said by Chief Justice Marshall that it is a matter of public history that the **object of vesting in Congress the power to regulate commerce with foreign Nations and among the several States was to insure uniformity of regulation against conflicting and discriminating state legislation.** * * *

This being true, how can it further that object so to interpret the constitutional provision as to place upon Congress the obligation to exercise the supervisory powers just indicated? The demands of such a supervision would require, not uniform legislation generally applicable throughout the United States, but a swarm of statutes only locally applicable and utterly inconsistent. **Any movement toward the establishment of rules of production in this vast country, with its many different climates and opportunities, could only be at the sacrifice of the peculiar advantages of a large part of the localities in it, if not of every one of them. On the other hand, any movement toward the local, detailed and incongruous legislation required by such an interpretation would be about the widest possible departure from the declared object of the clause in question.** * * * **A situation more paralyzing to the State Governments, and more provocative of conflicts between the General Government and the States, and less likely to have been what the framers of the Constitution intended, it would be difficult to imagine."**

This case clearly and succinctly holds that the regulation of manufacturing is a purely local matter within the powers reserved to the states and that the Federal Government has no jurisdiction over it under the powers to that government.

In Schecter v. United States, 79 L. Ed. 1570, decided May 27, 1935, the defendants were convicted of a violation of a Federal Act, regulating hours and wages. The defendants were wholesale poultry slaughterhouse market operators in New York. They purchased great amounts of live poultry and sold it to retailers in New York. The poultry was shipped in from points outside of the state. In holding the Act to be unconstitutional as applied to the defendants, the Court said:

"Were these transactions 'in' interstate commerce? Much is made of the fact that almost all the poultry coming to New York is sent there from other States. But the code provisions, as here applied, do not concern the transportation of the poultry from other States to New York, or the transactions of the commission men or others to whom it is consigned, or the sales made by such consignees to defendants. When defendants had made their purchases, whether at the West Washington Market

in New York City or at the railroad terminals serving the city, or elsewhere, the poultry was trucked to their slaughterhouses in Brooklyn for local disposition. The interstate transportations in relation to that poultry then ended. * * * Neither the slaughtering nor the sales by defendants were transactions in interstate commerce. * * *

In determining how far the Federal Government may go in controlling interstate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle. Direct affects are illustrated by the railroad cases we have cited, as, e. g., * * * the fixing of rates for interstate transportation which unjustly discriminate against interstate commerce. **But where the effect of interstate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of State power.** If the commerce clause were construed to reach all enterprises and transactions which could be said to have indirect effect upon interstate commerce, the Federal authority would embrace practically all the activities of the people **and the authority of the State over its domestic concerns would exist only by sufferance of the Federal Government.** * * *

The question of chief importance relates to the provisions of the Code as to the hours and wages of those employed in defendants' slaughterhouse markets. It is plain that these requirements are imposed in order to govern the details of defendants' management of their local business. **The persons employed in slaughtering and selling in local trade are not employed in interstate commerce. Their hours and wages have no direct relation to interstate commerce.** The question of how many hours these employes should work and what they should be paid differs in no essential respect from similar questions in other local businesses which handle commodities brought into a State and there dealt in as a part of its internal commerce."

In United States v. Butler, 80 L. Ed. 477, decided January 6, 1936, the Supreme Court had under consideration certain provisions of the Agricultural Adjustment Act of 1933. The action involved the right to collect processing taxes on flour. The Supreme Court held the act to be unconstitutional and said:

"Until recently no suggestion of the existence of any such power in the federal government has been advanced. The expressions of the framers of the Constitution, the decisions of this Court interpreting that instrument and the writings of great commentators **will be searched in vain for any suggestion that there exists in the clause under discussion or elsewhere in the**

Constitution, the authority whereby every provision and every fair implification from that instrument may be subverted, the independence of the individual states obliterated, and the United States converted into a central government exercising uncontrolled police power in every state of the Union, superseding all local control regulation of the affairs or concerns of the states.

Hamilton himself, the leading advocate of broad interpretation of the power to tax and to appropriate for the general welfare, never suggested that any power granted by the Constitution could be used for the destruction of local self-government in the states. Story countenances no such doctrine. It seems never to have occurred to them, or to those who have agreed with them that the general welfare of the United States, (which has aptly been termed 'an indestructible Union, composed of indestructible states'), might be served by obliterating the constituent members of the Union. But to this fatal conclusion the doctrine contended for would inevitably lead. And its sole premise is that, though the makers of the Constitution, in erecting the federal government, intended sedulously to limit and define its powers, so as to preserve to the states and the people sovereign power, to be wielded by the states and their citizens and not to be invaded by the United States, they nevertheless by a single clause gave power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed. The argument when seen in its true character and in the light of its inevitable results must be rejected."

In Carter v. Carter Coal Co., 80 L. Ed. 1160, decided May 18, 1936, the case involved the Bituminous Coal Conservation Act. It involved the right of the Federal Government to regulate hours and wages in the coal mining industry. The Court held the act to be unconstitutional and said:

"The determination of the Framers Convention and the ratifying conventions to preserve complete and unimpaired state self-government in all matters not committed to the general government is one of the plainest facts which emerges from the history of their deliberations. And adherence to that determination is incumbent equally upon the federal government and the states. State powers can neither be appropriated on the one hand nor abdicated on the other. * * *

*** * * One who produces or manufactures a commodity, subsequently sold and shipped by him in interstate commerce, whether such sale and shipment were originally intended or not, has engaged in two distinct and separate activities. So far as he produces or manufactures a commodity, his business is purely local. So far as he sells and ships, or contracts to sell and**

ship, the commodity to customers in another state, he engages in interstate commerce. In respect of the former, he is subject only to regulation by the state; in respect of the latter, to regulation only by the Federal government. * * * Production is not commerce; but a step in preparation for commerce. * * *

A consideration of the foregoing, and of many cases which might be added to those already cited, renders inescapable the conclusion that the effect of the labor provisions of the act, including those in respect of minimum wages, wage agreements, collective bargaining, and the Labor Board and its powers, primarily falls upon production and not upon commerce; and confirms the further resulting conclusion that production is a purely local activity."

Let us now turn to that momentous year, 1939, and analyze the decisions of the Court on this same subject matter.

In Mulford v. Smith, 83 L. Ed. 1092, decided April 17, 1939, the Supreme Court had under consideration the Agricultural Adjustment Act of 1938. By that act a certain quota of production of tobacco was apportioned to each farm, and penalties were authorized to be assessed against the anction warehouses for marketing tobacco from a farm in excess of such quota. The court held this act to be constitutional and said:

"This court has recently declared that sales of tobacco by growers through warehousemen to purchasers for removal outside the state constitute interstate commerce. Any rule, such as that embodied in the Act, which is intended to foster, protect and conserve commerce, or to prevent the flow of commerce from working harm to the people of the nation, is within the competence of a Congress. Within these limits the exercise of the power, **the grant being unlimited in its terms,** may lawfully extend to the absolute prohibition of such commerce, **and a fortiori to limitation of the amount of the given commodity which may be transported in such commerce.** The motive of Congress in exerting the power is irrelevant to the validity of the legislation.

The provisions of the Act under review constitute a regulation of interstate and foreign commerce within the competency on Congress under the power delegated to it by the Constitution."

The opinion in this case does not attempt to distinguish it from the previous decisions of the Supreme Court. The rule there announced is a complete and abrupt change from the decided precedents of the court. In 1939 Congress is given the power to regulate the production of crops a purely local enterprise, and the Court has definitely and conclusively changed the rule of constitutional construction, which held that the powers of Congress are limited

to those specifically granted to it and those necessarily implied therefrom, to a rule of construction, which interprets the powers of Congress, under the commerce clause, to be general and unlimited.. It will be noted that the rule of construction now is that Congress has the power to regulate anything, even though local in its nature, which possibly might or could affect interstate commerce. It is no longer necessary that the local enterprise actually affect interstate commerce, or that its products shall have reached the channels of such commerce, to give Congress power to regulate it. It is only necessary that there be a future possibility that the products of the enterprise might affect interstate commerce by increasing or diminishing the amount of such commerce. Can any local enterprise of production or manufacture be pointed out, which does not contemplate the possibility that it will at some time reach the channels of interstate commerce? Obviously not. Can any local enterprise of producton or manufacture be found, which, should it ultimately contemplate finding its way into interstate commerce, would not tend to prevent the flow of commerce by either increasing or diminishing the amount of the product shipped in interstate commerce? The answer is apparent. That my interpretation of this case is correct is made clear by the dissenting opinion of Mr. Justice Butler, which is concurred in by Mr. Justice Sutherland.

In National Labor Relations Bd. v. Fainblatt, 83 L. Ed. 1014, decided April 17, 1939, Fainblatt operated a purely local manufacturing plant in New Jersey. The Lee Sportswear Company in New York shipped cloth to the defendant in New Jersey. The defendant then made garments therefrom. The finished garments were delivered to the Lee Sportswear Company in New Jersey and were shipped by it to various places both in and outside of the State of New Jersey. The question involved was whether or not the defendant was subject to the National Labor Relations Act. In holding that the act was constitutional as applied to the defendant, the Court said:

> "Here interstate commerce was involved in the transportation of the materials to be processed across state lines to the factory of respondents and in the transportation of the finished product to points outside of the state for distribution to purchasers and ultimate consumers. **Whether shipments were made directly to respondents, as the Board found, or to a representative of Lee Sportswear at the factory, as respondents contend, is immaterial.** It was not any the less interstate commerce because the transportation did not begin or end with the transfer of title of the merchandise transported. * * * Transportation alone across state lines is commerce within the constitutional control of the national government and subject to the regulatory power of Congress. * * *
>
> It is no longer open to question that the manufacturer who regularly ships his product in interstate commerce is subject to the authority conferred on the Board with respect to unfair labor practices whenever such practices on his part have led or tend to lead to labor disputes which threaten to obstruct his shipments. * * * We cannot say, other things being equal, that the tendency differs in kind, quantity or effect merely because the merchandise which the manufacturer ships, instead of being his own, is that of the consignee or his customers in other states. In either case commerce is in danger of being obstructed in the same way and to the same extent."

Again no attempt is made to distinguish the principles, if any, of this case from those of previous decisions. Here, Congress is given power to regulate wages, hours and labor in a purely local manufacturing plant—a power which prior to 1939, by the Constitution, was vested solely in the States. It is difficult to follow the reasoning of the Court in this case. It is argued that the transaction is in interstate commerce. Fainblatt's plant was located in New Jersey. The goods were shipped to him by the Lee Sportswear Company from outside of the State. They were taken from him at his plant by the Lee Sportswear Company and were again shipped outside of the State. It is true that the goods were shipped in interstate commerce. By whom? The Lee Sportswear Company. But it was not a defendant in the case. The only thing the defendant did was to manufacture the goods after they were received by him. He sent none of his goods over a state border. He sent no employees of his across a state line. Everything he did was within the State of New Jersey. The only possible manner that anything, which was done in the defendant's plant, could affect interstate commerce was that on account of labor trouble there would be a lesser quantity of merchandise to ship in interstate commerce. The same line of reasoning would apply to every field of local production. Does not the farmer of Idaho raise his potatoes and wheat with an eye on the Chicago Markets? Does he not contemplate that his products may be shipped into another state? Would not labor troubles in his fields tend to lessen the amount of his farm products for shipment in interstate commerce? Would not the dissatisfaction of his single employee subject him to the regulations of Congress? The effect of this decision is made clear by the dissenting opinion of Mr. Justice McReynolds, wherein it is said:

> "The Labor Board claims jurisdiction in respect of employment at this establishment upon the theory that the material and garments move in interstate commerce; that disapproved labor practices there may lead to disputes; that these may cause a strike; **that this may reduce the factory output; that because of such reduction less goods may move across the state lines; and thus there may come about interference with the free flow of commerce between the states which Congress has power to regulate. So, it is said, to prevent this possible result Congress**

may control the relationship between the employer and those employed. Also, that the size of the establishment's normal output is of minor or no importance. If the plant presently employed only one woman who stitched one skirt during each week which the owner regnlarly accepted and sent to another state, congressional power would extend to the enterprise, according to tbe logic of the Court's opinion.

Manifestly if such attenuated reasoning—possibly massed upon probability—suffices, Congress may regulate wages, hours, output, prices, etc., whenever any product of employed labor is intended to pass beyond state lines—possibly if consumed next door. Producers of potatoes in Maine, peanuts in Virginia, cotton in Georgia, minerals in Colorado, wheat in Dakota, oranges in California, and thousands of small local enterprises become subject to national direction through a Board.

Of course, no such result was intended by those who framed the Constitution. If the possibility of this had been declared the Constitution could not have heen adopted. So construed, the power to regulate interstate commerce brings within the ambit of federal control most if not all activities of the nation; subjects states to the will of Congress; and permits disruption of our federated system. * * *

The doctrine approved in Kidd v. Pearson, 128 U. S. 1 32 L. ed. 346, 9 S. Ct. 2 Inters. Com. Rep. 232, has been often applied. It was the recognized view of this Court for more than a hundred years. * * *

The present decision and the reasoning offered to support it will inevitably intensify bewilderment. The resulting curtailment of the independence reserved to the states and the tremendous enlargement of federal power denote the serious impairment of the very foundation of our federated system. Perhaps the change of direction, no longer capable of concealment, will give potency to the effort of those who apparently hope to end a system of government found inhospitable to their ultimate designs."

For over a hundred years, it was the decided opinion of the Supreme Court that Congress had no power, under the guise of the interstate commerce clause, the taxing power, or otherwise, to control purely local enterprises. As late as 1936, Congress had no power to regulate either local manufacture or production. Three short years later, Congress had the power to regulate both. During this interval, there had been no amendment of the Constitution conferring additional powers upon Congress in this respect. The ominous portent, suggested in Kidd v. Pearson, in 1888, has now become a concluded fact.

An analysis of these decisions of the Court in that fatal year of 1939, which are only a few of the many of like import will disclose that numerous powers, which had therefore consistently been denied to Congress, have now become within the ambit of Federal control, and the conclusion is inescapable: That the commerce clause of the Constitution is now construed to reach all enterprises and transactions which could he said to have either a direct or an indirect effect upon interstate commerce; that the Federal authority now embraces practically all the activities of the people; that the state powers over their domestic affairs have been appropriated by the National Government; that the authority of the State over its domestic concerns now exists only by sufferance of the Federal Government; that the states are little more than geographical subdivisions of the nation; that Congress has invaded the States' jurisdiction and has become a parliament of the whole people, subject to no restrictions save such as are self-imposed; and that for all practical purposes we now have a completely centralized form of government, vested solely in Congress.

By these recent decisions of the Supreme Court, one safeguard of that liberty, guaranteed by the Constitution, namely, the powers of government reserved to the States, has been eradicated and appropriated by Congress. This has been accomplished, through the sanction of another safeguard of liberty—that department of government, which we endowed with the preservation of the constitutional guarantees—the Supreme Court.

At the time of the decision in the Carter Coal Company case, on May 18, 1936, the Supreme Court was valiantly fighting our cause and was fighting a first step of an attempt of Congress to obliterate the powers reserved to the States, being apprehensive that the first step might possibly lead to a journey which might end in finding States' powers so despoiled that the States would be little more than political subdivisions of the nation. Note the language of that renowned scholar and jurist, Mr. Justice Sutherland:

> "Every journey to a forbidden end begins with the first step; and the danger of such a step by the federal government in the direction of taking over the powers of the states is that the end of the journey may find the states so despoiled of their powers, or—what may amount to the same thing—so relieved of responsibilities which possession of powers necessarily enjoins, as to reduce them to little more than geographical subdivisions of the national domain. It is safe to say if, when the Constitution was under consideration, had it been thought that any such danger lurked hehind its plain words, it would never have been ratified."

In that fateful and momentous year of 1939, that one step had been taken, but that one step was both Alpha and Omega—the first and last. Under these recent decisions, the States have been thus so despoiled of their powers. They are now little more than geographical subdivisions of the nation. What was feared in 1936,

had become a decided fact in 1939.

For more than 150 years, Congress launched attack upon attack against the liberty of the people, by trying to usurp unto itself the powers reserved to the States by the Constitution. For more than a century and a half, the Supreme Court holstered by the knowledge of the sacredness of its trust—that of protecting the liberty of the people, by preventing centralization of power—valiantly repulsed each successive attack. In 1939, Congress succeeded in snbjugating the citadel of the liberty of the people. How was this accomplished? Was it by the Supreme Court—naturally the weakest department of government—giving up a hopeless struggle against overwhelming opposing forces—Congress, inherently the strongest department? Was it by the placing of men who were pledged to the designs of Congress, within the ranks of the Court? Was it by honest men, with a mistaken but implicit trust in Congress, being elevated to the Supreme Court? Was it the result of the desires of the people for a complete change in our form of government? Was it a combination of all these? Each of you, being learned in the law and knowing what the Constitution means to you as an individual citizen, can answer these questions to your own satisfaction. Each member of the Supreme Court, being answerable only to God and his conscience, can answer them. I have answered them for myself, but I do not deem it either fitting or proper that I should attempt to impose my answers upon you.

That this abrupt and complete shift in so-called Constitutional Doctrines is of the utmost importance to the people is self-evident. I believe, as the men who adopted the Constitution believed, that the primary and most important function of that instrument is to protect the rights and liberty of the people. Under our system, government is the instrumentality of the people—not the people the instrumentality of government.

I am apprehensive of what the future may hold for that liberty under this most recent construction of the Constitution. It is my firm conviction that the producers, manufacturers and other men of affairs can run thoir own private businesses without the supervision or control of the Federal Government, and that liberty cannot exist side by side with such supervision and control. To show that this apprehension is real, it is only necessary to mention a few of the enterprises which the National Government is now supervising, regulating and controlling. It regulates local banking, local production, local manufacture and practically every other local activity. It determines the wages of men engaged in local enterprises and fixes the hours of their employment. It tells the local farmer what crop he may plant and what part thereof he may market. It is in open competition with many individuals in purely local, private enterprises, such as, banking and electric power. In fact it is difficult to point out any single business enterprise, which is not regulated or controlled by that government.

Is such regulation, supervision and control compatible with the liberty of the people? Is it within the objects of our national government to tell the farmers of this country what crops they may plant and what part thereof they may market? Is it within the objects of our national government to make contracts between the local employer and employee? Is it within the objects of our national government to regulate purely private businesses, when such private affairs nowise interfere with the governing of the nation? Is it within the objects of our national government to compete with private individuals in purely local, private business activities? It is obvious that such matters were never contemplated to be within the province of that government, under the Constitution, by the men who framed that document, and the people who adopted it. It is likewise apparent that, under these decisions, they are now within the powers of that government by the accomplished designs of Congress.

Lay these regulations, supervisions and controls side by side with the blessings of liberty, which were intended to be secured by the Constitution, and endeavor to cover the present powers of the National Government and the liberty of the people with that great document. You will find strange bed-fellows. As the Constitution was once interpreted, it covered and protected that liberty. As it is now construed, its frayed remnants afford scant protection indeed.

Where will it all end? What is to become of those vaunted liberties, which have made this country the envy of the people of every nation? The first step has been taken to that forbidden end—that end which can only mean a totalitarian form of government, with powers vested solely in Congress, subject to no control save those self-imposed.

Can we depend upon Congress to put self-imposed restraints upon this invasion of our individual liberty? Let us for a moment reflect upon that vast multitude of governmental regulations, controls and competitions, which Congress has thrust upon us during the past decade, under the TVA, AAA, FHA, NLRB, SEC and innumerable other Congressional acts, departments and boards and add to them those which previously existed. Search through the history on Congress and you will search in vain for an indication of any such restraint, which has been by it self-imposed. Can a single instance be found where Congress, once having gained a foothold in any particular field of endeavor, has ever relinquished that hold? Can a single instance be found in which any board, bureau, department, regulation or power, once established or acquired by Congress, has ever been by it reduced or abolished? The records indubitably show that Congress, once given a power, retains it to the bitter end—never reducing it, but ever adding upon. In the face of its record, it is apparent that Congress cannot be trusted to curb its powers or those of the national government.

It is further self-evident that the only power which can stop this trend is the Courts. They, alone, can restore the Constitution to the purposes intended by those who framed it and those who adopted it. Having the utmost faith in the Courts and, knowing that within their province lies the protection of our liberty and the liberty of our posterity, I needs must turn to the Supreme Court and say: "Quo Vadis?"—"Whither goeth thou?" For I know that, as the liberty of the people is protected by that Court, it will be preserved and, as that liberty is invaded with the sanction of that Court, it will diminish.

PRESIDENT ANDERSON: The next matter on the program is "An Idaho Bar Journal," a committee report. However, before receiving that report. I wish to appoint as a committee to go into the matter and give it some study and report back on July 3rd, the following: Dean Howard, Secretary Griffin, and Mr. Tway.

MR. TWAY: Mr. President, members of the Bar: Our report is divided into four parts for the better presentation to this meeting. The report covers a survey of a representative group of lawyers and gives their opinions on this matter with particular reference as to whether or not they want such a publication as is proposed and whether or not they would contribute articles to same. The report covers a statement of the University of Idaho, College of Law ,and just what that institution could contribute in the way of financial aid, faculty supervision, and article contributions. The report covers the appropriate and/or estimated costs of such a publication, together with a statement of financing such a publication. This report covers the recommendations of the committee.

Part One

Your committee before proceeding with the matter referred to it made a comprehensive survey to determine whether or not the members of the Idaho State Bar really wanted a Law Journal published by the Idaho State Bar. In making this survey it was decided to contact the members of the Bar residing in Idaho Falls, Idaho, as representative of the attorneys throughout the State. The survey was limited to this group due to shortness of time, slightness of expense, and primarily due to the fact that it was felt that the results obtained would be representative of the opinions of lawyers throughout the State of Idaho.

The basis of the survey was upon the following questions which were propounded to each of twenty selected members of the Idaho Falls Bar:

1. Do you favor the Idaho State Bar publishing a quarterly or semi-annual Law Journel?

2 Would you be willing to contribute articles to such a Law Journal if it were published.

3. Would you be willing that the Idaho State Bar appropriate sufficient money for such a publication?

4. Should the Idaho State Bar discontinue the publication of its annual proceedings and substitute in lieu thereof a Law Journal which would be a combination report and Journal?

Of the twenty attorneys surveyed eight (8) answered question number one (1) in the affirmative, six (6) in the negative, five (5) that it made no difference, and one (1) had no opinion on the subject.

With refenrence to question number two (2) fifteen (15) attorneys answered in the affirmative, four (4) in the negative, and one (1) was undecided.

With reference to question number two (2) fifteen (15) attorneys answered in the affirmative, six (6) in the negative, and one was undecided.

With reference to question number four (4) eleven (11) answered in the affirmative, six (6) negative, and three (3) were undecided or ventured no opinion.

An analysis of the answers to the questions propounded would seem to indicate that while there is no overwhelming majority of the members of the surveyed group in favor of such a publication that there is some demand for such a publication. If, however, the answers to question number one (1) are analyzed in connection with the answers to question number two (2) we find that three fourths of the members of the bar contacted would favor such a publication as they are apparently willing to contribute articles to same. And likewise considering the answers to questions three (3) and four (4) we find that a majority of the members of the bar contacted were favorable toward such a publication. The answers to the fourth (4th) question would seem to indicate that a majority of the members surveyed favored the combined publication of the annual meeting reports and a law journal.

Part Two

Your committee wishes to thank Dean Pendleton Howard of the University of Idaho, College of Law, for his kind service, expression of opinion, and help in this matter. Rather than to bore you with superfluous statements your committee is incorporating herein the letter received from Dean Howard which sets forth the position of the College of Law of our State University with reference to the publication of a Law Journal. The letter is as follows:

"I have your letter of June 1 regarding the feasibility of the Idaho State Bar publishing a law journal. In order to answer your query it is perhaps in order to refer briefly to the history of the Idaho Law Journal, which was published by the College

of Law during the years 1931, 1932, and 1933. I served as editor-in-chief of this publication and am therefore thoroughly familiar with the problems and difficulties involved in putting out a legal periodical in this state. Our publication, it was generally agreed, set a high standard of excellence and contained many articles of interest and profit to lawyers, along with comments on legal topics, notes on recent cases and book reviews. It was well received and highly commended both by members of the profession and by other law schools throughout the country. In my judgment this is the only type of legal periodical worth publishing. The journal came out quarterly and the subscription price was $2.50 annually.

The College of Law was forced to discontinue publication of this journal at the end of three years for financial reasons. Wo found that while some members of the Idaho Bar were sufficiently interested in the publication to become subscribers, a considerable number were not. In the light of our three years' experience, we reluctantly reached the conclusion that the only feasible plan by which a state law journal could be made to pay its way would be to have the subscription price of $2.50 taken out of the annual lawyer's license fee and allocated for such purpose. This plan, which is adopted in some states, would make every lawyer in the state a subscriber to the journal. This proposal was presented to the commissioners of the State Bar, but they felt that the necessary funds could not be spared at that time and that there probably would be considerable objection from lawyers to their money being used in this way. As already indicated, the publication of the journal was thereupon suspended.

There is another factor which must be mentioned. The publication of a law journal is a job involving an enormous amount of work. We have four full-time teachers on our law faculty at the present time. This, as you know, is an absolute minimum under the rules of the Association of American Law Schools, of which we are a member, and means that we have to give a number of our courses in alternate years. Our curriculum now includes many courses which were not offered when we published the Idaho Law Journal. The result is that our staff have a considerably heavier teaching burden than they had at that time. In order to assume responsibility for the publication of a Law Journal we would need a fifth full-time teacher. Necessary adjustments could then be made in the teaching schedules of faculty members for the purpose of permitting each one of them to assume his share of the added burden of work. I am bound to say, much to my regret, that I see no present prospect for such an increase in our teaching personnel.

Let me summarize. I fully realize the value of a Law Journal. I feel assured that it would be of interest and benefit to the

members of the bar and that the preparaton of comments and case notes would constitute valuable training for our students. It would also tend to bring the College of Law into closer contact with the members of the bar—a result which is always desirable. The College of Law would be glad to undertake the job if it could be assured of a subsidy along the lines indicated above and if it could secure an additional full-time member of its teaching staff.

You asked if the College of Law could give any financial aid to this project. I regret to have to say that it is of course utterly impossible for us to do so. Our operating budget for the current biennium was drastically curtailed, and we now have barely enough funds to get along on.

Sincerely yours,

(Signed) PENDLETON HOWARD, Dean."

Your committee feels that the letter of Dean Howard needs no summarization as it sets forth clearly the situation as presented to the college of law and is a statement of a man who knows just the amount of work and worry connected with such a publication.

Part Three

Your committee after investigation has found that a majority of legal publications of the type under discussion are published and/or sponsored by Law Colleges or Universities. Your committee further finds that various State Bar Associations including California, Massachusetts, Ohio, Illinois, and various other states publish Law Quarterlies or Bulletins which contain articles contributed by members of the bar, case comments by law students, and announcements pertaining to the business of the Association.

Part Four

Your Committee after due investigation has found that this association can produce a 32 page bulletin (6" x 9") quarterly for each of an approximate 550 members of this bar, exclusive of editorial costs, for a sum of $1.50 per member per year. We make no estimate with reference to editorial costs.

It has been suggested to your committee that a portion of the recent increase in the annual Lawyer's license fee could be diverted to such a publication. Our survey indicates a majority of the group surveyed would favor an appropriation by this association for the publication of such a law journal.

Summary

Your Committee finds as follows with refereuce to the Idaho State Bar publishing a Law Journal:

1. That of the representative group of lawyers surveyed a slight majority are in favor of this association sponsoring the publication of some sort of legal periodical.

2. That of the group surveyed a three-fourths majority would be willing to contribute articles for publication.

3. That a majority of those attorneys surveyed would favor this association making an appropriation to defray the expenses of such a publication.

4. That a majority of the group surveyed would favor combining the publication of the annual proceedings of this meeting with a law journal to be published periodically.

5. That the College of Law of the University of Idaho would be willing to undertake the job of supervising the publication of such a law journal provided the Idaho State Bar would subsidize such a publication in sufficient amount to defray the expenses of same and provided further the College of Law could obtain one more full time instructor for its teaching staff.

6. That a majority of legal publications of the type proposed are sponsored by law colleges but that a number are published by various state bar associations.

7. That a quarterly law journal or bulletin would be the proper type to publish.

8. That a quarterly bulletin or journal could be published at a cost of approximately $1.50 per member of the Idaho State Bar per year, exclusive of editorial costs, provided each and every member of the Idaho State Bar were a subscriber.

RECOMMENDATIONS

Your committee recommends that this matter be referred to Dean Pendleton Howard of the University of Idaho, College of Law, for further study for the coming year, provided it should be the opinion of this meeting that the bar should favor the publication of such a journal and provided the Bar would be willing to subsidize the University of Idaho in sufficient amount to defray the cost of publication and distribution of such a journal. It being the intention of this committee that Dean Howard would report at the next annual meeting of the Idaho State Bar the result of his study and a definite plan for the publication of such a journal should be submitted at that time.

PRESIDENT ANDERSON: Before any action is taken, or any action is called for to be taken, upon the report of the committee, we have upon the program a discussion of this matter by Dean Howard.

DEAN PENDLETON HOWARD: The letter which Mr. Tway has just read to you stated the position of the College of Law of the University of Idaho with respect to the publication of this journal.

I might say, however, that at the time the former Journal was published there were three issues of the Journal, plus one issue devoted to the proceedings of the Bar. The Journal was aided by the fact that we of the Law School, the Editorial Board, were assisted also by a group of law students who contributed case notes and comments, and devoted much time to this work. With respect to the matter of financial support, at the time the Journal was published, 1931, 1932, 1933, there was a maximum of about 150 subscribers from the Idaho Bar. There are approximately 500 practicing lawyers at the present time. Only about 150 were interested enough to subscribe to the Journal. But we had a good deal of trouble keeping those subscribers paid up. We found that at the end of the third year, there were less than 100 paid subscribers from the lawyers of Idaho. And so we came to the conclusion that we couldn't continue the publication of the Journal unless we could have better financial support from the Bar.

I doubt very much if a publication which is worth anything can be put out for the sum of $1.50 a year. Our charge was $2.50 a year, and we were running into debt. Printing costs are higher now than they were when the Idaho Law Journal was published and despite some of the splendid conclusions reached by the Committee with respect to the number of contributions from the members of the Bar, I should like to say that in the light of my experience those statements must be minimized. When they are asked to get the articles on paper and turn it in, you will find that the pressure of business will always be too great for them to have the article forthcoming in time for publication.

I think that a Journal might be put out along the lines indicated in my letter. If the sum of $2.50 a year were allowed for the purpose, that would amout to around $1,200.00. A Journal could be published under substantially the same arrangement as the Idaho Law Journal, but I doubt if it could be published for any less money than that. The College of Law would be very eager to cooperate in this venture, provided we can get an additional member for our faculty, but I feel that it would be virtually impossible for us to assume the responsibility of this publication unless we can secure an additional staff member. As indicated in my letter, we give more courses in the law school at the present time than we did then, and the teaching load of the members of the faculty is considerably higher than in most standard law schools.

PRESIDENT ANDERSON: Since we have appointed a committee to give this matter some further consideration, I will leave the report of this committee to the committee I have just mentioned.

PRESIDENT ANDERSON: The next matter coming up for consideration is suggestions and recommendations to the Idaho State Bar by delegates or representatives of the local Bars. Before proceeding with that matter, I will appoint a committee to give consideration to the discussions that may arise; E. B. Smith, Paul Eimers, and W. C. Loofburrow.

I believe the best way is to call the roll of the local Bars and see if each one, as called, has any suggestions or recommendations to make.

The first one on the program is Shoshone County Bar Association, First Judicial District. Have they a representative here with any suggestions or recommendations? It appears not.

This next is the Clearwater Bar Association, Second and Tenth Judicial Districts. Mr. Paul Hyatt has the floor.

MR. HYATT: I have been asked by the Clearwater Bar Association to present a few recommendations. These are all on Legislative matters. The following was voted on, and we were asked to present it and ask that it be referred to the Legislative Committee and if approved, to be introduced at the next session of the Legislature.

The Clearwater Bar Association suggests and recommends to the Idaho State Bar:

I.

That the legislative committee be appointed to meet as early as possible before the opening of the 1941 Session of the Idaho State Legislature to draft legislation approved by the Idaho State Bar at this meeting, and that such legislation when drafted be referred to legislative committees in each local bar association, so that such local committees may interview the members of the State legislature from the areas represented by such associations, to explain and obtain support for such legislation before the opening of the session of the legislature, and that such proposed legislation be introduced in the opening days of the session so that the delays and failures heretofore experienced may be avoided.

II.

That this meeting of the Idaho State Bar approve and refer to the legislative committee for drafting and introduction at the next session of the legislature in the manner above outlined, legislation providing as follows:

(1) That writs of attachment levied on real and personal property shall cease to be a lieu thereon after five (5) years from the date of the levy, unless the same be renewed by issuance and levy of another writ of attachment.

(2) That sales of real property and mining property in decedents' estates and in guardianship proceedings may be by written bond, contract, lease with option to purchase, option to purchase, or title retaining contract in addition to sales for cash or on credit evidenced by note and secured by a mortgage, as provided in House Bill No. 273 introduced at the Twenty-fifth Session by the Judiciary Committee, and further validating all previous sales and contracts made in decedents' estates in such ways where the same have been confirmed by the court having jurisdiction of the estate in which the sale or contract was made.

(3) Repealing Section 12-1835 I. C. A., and enactment of any other legislation to make guardianship sales uniform as to practice and procedure with decedents' estates.

(4) That additions be made to the Collection Agency Code to make unlawful and prohibit the following practices by collection agencies, as well as to prohibit such practices by others who engage in such practice and claim not to be collection agencies:

1. To publicly publish or distribute, or cause to be published or distributed, any list of debtors commonly known as "deadbeat lists," or to threaten to do so, or to publish the names of any debtors under a purported sale of the same, or to offer publicly or advertise publicly a sale of any claims assigned to or held by it for collection;

2. To misrepresent the terms of the Collectors' listing contract or the commissions chargeable thereunder;

3. To solicit claims for collection under any ambiguous or deceptive contract or one that provides for a docket, listing-filing or tracing fee or similar charges;

4. To advertise for sale or threaten to advertise for sale any claim as a means of trying to enforce payment thereof;

5. To furnish or offer to furnish legal advice or perform or advertise, legal services, or to represent or advertise in any way that the licensee, or any of its officers or employees, is competent to do so;

6. Unless an attorney at law admitted to practice in the courts of the State of Idaho, to prepare any pleadings, summons or other papers or any papers, which attorneys only are authorized to prepare, for filing in any court, or to file or handle in whole or in part any suit in any of the courts of this State on any claim taken by, or assigned to, such licensee for collection, unless represented in all steps in the filing and handling of such suits by an attorney at law licensed to practice in this State; PROVIDED, HOWEVER, that this shall not apply to actions by a licensee in the small claims department of Justice Courts, on claims to which it has taken legal title for purpose of collection;

7. To communicate with others in the name of an attorney or upon the stationery of an attorney, or any stationary or paper with an attorney's name engraved or printed thereon;

8. In dealing with debtors to sign, circulate, employ, use, exhibit, send or serve any instrument or paper simulating, or intended to simulate, or purporting to be a form of court complaint or judicial process, notice, writ or summons, or sheriff's notice, or to be any form of paper, instrument or notice pertaining to any judicial or court proceedings;

9. To demand or obtain in any manner a share of the proper compensation for services performed by an attorney in collecting a claim, irrespective of whether or not the licensee may have previously attempted collection thereof;

10. To operate under more than one name, unless licensed so to do;

11. To use or employ the services of any Justice of the Peace, Probate Judge, Constable, Sheriff, or any officer or person authorized to serve any legal paper, in connection with the collection of a claim, for compensation contingent upon collection being made;

12. To use any stationary which has printed thereon such slogans as "Suits Instituted," "We sue when necessary," "Wages garnished," or slogans of a similar nature, or any statement to the effect that the licensee attaches property, or institutes garnishments, or court procedure, or will cause any of the same to be instituted;

(5) Validating all acknowledgements although containing substantial defects in form after three years from the acknowledgement.

(6) Amending the Constitution to abolish Probate Courts and place all probate and guardianship matters in the District Court with necessary legislation to provide for the Clerk of the District Court as Court Commissioner to handle uncontested matters.

(7) Increasing the civil jurisdiction of Justice Courts to $500.00.

MR. HYATT: The wording of these isn't the way it would be in the Law, but it is the general idea we had in mind.

PRESIDENT ANDERSON: Third District Bar Association, have you any suggestions or complaints?

O. W. WORTHWINE: I think we made enough this morning.

PRESDENT ANDERSON: Fifth District Bar Association.

P. J. EVANS: I was appointed by our local Bar Association to present some ideas to this State Association Meeting.

About four years ago, at Idaho Falls, I was appointed Chairman of the Local Bar Section and I haven't even been able to get out of that job since. They abandoned the organization a year ago at Boise, but they left me still acting in that capacity. I am like Mohammed's ghost, suspended between heaven and earth, with no function to perform. I hereby resign that position.

In accordance with that work, we were organized for the purpose of trying to devise some means of making the State Bar function more effectively. You know, our State Bar doesn't amount to a great deal in the opinion of lots of us. Very few take any interest in it, and after we pass all these resolutions and go home, we straightway proceed to forget them for another year. I thought over the matter and discussed it with a number of the boys of our local Association and with other local Associations, and we felt that if the State Bar was ever going to become a living effective organization that would really serve the interests of the members of the legal profession in the State of Idaho, we would have to devise some way of making the local Bar Association function.

As it stands now, there is no requirement in the rules of the State Bar requiring the Local Bar Associations to hold any meetings, and we have no "Clearing House," in order to advise the local Bar Associations just what the other associations in the State are doing or what matters they are interested in, with the result that those of us coming to these associations, come with very little knowledge of what is the thought of the lawyers of the other associations. The result is that we can't take any intelligent action on the various proposals that are submitted to our State Convention. In the last meeting of our local Bar Association, we adopted a resolution providing, among other things, as follows: That each local Bar Association should be required to meet at least four times a year, once each quarter. That the local Bar Association should be required to function and that a report of each of these quarterly meetings of the local Bar Association should be sent in to the secretary of the State Bar, who should send a copy of that report to all of the other local Bar Associations in the State, so that they may be advised of what the other associations are doing and have an opportunity to discuss them and make contributions to the suggestions under consideration.

Some of the local Bar Associations are functioning very well, and now are doing some good work. Notably, the Eleventh District Bar has some very good matters under consideration. The Third District Bar Association, I understand, does some exceedingly good work. But down here, we don't have the least idea of what those active associations are doing or what topics they are interested in.

Each local Bar Association should be correlated and brought in contact with the others and all be advised of what each is doing.

If we would do something like that, those matters would then be thoroughly understood by the members of each of the individual Bar Associations. The matters discussed would be of very material importance to the members of the profession and of interest to the members of the local Bar Associations. Give them something they can set their teeth into, something of interest to them. Unless we can get local Associations to functioning and discussing the matters of importance to the members of the profession, we might just as well forget the whole thing and take this money that we are now spending for license fees and turn it over to Dean Howard to publish a law journal.

There was another thing—we decided to recommend to this State Bar that any resolution that any association or individual desires to present to the State Convention should be filed with the Secretary of the State Bar at least thirty days prior to the date of the Bar meeting. Copies of that resolution shonld be sent out to the local associations so that they would have an opportunity before the meeting of the State Bar to discuss and consider these various resolutions. Only by doing so, I feel, can we have intelligent action upon those resolutions. Unless we discuss them, unless we understand them and have an opportunity of analyzing them, we cannot vote intelligently upon them. And unless we vote intelligently, we might just as well not vote at all.

PRESIDENT ANDERSON: The Seventh District Bar Association.

FRANK KIBLER: The Seventh District has no specific recommendations, but I would like to point out for the benefit of Mr. Evans that we do have an outstanding organization that is comparable even to the Third District Bar at Boise.

PRESIDENT ANDERSON: The Eighth District Bar Association.

E. V. BOUGHTEN: The Eighth Judicial Bar recommends that the meeting in the future be at a later date. We found it practically impossible for our members to attend, as early as the 1st of July.

PRESIDENT ANDERSON: The Ninth District Bar Association.

ROBERT KERR: C. A. Bandel elected president of the Ninth Judicial Bar, must have been delayed. He may plan to file a report with the Commission in writing.

PRESIDENT ANDERSON: Now for the Eleventh District Bar Association, composed of the Fourth and Eleventh Judicial Districts.

J. R. KEENAN: There are two resolutions of the Bar Association of the Eleventh District.

"That the Legislature of the State of Idaho is hereby requested and urged to adopt legislation providing that a judicial decree ordering the payment of alimony, or money for the support and maintenance of a spouse or children, when docketed, shall not constitute a lien upon the real property of the judgment debtor, unless the judicial decree ordering the payment of alimony, or money for the support and maintenance of a spouse or children shall by its terms specifically create such a lien."

"That the Legislature of the State of Idaho is hereby requested and urged, by new legislation or by amendment to the provisions of Section 31-907, Idaho Code Annotated, 1932, to define and make specific the force and effect of conveyances between husband and wife and of conveyances between both spouces and either of them where the conveyances contain no specific statement of the intention of the grantors as to whether the conveyance is one of gift, or is one conveying real property for the sole and separate use of the grantee, or is one conveying real property to the grantee as the latter's sole and separate property.

Among suggestions for the simplification of abstracts and the examination of titles considered by a Nampa bar committee was the advocating that the legislature pass a statute making five year old probate court decrees unassailable for any reason.

Such a statute would be patchwork legislation, and would not thoroughly serve the purpose of condensing abstracts as not every probate court decree is five years old. On the newer estates the necessity, if any, for showing probate proceedings in the abstract would still exist.

It seems that in some states letters testamentary are granted forthwith on petition of the executor, on the production of the will, without notice. The following would extend that same idea to intestate estates, along these lines:

The suggested new statute law would provide as follows:

On and after the fifth calendar day after the day of the death of a decedent, the party seeking appointment as executor or administrator shall present in court his petition for letters, and if there be a will, the will shall accompany the petition and the petition be proved through the witness to the will.

The court shall forthwith hear the petition, without notice of any kind, and make an order according to the proof, directing letters to issue on the filing of bond in the sum fixed by the court. When bond is filed, letters are issued by clerk of the court.

On the issuance of letters the executor or administrator publishes a notice stating in brief language the facts showing the jurisdiction of the court, the appointment of the party as executor or administrator, a direction to creditors to present their claims at the office of the probate judge, and the further langnage that after the last day of publication of the notice every person interested in the estate of the decedent, either as heir, devisee, legatee,

creditor or taxing body not filing objection in writing as provided by statute is conclusively deemed to have admitted the jurisdiction of the court over the estate, the right of executor or administrator to appointment, and the regularity, propriety and rightfulness of every order entered or to be entered in the course of the probate.

Pending publication, the powers of executor or administrator are emergency only, in other words the powers of a special administrator under the present statutes.

After publication his powers become the usual ones.

When a petition for any action by the court (other than the initiating appointment) is received, no notice of any kind is posted or published, but there is a statutory time of waiting, which time must elapse before the order may be made. During that time parties objecting may file their written objections. If no objections are made, the court, at the expiration of the waiting period, makes such order as the evidence requires. Setting of the time for hearing is done by endorsement on the petition, in the simplest language possible.

The executor may be required to furnish copies of accounts, etc. and to give notice of the filing of any petition in the course of the probate, but that is his personal duty only, not jurisdictional to the order, and failure to comply merely makes him liable on his bond.

The court shall keep posted at the Court Room a pending calendar of business which shall give a brief note of the petitions and other matters to be acted upon by the court in the succeeding two weeks, which calendar shall be revised daily. The keeping of such calendar is a duty personal to the probate judge and not jurisdictional.

The general idea behind this proposition is that if we can publish one notice, and by that one publication bring everyone interested into the proceeding, enter either their consent as if by default to every step taken to which objection is not made, all we need show, in most estates, in any abstract is the proof of publication of such a notice plus the court decrees, whether of distribution or confirmation of sale.

This suggestion transfers to the probate of estates some extra publication costs, and might not result in any net saving in case of intestate estates with but one piece of real property. There should be a shortening of the abstract and a net saving where there is more than one parcel of real property involved. It does away with the posting of notices except where sales are concerned and saves time and stationary.

PRESIDENT ANDERSON: The suggestions of the District Bar Associations will be referred to the committee of Messrs. Smith, Elmers, and Loofburrow.

The next order of business is the report of the Election Canvassing Committee for the Eastern Division.

W. B. BOWLER: There were sixty-eigth envelopes turned over to the committee containing ballots for the election of the Commissioner for the Eastern Division. Three were held invalid because of the failure of the endorsement of the envelope, required by the voting laws.

Of the sixty-five, L. E. Glennon received thirty-eight votes and O. R. Baum twenty-seven.

PRESIDENT ANDERSON: In view of the report of the committee, Mr. L. E. Glennon is declared the duly elected Commissioner for the Eastern Division for the next three years. I will appoint Mr. Bistline, Mr. Loufborrow, and Mr. Thompson to escort the new commissioner to the front, and we will hear a speech. Gentlemen of the Bar—the new Commissioner.

(Applause).

L. E. GLENNON: Mr. President, gentlemen of the Bar; I want to express my appreciation of the confidence you have shown in me, and I hope that you will not have occasion to regret it. I consider it an honor to serve in this capacity, and I am going to do the best I can. If I have an opportunity to promote the interests of the Bar in this capacity, I shall certainly advance them to the utmost.

I start in here with no personal motives to serve, with no animosity toward any member of the Bar, except the GUY at this meeting who got away with my hat! It is the only one I have, and I need it!

Seriously, gentlemen, I hope that I may be of some substantial service to the Bar in the next three years. I thank you.

JESS HAWLEY: I move the appointment of a committee of eleven members of the Bar, one from each local Bar, three at large, to investigate the economic status of the Bar, to report recommendations thereon and allied suggestions to our next annual meeting, and that a committee for the same purpose be appointed by the President of each local Bar; that the Commission make such appropriation as in its judgment is necessary for the carrying out of this purpose.

As a body, we have always seemed to feel quite altruistic and unselfish. Witness our efforts to reduce our fees in the matter of foreclosure. We are quite patriotic; witness our condemnation of the New Deal and its treatment of individual rights, and its setting aside of State rights. But I feel that we rather ignore a practical

aspect, and that's the economic status of the Bar. You know the soil grows more sterile each year, at least for the past seven years it is true. Surely, we have noticed the encroachment by National Boards and State Boards on what should be matters within the purview of our profession, and there are other causes.

The soil is fertilized at these meetings, but we need much more than that. I really think that we should seriously consider what can he done, what should be done, with reference to the field of legal endeavor. It is a subject that was touched upon five years ago by Mr. Eberle of Boise. He merely gave us an idea, only described that which was in the minds of a great many of us, hut nothing was done.

I think that a real study of the possibilities of the legal profession, and methods of bringing about better compensation for us who have spent years in our profession should be made.

It is a practical situation that confronts us, and we ought to investigate it thoroughly. We have such a wide scattering of members. With some initial checking up, at the next meeting we can really discuss a subject that probably will be of much more practical value than any we have discussed here or that we have talked of for many years.

A. L. MERRILL: I second the motion. It strikes a real thought. Whether or not I am right, I don't know, but I am personally very optimistic about the future of the legal profession. While we may think that at the present time there are trends that are detrimental to the interests of the lawyer, yet at the same time we are faced with economic and political difficulties that are certainly going to call forth the best talent of the future, and I am one of those who believe that the thing the lawyers of today ought to do is to study carefully these trends and to prepare themselves to advise younger men to prepare to meet the real and general tasks of the future. If a committee will study along that line, it will be of wonderful help, and I say not only with optimism, but with a firm conviction that the Bar of America is to play an increasingly important part in America's future.

PRESIDENT ANDERSON: May I inquire, Mr. Hawley, how that Committee was to be appointed? By the new president?

JESS HAWLEY: I think the present president knows the members of the Bar. I had an idea that the president now acting would make the appointment.

PRESIDENT ANDERSON: All in favor of Mr. Hawley's motion say "aye." Opposed, "no". The "ayes" have it and it is so ordered. I'll confer with the next president, having a pretty good idea who he is, and appoint the committee before we adjourn.

I am requested to announce that all visiting ladies meet with

our Ladies' Committee, Mrs. Ralph H. Jones, Chairwoman, on the mezzanine floor of the Bannock tomorrow at 12:45 o'clock P. M. for luncheon, and all of the local members' wives are requested to participate. Will those of you who have your bosses with you, see that she is duly informed?

Is there anything else to come before the meeting today? If not, then, we adjourn until tomorrow at 9:30.

TUESDAY MORNING, JULY 2, 1940

(Morning Session)

PRESIDENT ANDERSON: The first order of business this morning is a committee report on "Procedure to Effect Court Rule Making Power in Idaho," and we will appoint a committee to consider that matter and report back tomorrow, consisting of O. W. Worthwine, Francis Bistline and A. L. Morgan.

In the absence of Mr. Edwin Snow of Boise, Chairman of this Committee, who was to present this report. I call upon Mr. A. L. Merrill of the Committee.

A. L. MERRILL: Mr. Chairman, I doubt if the report needs to be read. I assume that the report was read by all when it was submitted to the local Bars, so I will sketch it briefly and read the conclusions.

In the first place, let me clarify one thought that I found has troubled some of the local Bar Associations. This report is not a report as to whether or not the rule making power should be vested in the Supreme Court. That matter has been passed upon by the Bar twice. This committee was appointed to investigate Idaho constitutional and statutory provisions and those of the other states to determine what procedure can be had in Idaho, and how. We are first of all concerned with Article Five, Section Thirteen of the Constitution, which provides "The legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a coordinate department of the government; but the legislature shall provide a proper system of appeals and regulate by law, when necessary, the methods of proceeding in the exercise of their powers of all the courts below the Supreme Court, so far as the same may be done without conflict with this constitution." The point in this provision that had to be thoroughly considered is whether or not in the face of that Constitutional provision, without cooperation action by the legislature, the Supreme Court could regulate the procedure of the District Courts.

The committee came to the conclusion, after an examination of the constitutional provisions of the other states—only one, North

Carolina, is even similar to Idaho on this point—that this could not be done, but we suggest the following:

There are clearly three methods by which, under the Idaho Constitution, the power to make rules covering procedure in the lower courts could be vested in the Supreme Court;

First: if an appropriate amendment were submitted and adopted similar to those employed in the Constitutions of Michigan, Nebraska or Texas, such authority would definitely and permanently be vested in the Supreme Court.

In view of the provisions of Section 13, Article 5, of the Constitution, it is not felt that the permanent power to make such rules could be vested in the Court in any other way. Your committee does not recommend a constitutional amendment at this time. The unanimous expression of the members is that harmonious cooperative action of the Court and Legislature can otherwise effect the desired result.

Second: the Legislature can be asked to enact a law similar in substance to that enacted in Arizona, delegating to the Supreme Court the power to prescribe rules of procedure in the lower courts.

I may interpose here to say that under the Arizona theory, there is a delegation of powers by the Legislature to the Supreme Court, and we find a number of cases which recognize that power to delegate, in matters of this kind.

However, the committee suggests a third alternative; tbe Legislature could be asked to enact a law similar to the Federal Statute, delegating to the Supreme Court power to prescribe the rules of procedure for the lower courts, which rules shall be submitted to the Legislature, to become effective at some fixed time unless the Legislature shall in the meantime refuse the rules so enacted and approved by the Supreme Court.

Your committee recommends the adoption of either the second or third method, and we were slightly in favor of the third method.

PRESIDENT ANDERSON: The report will be referred to the committee that has just been appointed to report back tomorrow. Any suggestions to offer with respect to this matter?

W. H. WITTY: I'd like to inquire if the legislature should delegate to the Supreme Court rule making power, why the committee thought it necessary or advisable that the Court promulgate the rule and then refer them to the Legislature.

A. L. MERRILL: The second method for the delegation of power did not call for re-submitting the matter to the legislature. The third method suggested involved that point, in order to avoid some Constitutional questions that have arisen where the Legislature has attempted to delegate its power. The matter of reference, then,

to the Legislature, was not connected with the delegations of power to the Supreme Court. It was for the purpose of avoiding any Constitutional objections.

WILLIAM M. MORGAN: Why did your committee decide against submitting this matter for Constitutional amendment? If you recognize in the Legislature the power to make rules for court procedure, which you do there, and which the Constitution also does, when necessary, you also recognize the power, then, of the Legislature to change that. There is a tendency in the Legislature to legislate everything they can think about—some things even that they don't think about.

Unless that is written into the Constitution and made a power, the Legislature will be constantly shaping laws which may be in conflict with one another.

A. L. MERRILL: The reason that we did not favor a constitutional amendment was because we were afraid that it wouldn't carry.

It is the desire on the part of the Bar to take from the Legislature the power to prescribe those rules and give it to the courts, and we are wondering if the people—the voters generally—would understand it, and we are afraid they would not. Therefore, we suggest these alternative methods as reflected in some of the decisions cited in the report. The criticism you suggest is ever apparent—it is present right now, because the Legislature can change the rules of procedure. But we thought that there might be a cooperative action of the two departments of the government and that it might be able to be done without the difficulty you suggest.

ROBERT M. KERR: There are a number of the attorneys who are of the opinion that the Supreme Court has that power now, even under the rather ambiguous section of the Constitution, that being a natural and inherent power of the courts. One suggestion was made that perhaps we might ask the legislature to acknowledge that power in the court, to eliminate the uncertainty.

A. L. MERRILL: That is in essence suggestion Two—it is really a delegation of power. The report discusses whether the inherent power is in a court to make rules and regulations.

JUDGE MORGAN: Did your committee give consideration to this question? If this is a legislative function—providing rules for the Court—may it delegate?

MR. MERRILL: We did. We think it is very doubtful and that's why we feel that recommendation number three is superior to two.

JUDGE MORGAN: Are you having mimeographed copies of your report made?

SECRETARY GRIFFIN: They were sent out to each of the local Bars.

JUDGE MORGAN: I have given this matter considerable thought and it has seemed to me that it is a matter of doubtful propriety for the Supreme Court to make rules for the District Court. District Courts should be as a body self-governing. I am wondering if our constitutional procedure does not provide for that? It says that the Legislature shall provide—when necessary—the procedure in all courts below the Supreme Court. We must give every word in the Constitution weight, if we can find weight to give it. It apparently was carefully drafted.

What does it mean, then, when it says, "and regulate when necessary?"

It simply means it is necessary to regulate the procedure in the District Courts when your District Courts themselves have not regulated it as a body. In other words, when can the Legislature function with respect to the courts below the Supreme Court. We have sixteen District Judges and eleven Judicial Districts and eleven different sets of rules in effect. Until the District Courts themselves get together and provide a code of rules for District Courts, it appears to me that it would be necessary for the Legislature to provide the rules of procedure in the District Courts.

Can the Court determine the District Court proceedings, if they desire, as has been done for Federal proceedings, and very successfully done? But if your committee did not consider the proposition that we already have the constitutional power, if we will avail ourselves of it, I believe that the Supreme Court could get together upon the matter and decide the thing.

MR. MERRILL: We, of course, have the opinion in 39 Idaho 788-495; the state constitution commits to the legislature the duty of providing the method of procedure in all courts below the Supreme Court. They left out "when necessary". On page five and six of the report, there is a discussion of that very power "when necessary." Particular reference is made to the North Carolina Constitutional Provision, which is the only one that we could find—identical in language with the Idaho Constitution. The report will indicate that the committee felt that there is certainly grave doubt as to whether or not the Supreme Court has the power to regulate the District Courts.

JUDGE MORGAN: I think that is true. I doubt it myself.

MR. MERRILL: The commission to this committee by the Bar was to develop the theory or to explain the law, if we could, and to determine whether or not that power he completely delegated to the Supreme Court and can be carried out under our present set up, and we came to the conclusion that it could not do so, except perhaps in the method suggested by the committee report.

O. O. HAGA: I think the committee has made a very fine study of the whole situation. I don't quite agree with the ultimate conclusion that there is any serious doubt about the power of the legislature to delegate to the Supreme Court the power to make rules.

Section One of Article Two is the provision that the powers of the government of this state are divided into three distinct departments; legislative, executive and judicial, and no persons or collection of persons shall use the powers of another department "except as in this Constitution expressly directed or permitted." That, of course, segregated the three departments and gives to each department exclusive jurisdiction.

Then, section 13 of Article 5, "The legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a coordinate department of the government, but the legislature shall provide systems of appeals, and regulate by law, when necessary, the methods of proceeding in the exercise of their powers of all the courts below the Supreme Court, so far as the same may be done without conflict with this Constitution."

I agree with Justice Morgan, but there is the further difficulty of how can the District Court provide for appeals? Or from the Probate Court to the District Court? There is the territorial zone, in which I think the Constitution very wisely provided that the Legislature could provide procedure when necessary. As Mr. Merrill has stated, the only state in the Union that has a Constitutional provision like this, and it is exactly like this, is that of North Carolina. In the state of North Carolina they have worked on the rule making power for thirteen years. The State Bar Association, and committees of that association, especially charged with the duty, had provided for the rule making power rule before Congress vested the powers in the Supreme Court of the United States.

The Chief Justice of the North Carolina Court, some twelve years ago, as chairman of one of the committees of the Bar Association, presented a bill which was approved, delegating to the Supreme Court the rule making power. It didn't get through the legislature, but committee after committee of the State Bar Association of North Carolina have, in the last few years, gone into the program as to the constitutionality of it; and I think that, without question, they have reached the conclusion that it is perfectly constitutional. One of the chief defenders of that rule making power, as you all know, is the District Judge, John J. Parker, of the Circuit Court of Appeals. He has worked with the North Carolina Bar Association for years. He has expressed himself as having no doubt whatever about the constitutionality of it. In the Supreme Court of North Carolina, the justices have worked on these committees and made reports on this power of the Supreme Court. However, they do recommend that the legislature should pass an act delegating to the Supreme Court, and I think in their last bill they recommended that there should he an advisory committee to sit with the Supreme Court and do the hard work. The justices are busy with other things. The committee is five, ten or fifteen members of

the Bar, and justices of the District Court to work with the Supreme Court, and recommended to the Supreme Court as the advisory committee of the Supreme Court of the United States, did, but leaving it to the Supreme Court to adopt or recommend the rules.

MR. MERRILL: We gave considerable study to the North Carolina situation. The North Carolina Constitution in its present form was adopted in 1836, which was just 14 years before the Idaho Constitution was adopted. Now, prior to 1816, the various constitutions theretofore adopted in North Carolina had contained provisions, which, while not definitely delegating to the Supreme Court the rule making power, did delegate supervisory powers and jurisdiction over the lower courts.

After adoption of the 1876 constitution, this provision was carried forward in the statute. The rules adopted under this authority were strictly limited to rules of practice, as distinguished from a code of procedure. They are now to he found in the North Carolina Code of 1926. They are brief and deal only with the practice by attorneys such as prescribing the order of and the time limits for arguments, etc.

One of the authorities is Durham vs. Davis, 190 North Carolina, 128, where the Supreme Court of North Carolina expressly delegated at least one of the powers granted to it by section 12 of Article 4 of the Constitution; namely, the power to allot and distribute jurisdiction among the inferior courts. In that case, a local court had been established by the Legislature. A later act, authorizing the county commissioner to increase its jurisdiction, was held to be unconstitutional, which could only be exercised by the Legislature. This might have some bearing upon the question as to whether the Idaho Legislature could give the power to the local court, properly granted to it by the courts. After consideration of the constitutional provisions of North Carolina, the rule apparent from the North Carolina Code, the decisions, and particularly the Durham decision of which I spoke, the committee felt some doubt as to the constitutionality of delegating the power and accordingly these two alternates—suggestions 2 and 3—are suggested. One, that we simply adopt the theory of the delegation of power, which is supported by Arizona; or two, adopt what seems to me would be the best suggestion; namely, a cooperative movement between the Legislature and the Supreme Court prescribing these rules, and let them be adopted by the Legislature, which would, of course, complete a delegation of power.

MR. HAGA: That wasn't my suggestion. I didn't mean that the Legislature should pass upon this. The bill which the Bar Association of North Carolina have recommended now provides that the civil procedure, as it stands shall, at the enactment of this act, he considered as rules of the court to he amended or modified from

time to time, as the Supreme Court, in the exercise of the power delegated to it, may see fit.

The old procedure becomes the rule of procedure, subject in the future to amendment or change as the Supreme Court may deem necessary. I assume that the North Carolina Bar Association had considered their own decisions undoubtedly.

JUSTICE MORGAN: It occurs to me that in order to avoid in the future the confusion and conflict between Legislative and court rules, the same Legislature which adopts the law vesting in the courts the power to make rules for inferior courts should propose an amendment to the Constitution, which would take it out of the hands of the Legislature. Oherwise, confusion by inadvertently enacting contradictory laws might arise.

MR. KERR: The thought that appeals to me is that we recognize that we have been following the procedure of allowing the District Courts to make their own rules. Each of us has had the experience of finding out what confusion that is; especially if he has gone into a District Court out of his own District and found out that he has forgotten to file the required brief within five days, or something of that kind. You can certainly get your ears knocked down pretty fast. One of the main reasons for having this rule making power in the Supreme Court is to avoid this sort of situation.

I am wondering whether if the Supreme Court, just in an advisory way, suggested a uniform set of rules, we could get the District Judges to adopt them and so solve the question?

PRESIDENT ANDERSON: Anything further? If not, we will pass to the next matter, which is a committee report on "Status of Bar Approved Legislation," and we will appoint a committee to consider that matter and report back, consisting of James Blaine, W. H. Witty and Weldon Schimke.

The report is by James W. Blaine of Boise. Mr. Blaine.

JAMES W. BLAINE: Our former President, J. L. Eberle, was slated to appear on this program, but due to the fact that he has made so much money in the law business of late, he has been vacationing for the last month and did not feel he would have sufficient time to prepare a report "status of Bar approved Legislation." In order to give him an opportunity to spend some of his money, I am undertaking his task.

This morning I am going to give you a biography of the lives of many of the illegitimate brain children of the Idaho Bar. Some have died an early death; others are still lingering on, and few have gained places of prominence in the State of Idaho. Of necessity, I will limit my historical sketches to matters which have been discussed and passed upon during the last three annual meetings

of this Bar.

LEASE OF REAL PROPERTY IN PROBATE PROCEEDING

First is a bill which we sponsored and which became law for some reason or other. It provided that real estate of a decedant might be leased without order of the probate court when the tenancy is month by month and does not exceed one year and the rental does not exceed $300.00.

SALE OF MINING PROPERTY IN PROBATE PROCEEDINGS

Two bills were drafted and introduced in the legislature dealing with sale of mining property in probate proceedings. H. B. 272 provided for sale of mining property in the same manner by the same procedure as in sales of other real property. H. B. 275 was a comprehensive bill covering the sale of real property and mining property by contract, lease and option, and similar methods. Both bills passed the House unanimously. H. B. 275 died in the Senate Judiciary Committee and H. B. 272 was defeated by a 25-12 vote of the Senate.

SALE OF PROPERTY BY A GUARDIAN

Section 15-1835, which provides "No order of sale granted in pursuance of this chapter (Guardianship proceedings) continues in force more than one year after granting the same, without a sale being had." Your legislative committee recommended that this section be repealed and presented a bill to the House to that effect. As is customary, the bill passed the House and died in the Senate Judiciary committee.

NOTICE OF FIDUCIARY CAPACITY

H. B. 274 sponsored by the Bar provided that instruments affecting real property wherein the grantee or lien-holder was described in a representative or fiduciary capacity, a mere designation of such a capacity was not to be notice of the capacity unless the terms of the relationship were set out in the instrument or in a separate instrument filed of record in the County Recorder's Office of the county in which the property lay.

This bill died in the House Reference Committee.

AFFIDAVITS RELATING TO REAL PROPERTY

H. B. 187 making affidavits relating to the title of real property recordable and when recorded were to be constructive notice of the facts therein stated and admissible as prima facie evidence in actions affecting title to the property. This bill passed both houses and on objections from the Federal Land Bank was vetoed by the Governor. I am informed that a similar bill will again be introduced in the next legislature after the bank's objections have been met.

UNIFORM BILLS

A "Uniform Business Records as Evidence Act" and a "Uniform Official Reports as Evidence Act" recommended by the American Bar Association passed both houses and are now on our statute books. However, two other uniform bills sponsored by the American Bar and introduced at the same time passed the house and died in the Senate Committee on Uniform Law, they being known as the "Uniform Composite Reports as Evidence Act" and "Uniform Judicial Notice of Foreign Law Act."

LAWYER'S LICENSE FEE

It is needless for me to report that the license fee of attorneys has been raised by legislative action from $5.00 to $7.50, which must be paid by March 1st of each year. I might report, however, that this change was sponsored by this organization.

COLLECTION AGENCIES

At our 1939 meeting the matter of regulating the collection agencies was discussed. While the Bar did not sponsor any legislation on this subject, a bill covering this subject was introduced in and passed by the House and tabled in the Senate, where it died.

RULE MAKING POWER

The Bar prepared a bill granting the rule making power to the courts and presented it to the Senate Judiciary Committee for introduction, but for some reason that committee did not take any steps to introduce it, so the bill was presented to the House Judiciary Committee, who introduced it. The House Reference Committee refused to publish the bill until the appropriation in the sum of $7,500 was deleted. This was done and the bill was printed and referred to the Judiciary Committee, but died there, since certain members of the Senate Judiciary Committee let it be known that if the bill reached the Senate it would be ignored to death.

This matter is still under discussion by the Bar and you have heard this morning a report on that subject.

JUDGE'S RETIREMENT

The next piece of legislation which I will mention is well known to many of you, particularly to the members of the Judiciary, it being the Judge's Retirement Bill. The bill was introduced in the House and passed that body by a 49-6 vote and was later passed by the Senate only to be reconsidered on a motion of Tom Heath and then recommitted to the Senate Judiciary Committee where it died.

PARDON AND PAROLE SYSTEM

In our annual meetings in 1937 and 1938 a change in the pardon and parole system was discussed and a resolution adopted recom-

mending a study of the subject. I feel that as a direct result of the action taken by the Bar, Governor Bottolfsen appointed a committee composed of lawyers, judges and prison officials to make a report and recommendation at the next legislature. I am informed that the committee has been meeting regularly and will subfit their report to the Governor this fall and we can expect some action from the legislature, probably not favorahle, since I am sure the bill will carry on appropriation.

I believe that the foregoing sums up our legislative activities with a result of 4 won, 8 lost and 1 not yet presented to the legislature, a batting average of 330 in the legislature.

One glance at the record will convince anyone that our record as lobbyist is very poor, thus giving rise to the old saying "The Legislature will never pass Bar sponsored legislation". I do not believe we ean lay our failure on the legislature's door step, although there have been a few rugged iudividualistic members of that body who have attempted to keep Bar approved legislation from getting recognition. From my observation the failure of our legislative program is due first, to lack of interest of our membhers in the Bar's program, thereby throwing the entire burden on a few individuals, who cannot possibly do the entire job as it should he done; second, failure of the har to acquaint the membhers of the legislature with our program and the need therefor, and last hut not least, the fact that this hody adopts many resolntions when in truth and in fact a great many of those expressing their opinions and a great many of those who vote have not heard of the proposed legislation or had an opportunity to study it, in other words they don't know what they are talking about.

Now I didn't come down here to criticise you gentlemen and tell you what a rotten hunch of lobbyists you are without having in mind what I believe to be a solution or at least a partial solution of the failure of our legislative program. Here it is for what it is worth.

1. Members of the Bar and the judiciary who feel that there is certain legislation or amendments to existing law, which are necessary and meritorious, should outline these changes and the reasons therefore and pass them along to the Secretary of our organization who in turn would refer it to the legislative committee or to a special committee, if one has been appointed.

2. In my opinion legislation which the bar proposes to sponsor should be drafted in advance of the annual meeting and copies of the proposed bills submitted to each of the local bars for discussion, thereby making it possible for the representatives of the local bars and members attending the annual meeting to intelligently discuss and pass upon the bills.

3. The next step would he for each local bar to present and explain the proposed bills which have been adopted at the annual meeting to the members of the legislature in their district prior to the convening of the legislature.

4. The members of the legislative committee in Boise will, during the session, watch the progress of our bills and be on hand to consult with the legislators if there are additional questions which need explaining.

These ideas are my own; I am requesting that you give them consideration and if you believe they will make our future recommendations to the legislation successful, put them in operation; if they are not satisfactory I urge you to formulate some other plan to accomplish one of the purposes for which we are organized.

PRESIDENT ANDERSON: We will pass to the next item on the program—"An Act Creating a State Legislative Drafting Bureau"—Francis M. Bistline of Pocatello. Mr. Bistline.

MR. BISTLINE: Last year when I addressed the Bar upon the subject of Recent Legislative Matters and Enactments of Interest I concluded with the suggestion that two things could be done to improve the quality of legislation in the State of Idaho, namely;

1. That the procedure making power be placed in the courts, and

2. That some sort of a Legislative Research Bureau be established to analyze bills from the standpoint of history, comparative legislation, and their legal effect if enacted.

Thereafter during that meeting a resolution was passed which provided that the Board of Commissioners of the Idaho State Bar prepare and report to this meeting a bill for the establishment of a Legislative Drafting Bureau, the director of which should:

(a) Examine all bills before being passed hy either House and consider and correct, if necessary, the draftsmanship and title thereof, and consider the extent to which such bill will amend or change the existing laws of the State.

(b) Prepare for the Secretary of State the index of all session laws with annotations or reference to similar legislation in other States.

(c) During the interim hetween the sessions of the Legislature, prepare such Acts as the Governor or other state officers may deem appropriate for introduction at the next session of the Legislature and render like service for newly elected state officers, and for members of the Legislature.

About month ago the Board of Bar Commissioners took this mandate to heart and took steps to set in motion the necessary machinery to produce a bill. The machinery was set in motion in the following manner:

A letter was prepared and sent to one F. M. Bistline at Pocatello with contents to this effect:

"Mr. Bistline, you suggested this idea now you prepare this bill." And, gentlemen, I am here with a draft of a bill, which I believe will, if enacted, fit the needs of Idaho in this field, and I have attached the same to this paper, marked "'Exhibit A" and ask that you consider it a part hereof, the same as if read at length. However, for the purpose of this presentation I shall give you only a brief resume' thereof.

The Committee, in going into this matter, found that the more recent tendency was to combine the drafting and research bureau, and a legislative council. The Committee examined the set-ups in the following states: Kansas, Illinois, Nebraska, Kentucky, Connecticut, Virginia, Michigan and Wisconsin, and attempted to incorporate the best features thereof. Consequently, after giving the matter consideration, the Committee decided a draft of a bill setting up a legislative council much after the fashion of Kansas, with a division of legislative research and drafting tied in with it, much more patterned after Virginia than any other state, with certain features from Nebraska and Illinois brought into it also.

The proposed bill as submitted, provides for a Legislative Council of 14, consisting of 6 Senators and 8 Representatives, with the Lieutenant Governor, the Speaker of the House and the Director of the Division of Legislative Research and Drafting as ex-officio members. The Lieutenant Governor to be the chairman, the Speaker the vice-chairman and the Director the secretary of the Council. By comparison Kansas has a membership of 25, Michigan 9, Virginia 1, Kentucky 21. The membership is to be bi-partisan, not more than 2-3ds of majority party, and apportioned equally between the two Congressional districts. The Senate members are to be appointed by the Lieutenant Governor and the House members by the Speaker.

By this bill the Council would have to meet each quarter, following the Kansas system, but may meet as often as necessary to perform its duties, the members to receive pay at the rate of $5.00 per day and their actual expenses.

Duties: The duties of the Council shall be:

(1) To collect information concerning the government and general welfare of the State, examine the effects of previously enacted statutes and recommend amendments thereof; deal with important issues of public policy and questions of state-wide interest, and to prepare a legislative program in the form of bills or otherwise, as in its opinion the welfare of the State may require, to be presented at the next session of the Legislature.

(2) To make an investigation and study of any matter or question which may he referred to it by the Legislature.

(3) To make an investigation and study of any matter or question which may be referred to it by the Governor.

(4) To co-operate with the administration in devising means of enforcing the law and improving the effectiveness of administrative methods.

The Council is given authority to employ a director of legislative research and drafting and to engage the services of such other persons and such research agencies as it may deem necessary. (I shall touch upon the matter of the Division of Legislative Reasearch and Drafting more at length later on.)

The Board is likewise given authority to conduct hearings, with power to enforce attendance of witnesses. production of evidence, etc., and all officers, boards and commissions or departments of the state government, or any local government, are required to make such studies for the Council as it may require. The Governor is granted the right to send a message to any session of the Council at any time it is in session.

At least 30 days prior to any session of the Legislature, at which such recommendations are to be submitted, the recommendations of the Council shall be completed and made public, and a copy of the recommendations mailed to each member of the Legislature, and to each elective state officer, and to each of the state law libraries.

But after all, the success of a legislative council is going to depend largely upon its research division. The proposed bill provides for the establishment of the Division of Legislative Reasearch and Drafting in charge of a Director, who shall be appointed by the Legislative Council from a list submitted by the Board of Education, who shall hold office at the pleasure of the Council.

Some states prescribe qualifications for the Director. For example, in Virginia the Director must be an experienced lawyer, preferably a graduate of a school of law of some approved college or University; Kansas prescribes no qualifications, leaving the matter entirely to the discretion of the Council, and the present Director is Frederick H. Guild, Professor of Political Science at the University of Kansas.

To try to avoid the appointment of an incompetent director, for purely political reasons to give a man a job, the committee deemed it advisable to require selection of the director from a list submitted by the State Board of Education, particularly in view of another feature of the bill which ties this in with certain departments of the State University.

The Council is authoribed to employ assistants as are needed for this Division of Legislative Research and Drafting.

The primary duties of the Bureau are to do research work to

aid the council and legislature in their work, to draft proposed bills and act as revisor of codes, it being the particular duty of the director to examine the statutory law and constitution of the state, with a view to ascertaining all irregularities and defects therein, all obsolete laws and all laws requiring amendments, and report these to the Governor and the Legislative Council.

A feature of this bill is that the Division of Legislative Research and Drafting is to be affiliated with the Department of Political Science and Sociology and the College of Law of the University of Idaho and its branch, and to give such instruction and furnish such facilities for training of students in legislative reference work and in the knowledge of Idaho institutions as may be arranged for with the heads of such department and college, and with the consent of the Board of Education, use the students in these courses as assistants during the sessions of the Legislature. This is adopted from the Nebraska plan.

Also, we have incorporated a provision that the Supreme Court may assign any employee of the Supreme Court or in the State Law Libraries for work in the research and revision department upon the request of the Director. This is inserted in the bill by reason of the fact the committee was aware of the situation that the State Law Librarians are in position to render valuable aid in this connection without interfering with their present duties, and further, that there are times when the Secretaries of the Judges of the Supreme Court, some of whom are attorneys, have time heavily resting upon their hands, which could be used very much to advantage in keeping down expenses in the research department.

Naturally there is something to be said on both sides of this question, but the whole thing is so concisely stated in an article by Frederick H. Guild, the Director of the Kansas Research Bureau, that I am going to quote him considerably at length. This article appeared in the January, 1938 issue of the Annals of the American Academy of Political and Social Science, and I quote as follows:

"The legislative council has now been in existence long enough to permit a partial test of its value, although there has not yet been sufficient time for full development of its possibilities. Of the three councils which have been in operation through more than one regular legislative session, two have been relatively inactive. The present report, in consequence, must necessarily be limited to the Kansas council, which has had nearly four and one-half years of continuous active experience.

SPREAD OF THE COUNCIL IDEA

Beginning with the creation of an executive council by Wisconsin in 1931, the council experiment has spread until there are now in existence seven legislative councils and the Wisconsin Executive

Council. Kansas and Michigan, in 1933, established a council which was distinctly legislative. In Virginia an Advisory Legislative Council established by executive order in 1935 was given legal status in 1936. The Kentucky council of 1936 is primarily a commission on interstate cooperation, with the additional duty of serving as a legislative council to prepare a legislative program. In 1934, Nebraska, Connecticut, and Illinois also adopted the council idea.

The Wisconsin Council has been relatively inoperative since 1933, as has that of Michigan since 1935. Both were active during their first biennium. The council in Virginia presented five excellent reports to the 1936 session, and the one in Kentucky was successful in preparing a legislative program of eleven bills for the special session of 1937.

The fundamental purpose in the creation of a legislative council is the preparation of a program for the next legislative session. The reasons for the creation of such an agency have been variously stated, but are fairly well summarized in the preamble to the Illinois law of 1937 which concludes:

"Such legislative planning and formulation as actually obtained would, by being recognized and made properly antecedent to regular sessions, conserve legislative time, save unnecessary expense, improve ensuing debate, and restore legislative activity to the high place in government and public esteem which it merits."

ESSENTIALS OF THE KANSAS IDEA

The methods and accomplishments of the council cannot be understood unless there is thorough comprehension of several important features of the Kansas idea which are frequently misconstrued by the observer. The first is that the Kansas council is legislative and not executive, in actual operation as well as in name. The legislators have been working out the council idea in their own way, as something indigenous to legislative soil.

The Kansas idea of formulating a program has been that the selection of the solution must be reserved for final decision in full legislature, newly elected. The program has not been a positive recommendation of specified solutions, but rather explanation of alternatives, finding as to facts; and as such, it has been adapted to legislative behavior more readily than any conclusions of a few council members could have been. Except in a few instances, even the bills recommended were tentative. The council expected them to be subject to amendment and compromise, and the accompanying factual material was as important as the bill itself. In other words, what the council has usually done has been to present comprehensive analysis of each situation.

Such a program clears the ground of much of the lost motion

and confusion of the past. It economizes legislative time by freeing it from the burden of innumerable, ill-considered, freak, and surprise attempts at solution of major problems with inadequate information and without impartial analysis. Certainly the 1935 and 1937 sessions were more clear-sighted, less confused, because of the existence of the council. The council selects the important topics and provides the factual basis for clarifying issues, permitting the major worth-while alternatives to rise to the surface. The legislature, however, must assume responsibility for the final choice.

The council's program is of such a nature, in consequence, that neither the legislature nor the governor has ignored it or can ignore it. Not in the slightest is this because of any remarkable potency of the council's official recommendations. It is due, instead, solely to the fact that there has been provided a genuinely new bit of legislative machinery by means of which a legislative program is developed over a period of many months. When the council concludes its last meeting, the program is actually there, an established fact, written across the whole state, and by that time no fiat of council, governor, or legislature can make or unmake it.

Herein lies the peculiar contribution of the Kansas experiment —and its chief contrast to the small, executive type council. The Kansas council evaluates the relative importance of public demand for action in various fields, and responds to that demand by analyzing those subjects which it considers most likely to be important before the session, regardless of whether or not it believes affirmative action desirable; and this the council has done well. The legislature and the governor may determine the emphasis to be given one part of the program as against another; then may disapprove or disagree on solutions or fail to take action; but the subjects sifted out by the council have proved to be the ones which did require consideration and decision in the legislative session.

The final essential is a well-staffed research department as indispensable for council success. Since the council's findings in its program are primarily factual, it is imperative that the legislators have an impartial staff, under their own control, upon which they can fully rely. While it required nearly fourteen months for this to become evident, and several months more before the research work was accepted as sound and unprejudiced, few Kansas legislators, administrators, or observers would now believe it possible for the council to continue successfully without this staff.

THE LEGISLATOR AS COUNCIL MEMBER

The council idea is based on using legislators without any attempt to metamorphose them over night into a brain trust or guiding angels free from behavior normal to legislators. Two factors enable them to function as they could not during regular session. The first is the quarterly meeting, with freedom from rush and pressure; no necessity for immediate decision; concentration on fundamentals instead of upon detailed language of bills; opportunity to talk all subjects over for three months at home before returning; and time for further consideration spread over two years. There are no special local bills to push through. Second, there is the research staff, to do most of the detailed work for committees and members, to supplement with additional information at the next meeting, and ultimately to report to the legislature such additional information as the council may direct.

The council member nevertheless remains strictly a legislator. Many members will probably run for reelection or for another office. They are naturally contemplating the next campaign. They must also think in terms of their membership on regular committees, of the give and take which will normally result in the regular session. In consequence, legislators have definite limitations in planning a program to extend beyond two years. They are particularly fitted, however, to gauge accurately the program which will best meet the needs of the next session. In so doing they do not sit down to plan such a program deliberately. A few items are selected as the result of conscious effort. Many others are chosen in response to the very same stimuli to which legislators have always reacted.

THE COUNCIL IN OPERATION

Introduction of new subject matter before the council normally takes the form of a proposal, which is referred to a standing or special committee, although it may receive preliminary consideration immediately upon introduction. These proposals consist of a very brief title indicating the general objective, and may be accompanied by further explanatory material. The proposal may be reported unfavorably at the same meeting, but usually all which seem to have any merit are referred to the research staff for preliminary statement or analysis of the facts. Some of these require extensive research. A progress report is usually presented at the next quarterly meeting and the preliminary and supplementary research reports are made available to all members, to all other legislators, and to a mailing list of one thousand citizens throughout the state.

Between council meetings, the committees may function more or less actively. Some have designated a member to cooperate with the research staff, who may appear for conference with the staff from time to time. Others may maintain contact primarily through correspondence. While committees have held special meetings, their formal work is usually done during the council session. The rules provide that on final report the committee shall present a bill covering the subject, but as a matter of fact this is rarely done until the last two meetings immediately preceding the regular session.

Proposals come not only from members but also from recommendations from the governor, from other legislators, and as a result of petitions or correspondence from citizens. In consequence, the gross result of council endeavor is somewhat akin to the regular legislative situation. Proposals are thrown in from all quarters. Attention is focused and information is provided by the committee reports and by the discussion thereon. General council interest in any one of the proposals as a part of the final program is a development from this procedure rather than the result of conscious planning. Committees and the council itself act as sifting agencies, first to eliminate various proposals and second to analyze the remainder. The program which finally evolves is the net result of the combined efforts of all members of the council.

COUNCIL ACTIVITY BETWEEN MEETINGS

General council activity is not much in evidence between meetings, aside from the work which the research staff may be doing under committee instruction. The individual member, however, serves a very definite function, which even he frequently fails to realize. He has heard the proposals, received the factual material, and listened to committee reports and to discussion in the debate following. On returning home there is ready at hand material to which he can easily turn for speeches over his district or for day-by-day discussion with constituents. That is, the council member spreads over his district, more intimately and in more detail than the press reports, what has been picked up at the council meeting. The essentials of the program thus begin to take preliminary shape. In addition, the legislator who is not a member, but who receives all the reports submitted, is similarly able to use the material as questions arise.

This almost invisible function, this dissemination of preliminary reports and factual material at the outset of popular consideration of the general problem, is perhaps one of the most valuable contributions which the council makes towards a legislative program. A gradual assimilation of such information and discussion goes on from one meeting to another. By this process the council is finally confirmed in its decision to proceed further, or is satisfied that as much has been done as is needed for the moment. It is in this manner that there is laid the foundation for a sound legislative program in the regular session. An important part of the work is accomplished long before the council submits a formal report to the legislature.

RELATION OF COUNCIL TO THE LEGISLATURE

The council is in fact, and in improved form, a perpetual interim committee for the legislature, always available to institute a study of a new subject, with full power to secure the necessary information, directing its attention at once to matters of immediate public interest. This timeliness of consideration is no small factor in

bringing the council's work before the people over the state while their interest and attention is focused on a particular problem.

Dumping of reports upon the busy first days of the regular session, the usual practice of interim commissions, imposes a task of assimilation which the ordinary legislator usually refuses to assume, or which delays the session if he must give time to it. The ability of the council to make reports more than a year in advance to the session, or preliminary statements indicating the scope of final reports, prepares the legislature for their reception. In consequence, these reports have been used immediately. In advancing legislative and popular understanding of the problem and the probability of immediate constructive steps in the next session, the council has been much more successful than most interim commissions of the past.

This new agency is not a group of specialists or experts, nor do its members pretend to be wiser than other legislators. It is as much a regular committee of the legislature as any other standing committee. Nevertheless, it is difficult as yet to avoid some feeling of natural jealousy which arises when a small part of the legislature is set apart as a "council." Many important members of the legislature cannot be appointed thereon if geographic, party, and other representative groupings are to be given proper weight. It must be borne in mind that there is much leadership in the new blood in the legislature. Also, new members coming fresh from the election feel that they have as much a mandate from their constituents as any other member of the legislature. They want to make a showing, to have equal voice in committee and on the floor. They would not willingly tolerate such a legislative organization if it undermined their own legislative standing.

By making its work immediately available and distinctly helpful to other legislators, old and new, the Kansas council has adjusted its relationship to the legislature to accord with this situation and with the psychological factors behind it.

While the individual member who returns to the regular session lays no claim to greater authority because of council membership, nevertheless the fact that he may have participated in six or seven quarterly sessions, with a mass of factual material before him and careful discussion of the various problems over this period, does enable him to be better informed than many other members of the legislature. He is in the strategic position, though frequently unwittingly, of requiring others to meet him upon the same factual basis. He serves as an interpreter of the work of the council to other members of his committee and to the general legislative body, and is partly responsible, in consequence, for the prestige of the research reports. In this he is not alone, for other legislators, not on the council, have also had access to material, and many of them may be as well informed. If chairmen of council committees return, they frequently play a very important part in developing the

final program in standing committees, on the floor and in the corridors.

REACTION TO RESEARCH REPORTS

The combination of council and research staff has brought about immediate, easy acceptance of research reports. The explanation seems to be three fold. First, the reaction of council members as legislators governs the research department in its selection and presentation of material in its reports over a two-year period, which makes them of immediate value to the legislators.

Second, the council members become sponsors for the research and for the research staff. Familiarity in this case has not bred contempt, for the continuous association has developed mutual understanding. In addition, other legislators who have received the reports of the quarterly meetings at a time when there was leisure to consider them have themselves been able to make use of part of the material. The approbation of council members, combined with their own practical use of the material, brings such legislators to the session with an appreciation of research results.

A third significant fact is that the legislator who knows that research has been completed on a certain subject is most reluctant to enter legislative debate on that topic without being informed. In the 1935 session, when incorrect statements were immediately challenged by council members or by other legislators who had in their hands the research report giving the exact facts, the uninformed legislators found themselves in an embarrassing situation. One major result was the rather continuous use of council reports throughout the session. Such use of factual material and the extent to which legislative committees came to the research staff during the session for additional facts indicate clearly the value of the research function of the council and its staff.

THE COUNCIL AND THE GOVERNOR

In Connecticut the governor is a member of the council; in Virginia he appoints all the members, although five must be from the legislature; in Wisconsin and Kentucky he appoints part of the membership from outside the legislature. Only in Kansas, Michigan, Nebraska, and Illinois are the councils entirely under legislative control. The two types of experiment, while allied in purpose, may work rather differently in actual operation.

Both Kansas governors have been skeptical of the quarterly appearance at the state house of representatives of the legislature, with full power to open any subject for discussion. However, the council thus far has kept its feet securely on the ground, and its treatment of inquiries into administration, for the most part, has been expertly handled. Although the Michigan governor in 1935 was antagonistic to the council and recommended the repeal of the

Michigan law, there has been no reason in Kansas why a governor should oppose the council and its program.

The formal relation is maintained solely by messages from the governor, one at the opening of each new council and others recommending special topics as occasion arises. These have been few in number. Close contact is maintained precisely as it is during a regular session, through conferences with chairmen of committees or individual members, and the governor never loses touch with the council from meeting to meeting. In addition, there is another contact through the research staff, which is under instructions to work for the governor on his legislative program.

The presence of the council enables the governor to keep in closer touch with the possible legislative program than he could if such an agency did not exist. The governor may ignore or take a definite stand on some of the alternatives presented in the program, or even add other topics to the list. He can rely upon the factual presentation of alternatives and use that material in reaching his choice for specific recommendation. In consequence, the council's work may be as beneficial to the governor as to the legislature.

PRESENT STATUS OF THE KANSAS COUNCIL

Those informed will probably agree that the Kansas council has been genuinely helpful to the legislature; that it prepared ample material for the presentation of programs to the 1935 and 1937 regular sessions; and that it has grown steadily in prestige with the legislature and with the general public. It seems clear to the writer, although others may not agree, that actually, in its brief four years, the council has already become an integral part of legislative machinery.

Certainly the net result of the council's labors has been a distinct gain. A comprehensive program was available for the special session of 1933, and 60 per cent of the bills recommended were passed. No interim committee reports in Kansas had ever before been of such immediate assistance or played so direct a part in the passage of legislation as did the council reports to the 1935 and 1937 sessions. In both sessions, the legislature actually placed major emphasis upon those items which the council had considered. The council even anticipated most of the major items in the governor's program, despite the unforseen political overturn which occurred in the 1936 election.

Experienced legislators believed reduction in legislative time was a direct result of council activity. Many believe the evidence shows that the new institution made positive accomplishments in its first two terms sufficient to warrant optimism for its future. The chief test at this time is a simple one—merely whether the council is meeting a genuine need and whether the end result, by and large, is a substantial gain. Despite misunderstandings and misconceptions, the answer to this in Kansas has been affirmative."

The State of Kansas has apparently taken the lead in this matter and is more or less looked to by other states creating a bureau, as a model. So much so that in November, 1937, the members of the newly created Illinois Legislative Council visited the Kansas Council during its regular meeting. The Illinois law was patterned after the Kansas law, and the visit was for the purpose of observing the Kansas Council in action.

The Kansas Legislative Council has conducted research on 98 subjects, which have been published and reported to the Legislature. Some of the titles are:

Sales Tax.
State Police.
Old Age Pensions.
Income Tax Rates and Exemptions
Possihle Additional Revenue from Taxation.
School Finance Survey.
The Social Security Program.
The Loan Shark Problem in Kansas.
Homestead Tax Exemption.
Report on State Penitentiary.
The Prison Lahor Prohlem in Kansas.

And other subjects of equal import. In fact I have here the Research reports from Kansas, which are available for examination to all interested, on the following subjects:

Regulation of State Travel Expense.
Cost of Government in Kansas.
Concentration of State Tax Administration.
A Survey of State Market Agencies.
A Possible Department of Revenue for Knsaas.
Organization of the State Highway Systems.
The Problem of Special (free) Funds.

An example of what is accomplished may be obtained from the accomplishments of the Kansas Council during 1938, for example:

FRESH-WATER RESOURCES OF KANSAS

During the Special Session of 1938, the House of Representatives adopted House Resolution No. 16, which directed the Legislative Council to collect data and information relating to fresh-water resources and prepare a legislative program which will alleviate conditions and protect the fresh-water resources of the state. On May 10, 1938, the Council held a hearing on this question and representatives of various organizations and state departments appeared before the Council.

At the conclusion of this hearing, a special committee was appointed to take such action as it deemed necessary. A valuable brief giving a comprehensive analysis of the many questions involved was prepared and read to the Council by the Chairman of this Special Committee to consider 1938 House Resolution No. 16. Proposals Nos. 37 and 38 were adopted on September 2, 1938, and Bills Nos. 4 and 5 to regulate core drilling and test wells for oil and gas and to protect fresh-water resources were later adopted for introduction in the Legislature.

INTERSTATE COOPERATION

Thirty-five states have established commissions on interstate cooperation along the lines set forth in Bill No. 1, adopted by the Kansas Council for introdnction in the 1939 Legislature. The bill follows quite closely the "Uniform law" adopted by most of the states and provides that the council of state governments shall "he a joint governmental agency of this state and of the other states which cooperate through it." The council of state governments has been described as "an agency established to solve, by cooperative action of the states, those problems of an interstate character over which the federal government has no jurisdiction."

THE MERIT SYSTEM AND RETIREMENT SYSTEM FOR STATE EMPLOYEES

Under Proposal No. 28, the question of recommending a retirement system for state employees was presented to the Council. This question is closely related to civic service or the merit system for state employees. The Kansas constitution, under article 15, section 2, prohibits the fixing of any term of office for a longer period than four years. The committee having this Proposal under consideration concluded that an effective retirement system probably could not be set up until more state officers and employees were assured of a longer term than four years. Consequently, the committee drafted an amendment to section 2 of article 15 of the constitution which excepts persons in the "classified service" from the tenure of office provision. The proposed constitutional amendment also prescribed a merit system for nearly all appointive state officers and employees. Research Publication No. 89 entitled "Personnel Administration" will be submitted to the 1939 Legislature.

PROGRAM FOR KANSAS PRISONS

On August 31, 1938, Mr. Howard B. Gill, Washington, D. C. appeared hefore the Council upon invitation of the Committee on State Institutions. Mr. Gill was loaned by the United States Department of Justice to have charge of the staff of the Prison Industries Reorganization Administration, a federal agency. He explained the Report of the Prison Industries Reorganization Administration on prison problems in Kansas (see Institutional Survey Report No. 7 "Research Publication No. 76").

Eight bills were adopted by the Council for introduction in the Legislature (see Bills Nos. 11 to 18, inclusive). These bills are summarized in Institutional Survey Report No. 9 (Research Pub-

lication No. 90) and cover the following subjects:

11. Authorizing the acceptance of benefits of any act of congress.

12. Making the prison mine subject to certain provisions of the general mining laws of the state of Kansas.

13. Probation in criminal cases.

14. Forty-eight hour week for prison employees.

15. Institution industries.

16. Knsas state receiving prison.

17. Board of probation and parole.

18. Division of personnel.

UNIFORM FEE AND SALARY SCHEDULES

A uniform fee and salary scale for county and city government was considered under Proposal No. 15. Facts relating to the operation of present salary schedules for county officers and employees were presented in Research Publication No. 77. Bill No. 8 was adopted for introduction in the Legislature. This bill would classify the counties on a basis of population into four groups and authorize the various boards of county commissioners to fix salaries with minimum and maximum amounts. Administrative control would be thus vested in the county commissioners. The Legislature would determine the salaries of the county commissioners as at present.

PRINTING APPROPRIATIONS FOR NON-FEE DEPARTMENTS

Under Proposal No. 7, a study of appropriation and control of funds for state printing was made by the Committee on Ways and Means and Budget of the Council (see Research Publication No. 78). On September 2, 1938, the Council requested the state budget director and the state printer to secure itemized estimates of printing requirements of the various non-fee departments. At the November, 1938, meeting Bill No. 9 was drafted and adopted for introduction in the Legislature. This bill would abolish the present state printing commission and transfer its powers to the state budget director. It would provide for itemized appropriations for all non-fee departments based upon estimates and authorize the budget director to make quarterly allotments for printing.

LEGISLATIVE PRINTING COSTS

In addition to the study concerning printing appropriations for non-fee departments, the Council had under consideration Proposal No. 17 asking for an investigation and study of legislative printing costs with a view of reducing such costs. Research Publication No. 85 relating to legislative printing is being prepared by

the research department of the Council.

The Council recommends to the 1939 legislature:

"That the appropriation for legislative printing be included as a separate item in the appropriation for legislative expenses.

"That a joint committee on printing be appointed consisting of three members from the House and two from the Senate.

"And that the rules be revised to give this committee sufficient power to reduce the cost of legislative printing and to eliminate waste therein."

ADMINISTRATIVE RULES AND REGULATIONS

Bill No. 10 of the Council would require rules and regulations promulgated by various state administrative agencies to be submitted to the Legislature for its consideration within ten days after each legislature convenes. The purpose is to permit disapproval by the Legislature and insure revision of those rejected. In order to have one place where all rules and regulations may be consulted by any person interested, the bill would require filing them with the revisor of statutes before they become effective.

A report on this question is contained in Research Publication No. 84 entitled "Legislative Functions of Administrative Agencies." No suggestion is made that the rule-making powers of any administrative agency have been misused in Kansas. The advantages and disadvantages of authorizing such agencies to make regulations to carry out legislative acts is discussed. The suggestion is that such powers should be safeguarded and made more useful.

CHAIN-STORE LICENSING

On May 12, 1938, a Special Committee on Chain Stores was created with instructions to secure a copy of the Louisiana law which places an annual license tax on chain stores. At the September meeting of the Council this committee presented a bill modeled after the Louisiana law. With some amendments exempting certain stores, this bill was adopted for introduction in the Legislature.

After a similar study by the Kentucky legislative council a similar change was made in the Chain store tax of Kentucky. If this were made in Idaho it would probably bring sufficient additional renvenue to pay all the expenses of the Council and the Research Department.

LAND AND WATER CONSERVATION

Among the first proposals presented to the Council was Proposal No. 3 relating to conservation of land and water and flood control. Publication No. 66 entitled "Water Resources of Kansas" was prepared by the State Planning Board. Many meetings have been held by various groups interested in conservancy problems in the state.

The Council Committee on Flood Control, Drainage, Forestry, Fish and Game, and Soil Conservation held meetings and hearings on a proposed bill. This hill as revised and amended by the committee was adopted as Bill No. 19 for introduction in the Legislature.

VETERANS' GUARDIANSHIP ACT AMENDMENTS

In 1929, Knsas adopted the Uniform Veterans' Guardianship Act, as recommended by the National Conference of Commissioners on Uniform State Laws. As is the case with many other statutes, changing conditions and federal enactments necessitate amendments and revisions from time to time. Bill No. 6, adopted by the Council, would amend the present Kansas Guardianship Act and add several new provisions in regard to investments of funds by guardians.

ANTI-PRICE DISCRIMINATION

Proposal No. 33 relating to unfair trade and anti-price discrimination was referred to the Committee on Municipal Government and Fees and Salaries. This committee submitted Bill No. 7 to the Council. This bill is known as the anti-price discrimination bill. On November 18, 1938, the Council adopted Bill No. 7 for introduction in the Legislature.

STANDARDIZATION OF HIGH SCHOOL TUITION LAWS

Pursuant to Proposal No. 1 and the instructions of the Committee on Education, much study and research has been done on certain problems in connection with the statutes relating to high schools and in particular the present tuition laws. Research Department Publication No. 61, entitled "Standardization of High School Tuition Laws," was completed in November, 1937. In May, 1938, Publication No. 75 was submitted to the Council. This was a summary of a bulletin prepared by Dr. W. E. Sheller and Mr. Ralph Rogers, Manhattan, Kansas, for the Kansas Congress of Parents and Teachers.

At the September, 1938, Council meeting, the Committee on Education submitted Bill No. 2, which would in effect extend the provisions of the Barnes high school law to all counties of the state. This bill has received considerable study and research and much data and information is available to explain its provisions. In order that the Legislature may have the benefits of this study and research, Bill No. 2, as amended and revised, was accepted for introduction in tbe Legislature.

STATE ADMINISTRATIVE REORGANIZATION

Under Proposal No. 9, departmental reorganization studies of other states and the possibilities of administrative reorganization of state departments in Kansas has been made by the research department of the Council. The possibilities are presented in six

preliminary research reports designated as Publications Nos. 65, 72, 79, 80, 81 and 89.

At the November, 1938, meeting a special committee was appointed to draft bills covering a Department of Revenue, a Department of Finance, and a Department of Business Regulation, with the understanding that at least a start could be made toward the actual drafting of this comprehensive program.

Upon consultation with the reviser of statutes and members of his hill-drafting staff it was found that the task is an enormous one. Thousands of sections of the Kansas statutes must be carefully examined. A survey must be made as to the effects of transferring administrative power from one state agency to another. Many constitutional questions arise. It is not an impossible task, but a difficult one in the time available. If questions of legislative policy can be determined, bills to effecuate at least a partial reorganization of administrative departments of the state can be drafted for the 1939 Legislature.

LEGISLATIVE BILL DRAFTING

The bill-drafting department of the office of reviser of statutes is available to the Council and to all members of the Legislature. Nineteen bills and one resolution were drafted and adopted by the Council and are printed in this report in form for introduction in the Legislature.

All bills contained in this report are to be introduced by members of the Legislature and take the same course as other bills. Bills are adopted by the Council for introduction in order to give the Legislature the concrete results of its study, research and consideration.

By presenting drafts of bills on subjects of major and state-wide importance after extensive research the Council may conserve the time of the Legislature and prevent a multiplicity of bills which might otherwise result from the Council's Report and Recommendations.

Naturally some questions will arise as to the practical effect of putting such a plan in operation.

One naturally is cost, and another is constitutionality.

ESTIMATED COST

Each quarterly meeting of the council should not exceed five days and the total amount of salary and expense for each member of the council should not exceed $10.00 per day, even including travel expense. This would make a total of twenty days' time at $160.00 per day or a total of $3200.00 for the biennium for the meetings of the council.

If the right kind of a director is obtained, he should draw a salary somewhat equivalent to that of a professor at our Universities, which we understand is around $3800 to $4000 a year,—which for the biennium would amount to approximately $8000.

Stenographic and clerical hire should not exceed $4000.00 for the hiennium, and additional miscellaneous expense should not run in excess of another four or five thousand dollars. Totalling all these items we estimate that $20,000 would be sufficient to operate the council and its research department for the two years.

To offset this cost the following items can he eliminated:

First the House and Senate attorneys during the session who receive approximately $2000.00;

Second, it has been customary to appropriate $4000 for "clean-up" work after the sessions, consisting of editing the journals and session laws. All of this would be saved as it would be the duty of the Division of Legislative research and drafting to do this work.

And lastly, the hired help commonly known as the attaches of the House and Senate could be greatly diminished in number. During the 1939 Session, the Senate managed to struggle along with only 33 attaches, whereas the house was handicapped by having only 17, all of which make a total of 60, all drawing $5.00 a day, making a total of $300 a day or ahout $18,000 for each session.

Assuming that the work of the research division and the council would accomplish sufficient that even half of the attaches could be eliminated, there would be an immediate saving of $9,000.00.

So already we have accounted for $15,000.00.

In addition to the ahove items there should he a lot of saving on printing.

Also there is the possibility that the legislature would do all of its work the first two weeks instead of the last two as the system now prevails, and then go home, which would have over $500 for each day that it eliminated from the total time.

No doubt with such a bureau function studying the various departments of the government many a leak in government expense could be plugged. Also it is possible that other sources of revenue could be discovered by a properly functioning legislative council and research staff. It really has possibilities.

CONSTITUTIONAL QUESTIONS

The principal constitutional question which arises is: Whether or not members of legislatures could serve on such a council and receive compensation for their services if they had drawn the full $300.00 allotted by the constitution for their salaries for a general session.

Undoubtedly before the legislature meets this question will be settled by our courts as Judge Koelsch has before him a case in which that question is involved, so for the moment, I would say, if you want the answer to that question, just ask Judge Koelsch.

Should such a plan be put into operation it would perhaps be well that the legislative council and research bureau make a study of the constitution with a view to making necessary amendments to facilitate its work. In that connection a split session of the legislature has been suggested, meeting for example, twice during the biennium for periods of about 30 days each time. Undoubtedly other suggestions may have come to your mind.

Also should such a plan be put in operation I personally would make the suggestion that the first thing the council consider is the bill itself, especially if adopted in the form in which I have submitted it, for it is possible that there might be more room for improvement. I thank you.

EXHIBIT A.

Section 1. Legislative Council; membership; party representation. There is hereby created a legislative council, which shall consist of 6 senators and 8 representatives, to be appointed by the president of the senate and the speaker of the house of representatives, before the close of the 1941 session of the legislature and during each regular session thereafter, such appointments to be approved by a majority vote of the respective houses. The president of the senate shall be ex-officio member and chairman, and the speaker of the house shall be ex-officio member and vice-chairman. The party representative on the council shall be in proportion generally to the relative number of members of the two major political parties in each house of the legislature, but in no event shall the majority party in either house be represented by more than two thirds of the members of said council from either house. The president of the senate and the speaker of the house shall prepare their list of appointees so that the whole membership of the council shall include representation from each congressional district and representation from each of the more important committees of both houses.

Section 2. Duties of Council: Government and state welfare information; legislative program; investigation and studies; law enforcement.

It shall be the duty of the council:

(1) To collect information concerning the government and general welfare of the state, examine the effects of previously enacted statutes and recommend amendments thereto, deal with important issues of public policy and questions of state-wide interest, and to prepare a legislative program in the form of bills or otherwise, as

in its opinion the welfare of the state may require, to be presented at the next session of the legislature.

(2) To make an investigation and study of any matter or question which may be referred to it by the Legislatnre;

(3) To make an investigation and study of any matter or question which may be referred to it by the Governor.

(4) To co-operate with the administration in devising means of enforcing the law and improving the effectiveness of administrative methods.

Section 3. Director of Research and Drafting. Other employees. The council shall have authority to employ a director of legislative research and drafting and such other persons and to engage the services of such research agencies as it may deem necessary and to fix their compensation, provided the expenses of the council for all purposes shall not exceed the amount of the appropriation herein made or hereafter made for the maintenance and operation of the council. The council may also appoint such committees as it shall deem necessary to assist it in investigation and studying matters referred to it.

Section 4. Each officer, board, commission or department of state government, or any local government, shall make such studies for the council as it may require and as can be made within the limits of its appropriation.

Section 5. Testimony in investigations; fees and mileage of witnesses. That in the discharge of any duty herein imposed the council shall have the authority to administer oaths, issue subpoenas, compel the attendance of witnesses and the production of any papers, books, accounts, or documonts, and to cause the deposition of witnesses, either residing within or with the state, to be taken in the manner prescribed by law for taking depositions in civil actions in the district courts. In case of disobedience on the part of any person to comply with any subpoena issued in behalf of the council, or on refusal of any witness to testify to any matters regarding which he may be lawfully interrogated, it shall be the duty of the district court on application of a member of the council to compel obedience by proceedings for contempt as in the case of disobedience of the requirements of a subpoena issued from such court or a refusal to testify therein. Each witness who appears before the legislative council by its order, other than a state officer or employee, shall receive for his attendance the fees and mileage provided for witnesses in civil cases in courts of record, which shall be audited and paid upon the presentation of proper vouchers sworn to by such witness and approved by the secretary and chairman of the council.

Section 6. Meetings; quorum. The council shall meet as often as may be necessary to perform its duties: Provided, that in

any event it shall meet at least once in each quarter. Eleven members shall constitute a quorum, and a majority thereof shall have authority to act in any matter falling within the jurisdiction of the council.

Section 7. Governor's messages. The governor shall have the right to send a message to any session of the council at any time the council is in session.

Section 8. Secretary.

The Director of the Division of Legislative Research and Drafting shall be the secretary of the council and shall through said division assist in coordinating the work of the council and of any committees which may be appointed by it, and in supplying any information and rendering such assistance and service as may be necessary or as the council may require.

Section 9. Minutes and reports; rights of members of legislature. The council shall keep complete minutes of its meetings and shall make periodic reports to all members of the legislature, and keep said members fully informed of all matters which may come before the council, the actions taken thereon, and the progress made in relation thereto. Any member of the legislature shall have the right to attend any of the sessions of the council, and may present his views on any subject which the council may at any particular time be considering, but he shall not have the right to participate in any decision.

Section 10. Recommendations to Legislature.

The recommendations of the council shall be completed and made public at least 30 days prior to any session of the legislature, at which such recommendations are to be submitted; and a copy of said recommendations shall be mailed to the post-office address of each member of the legislature, to each elective state officer and to each of the state law libraries and to the Library of the College of Law, University of Idaho.

Section 11. Compensation of members. That members of the council and the chairman and vice-chairman thereof shall be compensated for the time spent in attendance at sessions of the council at the rate of $5.00 per day and actual expenses incurred while attending said session.

Section 12. Division of Legislative research and drafting. Director; qualifications and compensation.

There is hereby established, a division of Legislative research and drafting in charge of a director, who shall be appointed by the legislative council and confirmed by the Board of Education, and who shall hold office at the pleasure of the council .

Section 13. Assistants, draftsmen, and clerks; how appointed and paid.

The legislative council, may employ and fix the compensation of necessary assistants, draftsmen and clerks, who shall be selected solely on the grounds of fitness for the performance of the duties assigned to them. Such compensation shall be paid out of appropriations made for the purpose.

Sec. 14. Affiliated with State University. The Division of Legislative Research and Drafting shall be affiliated with the department of political science and sociology and with the college of law of the University of Idaho and its branches, in such manner as may be provided by the board of education. It shall give such instruction and furnish such facilities for the training of students in legislative reference work and in the knowledge of Idaho institutions as may be arranged for with the heads of such departments and college, and may with the consent of the board of education, use the students in these courses as assistants.

The Supreme Court may assign any employee of the Supreme Court or in the State Law Libraries for work in research and revision upon the request of the Director.

Sec. 15. Duties of Division. The division of legislative research and drafting shall perform the following duties:

(1) Classify books, pamphlets, periodicals, documents and other literature relating to prospective or pending legislation.

(2) Prepare catalogs, indexes, lists, digests and compilations of material relating to subjects of legislation;

(3) Publish bulletins and pamphlets containing guides to or summaries of materials or information in the division;

(2) Keep on file copies of all bills, resolutions, amendments thereto, reports of committees, and other documents printed by order of either house of the Legislature.

(5) Accumulate data and statistics regarding the practical operation and effect of statutes of this and other states.

(6) Upon the request of the Governor, the legislature or Committees thereof, the legislative council, or any elective officer of the state, the division shall:

(a) Draft or aid in drafting legislative bills, resolutions, amendments to the state constitution, and memorials to congress.

(b) Advise as to the constitutionality or probable legal effect of proposed legislation;

(c) Prepare summaries of existing laws affected by proposed legislation, compilations of laws in other states or countries relating to the subject matter of such legislation, and statements of the operation and effect of such laws.

(d) Make researches and examinations as to any subject of proposed legislation.

(7) It shall also be the duty of the director to examine the statutory law and constitution of this State with a view to ascertaining all irregularities and defects therein, all obsolete laws and all laws requiring amendments, and, at least 30 days before any regular meeting of the council he shall make a detailed report of his findings to the governor and the legislative council.

The director shall perform such other duties as may be required by law.

Sec. 16. All books and documents of the Division of legislative research and drafting shall be accessible to public officers and the general public.

Section 17. How requests for drafting bill shall be made.

All requests for the drafting of bills or resolutions shall be submitted to the division in writing and shall contain a general statement respecting the policies and purposes which the Governor, officer, legislators or committe thereof, or legislative council desires incorporated therein and accomplished thereby.

Section 18. If any section, subsection, paragraph or provision of this act shall be held invalid by any court for any reason, it shall be presumed that this act would have been passed by the legislature without such invalid section, subsection, paragraph or provision, and such findings and construction shall not in any way affect the remainder of this act.

PRESIDENT ANDERSON: The next matter on the program is "Problems in Community Property Law in Relation to Life Insurance," by Mr. Weldon Schimke of Moscow. Mr. Schimke—

WELDON SCHIMKE: Mr. Chairman, gentlemen of the Bar: In 1905 the New York Life Insurance Company issued to one Charles Newman a 20 year endowment life insurance policy. Newman was at the time a married man, but he did not name his wife as beneficiary, and his wife, as a matter of fact, was ignorant of the existence of the policy until after his death. The policy contained the customary clause whereby he reserved the right to change the beneficiary. The original beneficiary named was his estate. Thereafter he changed the beneficiary from time to time, the beneficiaries being, for the most part, his brothers and sisters. The wife was never named as beneficiary. He had borrowed upon the policy upon occasion. The premiums were slightly more than $500 a year, and were paid entirely out of the community funds. At the time of his death, the premiums paid aggregated almost $8,500.00. Upon Newman's death, the insurer interpleaded the claimants and paid the money into court. The court said: "The chose in action represented by the policy belonged to the community because of

the fact that community funds had been paid as the consideration for its acquisition." Being community property, the husband could dispose of only his undivided half interest in the policy." The wife received half, and the designated beneficiary received half.

The foregoing represents briefly the facts and holdings in the case of New York Life Insurance Co. v. Bank of Italy, 214 Pac. 61, decided by the California District Court of Appeals in 1923. The Supreme Court of California declined to hear it further. This case is perhaps, from our point of view, the leading one on the question.

While the Bank of Italy case was pending, negotiations were proceeding between the attorneys for one Elizabeth Blethen and the Pacific Mutual Life Insurance Company, whereby she sought to obtain part of the proceeds, at least, of a policy insuring the life of her deceased husband.

George Blethen had obtained the policy from the defendant insurance company while he was married, and all premiums were paid out of community funds. His right to change the beneficiary was reserved by the terms of the contract. The Blethens had domestic difficulties and separated. A property settlement was made, no mention whatever being made of his life insurance. An interlocutory decree of divorce was entered in which there was no reference to or disposition of the life insurance. The former beneficiary having been his wife, he changed it to his son, and thereafter made his sister beneficiary. He died before a final decree of divorce was entered.

Mrs. Blethen's attorney wrote to the company, stated that Blethen had agreed that the proceeds of the policy should be used for the benefit of their adopted son, asked who the beneficiary named in the policy was, and informed the company of the status of the divorce proceedings, and of the existence of the property settlement agreement.

The company acknowledged this letter, and asked for a certified copy of the property settlement agreement. There being no reply, they wrote again and asked for definite advice as to whether or not Mrs. Blethen claimed an interest in the policy. Her attorneys replied in effect that they did not see what they could do for their client, as the assured had the right to change the beneficiary without the consent of any one, and "there seems to be nothing that we can do except to let you follow your regular course."

Shortly thereafter the company settled in full with the beneficiary named in the policy. Nine months later the decision in the Bank of Italy case came out. A month after that Mrs. Blethen's attorney again wrote to the company, referring to that case, and demanding half of the proceeds of the policy. The company declined to pay on the ground that they had already made full settlement

with the beneficiary named in the policy. Mrs. Blethen took her claim into court. On appeal (243 Pac. 431), the court held that Mrs. Blethen had asserted herself too late. The insurance company, in good faith, had settled the loss and paid the proceeds to the named beneficiary without notice of any adverse claim on the part of Mrs. Blethen. In fact, the letters from her attorneys plainly stated that they couldn't do anything for her and expressly negatived the idea of an adverse claim. Cf. Lovell v. Metropolitan Life Insurance Company, 5 P. (2), 430, California, 1931, a similar case.

While we must not be too harsh, because Mrs. Blethen's attorneys did not have the early benefit of the Bank of Italy case, nevertheless, it is very obvious that they made at least three significant blunders: (1) In the property settlement and in the divorce decree, specific provision should have been made with reference to the insurance. (2) A claim to some interest in the proceeds of the policy should have been asserted before the company paid over the proceeds to the beneficiary. (3) When they did get ready to sue, they sued the wrong party. Had they sued the beneficiary who collected the proceeds of the policy instead of the company, it is very apparent from two prior and at least three subsequent California cases that they would have won.

Brown v. Brown, 147 Pac. 1171, Cal. 1915.
Shoudy v. Shoudy, 203 Pac. 437, Cal. 1921.
Martinez v. Huson, 57 P2d 970, Cal. 1936.
McBride v. McBride, 54 P2d 480, Cal. 1936.
Mazman v. Brown, 55 P2d 539, Cal. 1936.

Why do I dwell upon the errors of counsel for Mrs. Blethen? Simply because Idaho lawyers are making the same mistakes every day. How often in divorce proceedings do we inquire about life insurance policies in the family—those on the life of the husband, wife, or any member of the family. In probate matters, do we ordinarily concern ourselves with community interests in life insurance policies which should be inventoried? And with reference to the collection and payment over of the proceeds, it is our usual assumption that the insurance agent or adjuster will take care of it. Sometimes we may even go so far as to fill out the proof of loss blanks furnished by the insurance company, but how often do we consider ourselves with reference to whether or not the wife of the deceased has a right to the proceeds as against the named beneficiary?

The prevailing theories underlying community interests in insurance policies are not usually difficult. The main principles are fairly easy of application. The thing that has made this problem important to us is the fact that it has been so largely ignored by the Idaho bar. A broad and profitable field for legal endeavor has been neglected.

Turning again to the Blethen and Bank of Italy cases, the opin-

ions of both decisions recite that the designation of a beneficiary undor a life insurance policy is in the nature of a gift, and the cases rest squarely upon a California statute, passed in 1891, whereby the husband was prevented from making gifts of community property without the consent of the wife in writing. Prior to that time, it appears that his power to make gifts of community property was absolute. The court stated in the cases referred to that the gift of life insurance proceeds is inchoate, uncomplete and may be subject to revocation if the right to change the beneficiary has been reserved, but in the absence of consideration from the beneficiary, it is in the nature of a gift, and that the law regarding gifts is applicable.

At the same time, the California courts have ruled, a gift by the husband of community property is not void, but only voidable at the instance of the wife, and if the wife fails to object at the proper time, the gift becomes absolute. This is what happened in the Blethen case. The failure of Mrs. Blethen's counsel to assert her claim when the loss was being adjusted constituted a waiver of her objection, and the gift of her husband to his sister became absolute.

The California law upon the question took some time to crystalize. Two very early California cases (In re Stan's Estate, Myr. Prob. 5 and In Re Wobb's Estate, Myr. Prob. 93) held that a life insurance policy paid for out of community funds was community property. However, this doctrine was more or less forgotten; for 48 years California stumbled in the darkness, and most of the cases preceding the Bank of Italy cases discuss not the effect of premium payment from community funds, but the nature of the interest of the beneficiary in a life insurance policy while the assured is still living. There is at least one case in which there is strong dicta to the effect that payment of premiums from community property makes no difference, although the court found that there was no proof with reference to the source from which premium payment was made. Shoudy v. Shoudy, 203 Pac. 437, California 1921. But the California doctrine or approach to this entire question did not begin to take shape until the Bank of Italy case was decided. It cannot be too strongly urged that no California case upon this problem decided prior to the Bank of Italy case can be trusted. Such cases very frequently represent theories now regarded as exploded.

While we are on the subject of trustworthy sources of reference material upon this problem, I would like to comment in passing that, for the most part, eastern lawyers and eastern courts cannot be relied upon in dealing with a community property question. Two illustrations will suffice. In the leading Washington case of Occidental Life Insurance Co. v. Powers, 74 P (2d) 27, decided by a divided Washington Supreme Court in 1937, the majority opinion comments as follows upon a Federal case decided by the Seventh

Circuit Court of Appeals, involving Washington law: "That case did not have the benefit of any counsel except from Chicago, who were unfamiliar with our law governing community estates, wills, and testamentary disposition. The writer of that opinion lamented that there was no decision of the Washington Supreme Court to aid them. There were, but they were not cited there."

Serious error in A. L. R. is very rare but that very fine work has slipped once upon this problem. An annotation in 52 ALR 386, written in 1928, cites the Shoudy case from California as authority for the proposition that payment of premiums out of community property does not give the wife any additional claim to the proceeds of a life insurance policy. No other case was cited. I won't quarrel with the accuracy of the citation. However, the Shoudy case was decided in 1921. It was dead in 1923 when the Bank of Italy case came out, although the opinion in that case spoke kindly of it, and it was buried in 1926 by the opinion in the Blethen case. In 1928 the ALR editorial board still considered it good law. In fairness to ALR, it should be said that the recent annotatio in 114 ALR at page 545 contains good brief reviews of practically all the significant cases in point. However, the material has not been particularly well analyzed and sorted out. The best analytical writing on the question thus far has been in some of the law reviews.

Washington Law Review, Volume V. Page 45, April, 1930.
Tulane Law Review, Vol. XII, Page 156, December, 1937.
Washington Law Review, Vol. XIII, Page 321, November, 1938.
Tulane Law Review, Vol. XIII, Page 424, April, 1939.
Texas Law Review, Vol. XIII, Page 121, February, 1939.

The really great judicial opinion in which the theories of the various states with regard to community life insurance problems are compared and contrasted, and the advantages and disadvantages of each weighed and a deliberate selection made among them, has not yet been written. When that opinion is written, I hope that it will come from our own Supreme Court. The nearest approach to such an opinion yet published is that of the Washington Supreme Court in the Occidental Life Ins. Co. v. Powers case.

Some of the difficulties in this problem have developed from peculiarities in the community property theory of several of the states, but most of them have arisen from a lack of comprehension on the part of the courts of the essential nature of life insurance. Happily, that cloud has been very much dispelled in the last twenty years.

Practically every life insurance policy sold involves two elements —a risk of loss which the company assumes, and for which the company exacts a risk charge. Second, the accumulation of a savings fund or reserve. The difference between the various policies and types of contracts lie in the manner in which these two ele-

ments are put together. Let us suppose that I want a policy with no savings fund involved. This kind of insurance is called term insurance. If I die, my beneficiary collects. If I do not die, the policy is worth nothing. Term insurance is in many respects like an ordinary fire insurance policy.

However, suppose I reason about the situation in this manner: Even although term insurance is cheap, I might carry it until I am sixty years old, and then find out that I am uninsurable, and then I can't get insured any more. If I live and beat the game, I will have paid out quite a little sum of money, but I won't have gotten anything out of it. What I want is a term policy for my whole life, one that will pay $1000 when I die, whether that occurs when I am 39 or when I am 99. I wonder whether there is any such policy?

There is such a policy and it is called ordinary life. Let us suppose that I have a $1000 ordinary life policy, and under the mortality table, I can expect to die in 35 years. It is very obvious that the company will have to collect a premium sufficient in size so that 35 of such annual premiums, together with the interest accrued, will cover the cost of doing business, and still leave the company a nest egg of $1000 to hand over to my beneficiary upon my death. Of course, I may die sooner than that, but I might on the other hand live longer than my expectancy. The law of averages never fails the insurance company. This thousand dollars that they must put by isn't all accumulated at once. It is built up little by little as I pay premiums, and is sometimes called the company's legal reserve. Almost half of it will be accumulated in the first 20 years in my example. This accumulation is what constitutes the cash value of a policy, or its surrender value, or its loan value, or the policy reserve, whatever it may be called. Such values are required to be stated on the face of the policy. Section 40-1303 Idaho Code Annotated.

This cash value is the equivalent of savings in the bank. It may be drawn out, and the policy surrendered. It can be pledged as collateral for a loan. It is, in the fullest sense of the word, property, and its value is capable of exact determination. Such values exist from the third year of the policy until maturity. Section 40-1303 Idaho Code Annotated.

That part of the premium that has been used to cover the expenses of the life insurance company and the risk they assume in insuring my life is dissipated and spent, as surely and finally as if it had been spent for whiskey, or was deposited fruitlessly in slot machines. That part of the premium which goes to augment the cash surrender value of a life insurance policy has been saved, just as surely as if the money were deposited in a bank.

After this brief review of the nature of life insurance, let us turn to see what some of the other community property states have

done. In the relatively early case of Martin v. McAllister 63 S. W. 624, 56 ALRA 585, decided in Texas in 1901, the court held that a life insurance policy was not property; it was the evidence of a contract; that the same event which matured the policy (that it, the death of the assured) dissolved the community, that the community and the property never did co-exist, and that there was never therefore any community property right therein. Although it finds some support in later decisions (for instance, Jones v. Jones, 146 S. W. 265, Tex. 1912) we are perhaps justified in saying today that this represents bad law and a minority viewpoint. It is to be regarded as unfortunate that some decisions have attempted to reconcile these cases rather than overrule them. The result has been confusion. After discarding this doctrine as exploded, the law of Texas may today he summarized as follows:

1. The proceeds of a policy on the husband's life, payable to his estate, the premiums upon which were paid with community funds, is community property.

Martin v. Moran, 32 S. W. 904, Tex. 1895.
State v. Jones, 290, S. W. 244, Tex. 1926, rev. on other grounds
Jones vs. State, 5 SW 2d 973, Tex. 1928.
Rowlett v. Mitchell, 114 S. W. 846, Tex. 1908.

2. The proceeds of a policy on the husband's life, payable to the wife, the premiums upon which were paid with community funds, belong to the wife as her separate property, upon a gift theory.

Texas Law Journal article cited.
Martin v. McAllister, 63 SW 624, Tex. 1901.
Evans v. Opperman, 13 SW 312, Tex. 1890.
Johnson vs. Cole, 258 SW 850, Tex. 1924.
Davis vs. Magnolia Petroleum Corp. 105 SW 2d 695, Tex. 1937.
Jones v. Jones, 146 SW 265.
Annotation, 114 ALR 545.

3. A divorced wife cannot have an insurable interest in the life of her former husband, under the public policy of the State of Texas.

Whiteselle v. Northwestern Mutual Life Ins. Co. 221 SW 575, Tex. 1920.
Hatch v. Hatch, 80 SW 411, Tex.
Lawson v. United Benevolent Association, 185 SW 978 Tex. 1916.
Appleby v. Grand Lodge, 225 SW 588, Tex. 1920.
Williamson v. Modern Woodmen, 237 SW 339, Tex. 1922.

The prevailing rule is otherwise.

Courtois v. Grand Lodge, 67 Pac. 970, Cal.
Kelly v. Kelly, 60 So. 671 (La.)
Humphrey v. Mutual Life Ins. Co., 151 Pac. 100, Wash. 1915.

Teed v. Brotherhood, 190 Pac. 1005 (Wash. 1920).
52 ALR 386 and 59 ALR 172.

4. In a divorce action, one Texas case gives the wife half of the cash surrender value of life insurance policies, the premium of which have been paid from community funds.

Russell v. Russell, 79 SW2d, 639, Tex. 1934.

Although most of the Texas cases deny her such relief.

Whiteselle v. NW Mutual Life Ins. Co., 221 SW, Tex. 1916.
Hatch v. Hatch, 80 SW 411, Tex. 1916.
Fain v. Fain, 93 SW 2d 1226, Tex. 1936.

Although this latter view has been severely criticised by one writer.

W. O. Huie, article in Texas Law Review, Vol. XIII, page 121 February, 1939.

5. The wife in case of divorce has no claim for reimbursement for premiums paid from community property.

Whitesells v. NW Mutual Life Ins. Co., supra.
Fain v. Fain, supra.

But she may have a claim for reimbursement of premiums paid out of her separate property.

Hatch v. Hatch, 80 SW 411, Tex. 1916.

The results obtained in Louisiana appear to he somewhat anomalous. The Louisiana courts apparently concede the right of the husband to name a beneficiary other than the wife, and in event he has not reserved the right to change the heneficiary.

Morris v. Providential Life & Accident Ins. Co., 162 So. 443. La. 1935.

Or in event his death has matured the policy.

Pearce v. Nat. Life & Accident Ins. Co., 125 So. 776, La. 1930.
Toussant v. Nat. Life & Accident Ins. Co., 86 So. 415, La. 1920.
Cf. Ticker v. Metropolitan Life & Accident Ins. Co., 11 Orl. App. 59, La. 1914.

It has heen held that the wife has no cause for complaint, even where premiums are paid from community property. Tbis would make it appear as if the wife had no interest. In any event, that interest is not well protected. This would appear to be consistent with the result reached in Newman v. Commissioner of Internal Revenue, 76 F (2d) 449 (cert. den.) wherein it was held that the entire proceeds of policies on the husband's life are taxable as against the wife. A comment in the Tulane Law Journal (Vol. XIII, page 424, April 1939) questions the ruling in the Newman case, and states that it has been overruled in Lang v. Commissioner of Internal Revenue, 304 U. S. 264, 58 S. Ct. 880, 82 L. Ed. 1331 (1939). It is possible that a distinction may lie in the fact that the Lang case was based upon Washington law, and the Newman case upon Louisiana law.

An article in the Texas Law Review (Vol. XIII, page 121, February, 1939) cites McKay on Community Property, Sec. 421, note 11, for the proposition that Louisiana does not recognize the rule prevailing in most community property states that property may be in part community property and in part separate. As a result, life insurance must be all community property or all separate property. Its status is determined as of the time the policy was taken out. If it was taken out while the assured is single, the policy is separate property.

In re Moseman, 38 La. App. 219 (1886).
Verneuille's Succession, 45 So. 520 (La. 1908).

When the policy is taken out during coverture, it is community property, if payable to the husband's estate.

Le Blanc's Succession, 76 So. 223, LRA 1917F 1137 (La. 1917).
Succession of Buddig, 32 So. 361 (La. 1902).
Berry v. Franklin State Bank & Trust Co., 173 So. 126 La. 1917, dicta.

If, on the other hand, the policy is payable to the wife, the wife takes the proceeds on maturity of the policy, as her separate property, on a gift theory.

Pilchner v. N. Y. Life Ins. Co. 33 La. App. 322 (1881).
Lawler v. Penn Mutual Life Ins. Co. 24 So. 16 (La. 1898).
Kelly v. Kelly, 60 So. 671, La. 1913.
Desforge's Succession, 64 So. 978, 58 LRANS 689, La. 1914.
Nelson v. Herndon, 147 So. 359, 88 ALR 236 La.
Ticker v. Metropolitan Life Ins. Co. 11 Orleans App. 55, La.
Successions of Geo. & Francis Clark, 27 L. Ann. 269 (La. 1875).
Succession of Bofenschen 29 L. Ann. 711 (La.)
Putnam v. N. Y. Life Ins. Co., 7 So. 602 (La. 1890).
Douglas v. Equitable Life Assurance Society, 90 So. 834 (La. 1922).
Succession of Hearing, 26 La. Ann. 326 (La. 1874).

Since a policy payable to the wife is her separate property, the husband has no right to change the beneficiary without her consent.

Pilcher v. N. Y. Life Ins. Co. 33 La. Ann. 322 (La. 1881).
Putnam v. N. Y. Life Ins. Co. 1890 La. 42 La. Ann. 739, 70 So. 602.

However, it would appear that the right of a husband to change the heneficiary from the wife to his estate was not challenged in at least one case.

Berry v. Franklin State Bank & Trust Co., 173 So. 126 (La. 1937).

The question naturally occurs—when a policy is taken by a single man who thereafter marries, and the bulk of the premiums are paid out of community property, and under the Louisiana law the policy is his separate property, how is the community protected? The Louisiana courts have held that the community is entitled to be reimbursed for all premiums paid from community funds.

In re Moseman, supra.
Verneuille's Succession, supra.

Similarly when the community is terminated by divorce, and premiums are thereafter paid on a community policy out of the separate property of the ex-husband, his separate estate is entitled to be reimbursed for premiums so paid.

Le Blanc's Succession, 76 So. 223, LRA 1917F 1137 La. 1917.
Berry v. Franklin State Bank & Trust Co., 173 So. 126 (La. 1937).

However, with all due justice to the Texas and Louisiana cases, I offor it as my opinion that they are essentially foreign to any problem that we may have in Idaho. Our own statutes compare more nearly with those of California and Washington than they do with those of Texas and Louisiana. Our community property theory is more like that of our immediately neighboring states. To cite one specific example, Idaho recognizes that property may be in part community property and part separate property.

Northwestern & Pacific Hypotheek Bank vs. Rauch, 7 Idaho 152, 61 Pac. 516.

This renders unnecessary and perhaps unlikely the adoption of the Louisiana rule that a policy is all community or all separate, subject to a right of reimbursement for premiums.

New Mexico has adopted the Louisiana rule that the separate or community status of a policy is determined at the time the policy is taken out, irrespective of the source of premium payment.

In re White's Estate, 73 P2d 316 (N. M. 1937), 89 P2d 36 (N. M. 1939).

Arizona has some confused and inconclusive cases on the general question.

Christy v. Hudgens, 203 Pac. 569 Ariz. 1922.
Jackson v. Griffin, 4 P2d 900, Ariz. 900.
Coe v. Winchester, 33 P2d 286, Ariz. 1934.

The California cases regard the designation of a beneficiary as in the nature of a gift, and the gift is absolute if the right to change the heneficiary is not reserved, or in event of the death of the assured, subject only to the right of the wife to avoid the gift. Only

the wife may raise this objection, and if not seasonably made by her, it is waived.

Shelly v. McKimmins, 90 P2d 812, Calif. 1939.
Blethen v. Pacific Mutual Life Ins. Co. 243 Pac. 231, Cal. 1926.

Upon the death of the husband, his policy naming his wife as beneficiary vests the proceeds in her as her separate property, and upon her subsequent death, the proceeds are taken by her heirs to the exclusion of the husband's heirs.

In re Miller's Estate, 71 P2d 1117, California 1937.

Where a policy is payable to assured's wife, her executors, administrators or assigns, the policy is her separate property, even though she dies first. The husband's estate cannot claim the proceeds as community property, hut is limited to the one-third portion which a husband inherits of the wife's separate property.

In re Dobbel's Estate, 38 Pac. 87, Cal. 1894.

Where, however, the husband desiguated as beneficiary the wife, if living, otherwise to his own estate, and the right to change the heneficiary is reserved, then upon the wife's prior death, his estate becomes beneficiary, and the proceeds retain their character as community property, and are divided equally between the heirs of the husband and the wife.

In re Castagnola's Estate, 230 Pac. 188, Cal. 1924.

On the other hand, where there is consideration for the designation of a beneficiary, there is no gift problem, and the husband's power of dealing with community personal property is broad and sweeping. These problems ordinarily arise out of family discord, which is responsible for the circumstance that the wife is no longer designated as beneficiary. The designated beneficiary will claim that he or she took care of the assured while he was sick, or furnished him board and lodging while he was broke and estranged from his wife, or washed his socks for him, or performed other services. It becomes a simple question of fact as to whether or not there was a contract whereby such person was designated as beneficiary.

Martinez v. Hudson, 57 P2d 170, California 1936.
Shelly v. McKimmins et al, 90 P2d 842, California 1939.
Mundt v. Connecticut General Life Ins. Co. 95 P2d 966, Cal. 1939.
Shoudy v. Shoudy. 203 Pac. 433, Cal. 1921.

Where money has been advanced or substantial financial concessions made by the beneficiary, the courts ordinarily have no trouble in determining that there was consideration for such designation.

Dixon Lumber Co. v. Peacock, 19 P2d 233, California, 1933.

Union Mutual Life Ins. Co. v. Broderick, 238 Pac. 1034, California 1925.

The mathematical method followed by the California courts for the determination of the wife's interest is quite simple. That proportion of the total proceeds of an insurance policy is community property which the premiums paid from community funds bear to the total premium paid on the policy. If half of all the premiums have been paid out of community funds, half the face of the policy is community property. The wife takes one-half of this community interest.

McBride v. McBride, 54 P2d 480, California 1936.
Beemer v. Roher, 30 P2d 547, California 1934.
Modern Woodmen of America v. Gray, 299 Pac. 754, California 1931, modified in Travellers Ins. Co. of Hartford v. Fancher, 26 P2d 48, California 1933.

In this last case the second wife advanced the theory that if premiums had not been paid out of the funds of the second community, the policy would have lapsed, and consequently the face of the policy actually represents the proceeds of the final premiums, paid by the second community, and hence the second community should receive the entire proceeds. This contention the court rejected, arguing that the right to keep the policy in force was a valuable legal right, and that it was a right which had its origin under and was maintained by the first community.

The fact that the wife inherits other property substantial in amount from her husband, and receives more than one-half of the community estate, is not material. She still has her community interest in a policy paid for with community funds.

Mundt v. Connecticut General Life Ins. Co. 95 P'd, 966, Cal. 1939.

In an action by a wife to establish her community interest in a life insurance policy, the statute of limitations applicable in California is two years rather than four. It has been held to be not based upon a contract in writing. The case in point does not make it clear when the cause of action arose. In view of the fact that the husband's death and the wife's demand upon the company were made more than three years prior to the bringing of the action, this issue was perhaps immaterial.

Meyers v. Guardian Life Ins. Co. of America, 66 P2d 753, Calif. 1937.

It has been contended that under the California statute since 1923, all community property "in the absence of testamentary disposition" went to the wife, and that the designation of a beneficiary is not a testamentary disposition, and that the wife takes the entire proceeds of policies paid for with community funds to

the exclusion of the two minor children named as beneficiaries. The Court decided that the wife received only half, being her half of the community interest, and that his designation of his children as beneficiaries was a good and valid gift to them as to his undivided community interest, which gift became absolute upon his death.

Travelers Ins Co. of Hartford v. Fancher, 26 P2d 482, Calif. 1933.

Further, the California courts have ruled that where a policy is payable one-third to the wife, and two-thirds to other beneficiaries, the wife has an election. She may take her one-third under the policy, in which event she is entitled to no more, or may reject her right to recover under the policy and elect to take her one half of the community interest in the policy.

Mazman v. Brown, 55 P (2d) 539, California, 1936.

All of which suggests that it may be a mistake to try to collect available moneys under an insurance policy without looking into the situation fully.

Many of the cases grow out of divorce, and in most of the divorces no disposition was made of the life insurance. However, in some cases such a disposition has been made by property settlement contract, and such disposition will be protected, even though not mentioned in the decree.

Shoudy v. Shoudy, 203 Pac. 433, California 1921.

On the other hand, when a property settlement making no disposition of insurance upon divorce was made pursuant to an express warranty that an attached list was a true and complete inventory of all community property, and the insurance was omitted, then such property settlement and divorce decree did not bind the wife insofar as the insurance is concerned.

Jenkins v. Jenkins, 297 Pac. 56, California 1931.

This latter case involves a situation wherein the beneficiary, by inadvertence, was not changed, and the first wife was still the named beneficiary. Also, the court found that no premiums were paid out of the community funds of the second community, and the mathematical method by which conclusion was reached is very interesting.

On the other hand, it has been held that where a divorce complaint and decree find that there is no community property, and the ex-wife finds, upon the subsequent death of the ex-husband, that he had some life insurance, and sues to get part of it, the decree issued pursuant to her own complaint bars her, and constitutes a previous adjudication to the effect that the life insurance itself was not community property, and she is estopped by such judgment.

Brown v. Brown, 147 Pac. 1171, California 1915.

How would you like to get mouse-trapped in such fashion, especially if you had built the mouse-trap yourself by drawing the divorce complaint?

The situation in Washington is, on the whole, rather similar to that in California. The rule there with respect to the assignment of policies or designation of a beneficiary in consideration for some tangible benefit is the same.

Johnston v. Johnston, 47 P (2d) 1048, Washington, 1935.
Schade v. Western Union Life Ins. Co. 215 Pac. 521, Wash. 1923.
Seattle Association of Credit Men v. Bank of California, 30 P (2d) 972, Washington, 1934.

Washington has two very interesting cases, particularly the latter one, involving policies taken by a corporation upon the lives of its officers.

May v. Rudell, 270 Pac. 1041, Wash. 1928.
In re McGrath's Estate, 71 P (2d) 395, Washington 1937.

The latter is a very pertinent case of taxability of insurance proceeds.

Washington, like California, has its early case which has since been overruled.

Cade v. Head Camp, WOW, 67 Pac. 603, Washington 1902.

In Mutual Benefit Life Ins. Co. v. Lundquist, 248 Pac. 808, Washington, 1926, the court determined that none of the premiums had been paid out of community funds, but the proof by which this conclusion was reached is highly interesting and well worth reading.

Washington pro-rates premium payment in order to ascertain the proportion of the community interest in a policy, just the same as California does.

In re Coffey's Estate, 81 P (2d) 283, Wash. 1938.
In re Brown's Estate, 214 Pac. 10, Wash. 1923.

However, Washington departs from California in that it gives the entire community equity in a policy to the wife, not merely half of the community equity. The case in which this was decided is Occidental Life Ins. Co. v. Powers, 74 P (2d) 27, 114 ALR 531, Washington, decided in December, 1938. It is this case that has put ants in the pants of all the life insurance companies.

The assured, while married, took out a $5000 policy, reserving all rights, including the right to change the beneficiary. The beneficiary named in the policy was his mother and his secretary. When he died he left an equal or greater amount of other insurance,

naming the wife as beneficiary. The court held that this fact made no difference, that the wife still had her community interest in the property in question; that the only way a husband could make an effective gift of his community interest under the Washington statute was by "testamentary disposition" and that the designation of a beneficiary was not such a disposition. Accordingly, the attempted gift was wholly void, and the decedent's mother and secretary took nothing. Counsel for the mother also argued that the wife may be entitled to the cash value of the policy, or half thereof, but that the beneficiaries should get the rest. The court held that the avails of the policy, both cash value and the face thereof, were obtained with community funds, and that no such distinction should be made. The court held further that the existence of a moral duty on the part of the son to support his mother did not alter the situation, and that the procedure was inapt to enforce any such legal duty.

The court was divided, 5 to 4. A strong dissenting opinion feels particularly incensed at the exclusion of decedent's mother, and almost starves her to death before our very eyes while the greedy wife will not concede her so much as a crust of bread.

It is perhaps a reasonable inference from the language of the opinion that the assured could have accomplished his object in either of two ways: First, he might have confirmed the grant to his mother and secretary in his will, in which event they would between them, take half of the policy. In the second place, he could have changed the beneficiary under the policy to his estate, and then bequeath cash money from his estate to his mother and secretary.

It cannot be too strongly urged that the California and Washington cases rest squarely upon the holding that the husband cannot make a gift of community personal property. Prior to 1893, it appeared to be the rule in California, under statutes practically identical with our own, that the husband had the absolute power to give away community personal property, or to dispose of it generally in any way he saw fit.

Spreckels v. Spreckels, 48 Pac. 228, California 1897.

However, it has been held that the 1891 statute, which requires the wife's written consent to gifts from the community, applies only to property acquired after its passage, and not to property acquired prior thereto.

Spreckels v. Spreckels, 48 Pac. 228.
Clavo v. Clavo, 102 Pac. 556, California 1909.

The fact that the husband has given away property worth less than half of the community property is apparently immaterial.

Dargie v. Patterson, 169 Pac. 360, Calif. 1918.

A gift by the husband is not void, but only voidable at the instance of the wife, and if not so voided by her is valid.

Spreckles v. Spreckles, 158 Pac. 537, California 1916.
Dahne v. Dahne, 193 Pac. 785, California 1920.
Pomper v. Behnke, 275 Pac. 122, California 1929.
Shelly v. McKimmins, 90 P2d 842, California 1939.

After the death of the husband, his gift is valid as to his undivided community interest, and voidable as to the wife's interest.

In re McNutt's Estate, 98 P2d 253, California 1940.
Trimble v. Trimble, 26 P2d 477, California 1933.
Ballinger v. Ballinger, 70 P2d 629, California 1937.
Matthews v. Hamburger, 97 P2d 465, California 1939.

During his lifetime, it may be set aside entirely.

Britton v. Hammel, 52 P2d 221, California 1935.

However, in seeking to protect her rights, the wife must plead and prove that the property in question was acquired since the passage of the 1891 statute.

Scott v. Austin, 207 Pac. 710, California 1922.

And there is dicta tending to indicate that an allegation of fraud might be helpful.

Johnson v. National Surety Co. 5 P2d 39, California 1931.

The Washington courts have held that the community is "essentially a business concern" of which the husband is merely statutory managing agent.

Sun Life Assurance Co. v. Outler, 20 P (2d) 1110, Washington 1933.
Schramme v. Steele, 166 Pac. 634, Wash. 1917.

In Washington, by judicial construction, the husband cannot make substantial gifts of community property without the consent of the wife.

Sun Life Assurance Co. v. Outler, supra.
Schramme v. Steele, supra.
Nimey v. Nimey, 45 P (2d) 949, Washington, 1935.
Parker v. Parker, 207 Pac. 1062, Washington, 1922.

It has been pointed out that the same code that gives him power to sell the whole restricts his power of testamentary disposition to half the community property.

Marston v. Rue, 159 Pac. 111, Washington, 1916.

This last involved a gift by a husband to his mistress.

The Washington courts appear to adopt a superior air of self-conscious virtue, saying in effect concerning the California rule: "You don't really have a community property system at all. Here we really protect the wife. Our law is more just and humane."

Stewart v. Bank of Endicott, 143 Pac. 458, Wash. 1914.
In re McGovern's Estate, 42 P (2d) 796, Washington 1935.
Cf. Spreckles vs. Spreckles, 48 Pac. 228, California 1897.

A highly interesting case is Nixon v. Brown, 214 Pac. 524, decided by the Supreme Court of Nevada in 1923. A gift by a United States Senator, worth from three to five million dollars at the time, without his wife's express consent at the time, of a $50,000 opera house to his old home town, was adjudged to be valid. The court said that he could "'make a voluntary disposition of a portion of the community property, reasonable in reference to the whole amount, in the absence of a fraudulent intent to defeat the wife's claims." There was no allegation of fraud, and the court did not feel the gift so large in proportion to his wealth that a fraudulent intent to deprive the wife of her interest in community property could be inferred.

In all these insurance and gift problems it is to be remembered that they can be raised after incredible lapses of time. It sometimes happens that a wife divorced 30 years or more appears upon the death of her ex-spouse, sets aside the divorce on the ground of the court's lack of jurisdiction, gets appointed administratrix of his estate, and moves right in to collect her community share of his insurance, and to set aside all gifts made to wife No. 2, who is by this time, unhappily, no wife at all, not even a widow.

Meyers v. Guardian Life Ins. Co. of America, 66 P (2d) 753, California 1937.
In Re McNutt's Estate, 98 P (2d) 253, California 1940.

What will the Idaho courts do with this problem when it is presented? Let us first address ourselves to the problem of whether or not a husband can make gifts of community personal property, because if he can make such gifts, then there is no problem at all. Let us summarize the arguments in favor of sustaining such power in the husband:

1. The language of the statute itself is broad and sweeping. It gives him the like power of disposition as he has of his separate estate.

2. The California courts have so construed practically identical language.

3. The case of Bosma v. Harder, 185 Pac. 74, decided by the Supreme Court of Oregon in 1919, in construing Idaho law, held that he has such power. This case, however, can be sustained independently of this holding.

On the other side of the ledger, we might argue as follows:

1. There was no clear construction of the California code provision in this particular at the time Idaho adopted it.

2. The broad and sweeping language of the statute is to be construed in the light of the fact that the community is a business organization, and that the husband's powers refer to business management.

3. The radical difference in the community property of this state as compared with that of California will justify a difference in the rule adopted that will more adequately protect the wife. In support of this contention, abundant Washington authority can be cited. The wife's interest here is no mere expectancy, but is a present, vested and substantial interest. It has been so held many times, and as late as Volume 100 of the Pacific Second, in an opinion by Judge Morgan.

4. In view of the nature of the wife's community interest in Idaho, it is barely possible that a statute construed to give the husband absolute power to give community property away might deprive the wife of her property without due process of law.

5. As the Washington courts argue by analogy, the husband's power of testamentary disposition is limited to half the community property.

6. Some of the cases suggested that gifts may be valid in the absence of fraud with reference to the wife's interest. The suggestions in some cases to the effect that the rule might be otherwise if fraud had been pleaded or proved offer a convenient escape from a harsh rule in a hard case.

When the Idaho Supreme Court is confronted, as was the Washington Court in Marston v. Rue, with the erring husband, the wronged and innocent wife, and the brazen and aggressive mistress —the Mae West type—who has taken unto herself the family automobile, what is our court going to do? They're going to do right by our Nell. Virtue will be rewarded and sin punished. In many of these cases the courts try to ascertain who has been sleeping in the wrong bed, and then render judgment against the sinner. We might call it the boudoir theory of jurisprudence. And this approach may not be as foolish as it sounds, and may serve a very useful social purpose.

Assuming that the husband may not make gifts with a purpose of defrauding the wife of her community interest, and that a gift substantial in amount in proportion to his estate may be competent evidence of such an intent, it behooves us to let our pleadings in such matters bristle with allegations of fraud, and to outline the family financial affairs in some detail. On the basis of this assumption, let us turn to the specific question of life insurance proceeds.

I feel that the courts of this State will follow, in general, the California and Washington rule, and recognize the existence of a community interest in life insurance policies. The approach to this problem existing in Louisiana and Texas will be rejected. I trust that when the assured dies while married, the fair method of calculating the extent of that community interest is by prorating premium payments, as is done in California and Washington. Personally, I prefer the California rule which allows the wife to take only half of the community interest to the Washington rule which allows the wife to take the entire community interest.

Upon divorce, I favor personally the rule in the ordinary case that the wife should receive half the cash value of the policy. This doctrine has found minority support in Texas, and is approved in the Tulane Law Review, Vol. XIII, Page 156. It may be true that the ordinary value of a policy is slightly more than its cash value, because of prepaid expenses, commissions and the like. However, the difference would not normally he great, and for all practical purposes is negligible. In an unusual case wherein the health of the assured was so impaired that his life expectancy was far less than normal, the value of the policy may even approach its face value.

Texas Law Review, Vol. XIII, Pages 121-151.

However, that becomes simply a matter of proof, and appropriate adjustment could be made.

After divorce, if the decree or settlement fails to make any disposition of the life insurance, I favor a modification of the Texas rule whereby an ex-wife retains no insurable interest in the life of her ex-husband. In Texas she gets nothing. I would give her half of the accumulated community cash values at the time of divorce (cash value at divorce minus cash value at marriage) including, possibly, interest.

I would deny her any claim to or interest in the face of the policy as such upon two grounds, both of which points have apparently not been thus far argued.

First, giving her a pro-rata share in the policy places the divorced husband in a position where the best thing he can do is to lapse the policy, and no one gets anything. This does not seem to me to be good public policy. For instance, a married man takes a $3000.00 policy, paying $100.00 a year premium, and pays ten premiums out of community funds. He is divorced, and then marries again. He pays one premium out of the funds of the second community. The interest of the second community would amount to only one-eleventh of the face of the policy—roughly $270.00—for a premium payment of $100.00. After he has paid ten premiums, or $1000.00 out of the assets of the second community, the second community still has only $1500.00 of insurance. To pro-

tect the second wife, the husband had better drop the existing policy, sacrifice any accumulated values, and take a new policy. Any rule making such a course profitable is inhumane and unjust, and in the long run benefits foreign insurance companies at the expense of the citizens of this State.

In the second place, it is only appropriate and proper that we regard life insurance as a business proposition. A policy does not insure one's life in the sense that it prevents death or brings the dead back to life. It merely tends to replace in some measure an earning capacity which has been destroyed by death. Now to whom does this earning capacity belong? It belongs to the second community, because the husband's earnings become the property of the second community. In the ordinary case which gets into court involving a divorce which pays no attention to insurance, a second marriage, and a premature death, it is unrealistic to regard the insurance policy as being the proceeds of premium payment. The face of the policy represents, minus the cash value, the proceeds of the assured's earning capacity. It is as if a house had burned down, and the former wife claimed an interest in the insurance settlement because she had helped to pay fire insurance premiums 30 years before. The rule in this respect in Washington and California is as if the first wife claimed an interest in all the jackpots the husband may strike after divorce, because of all the money he put into slot machines during coverture.

I hope to leave one thought with you—that a wife or husband may have a community interest in any insurance policies paid in whole or in part with community funds, irrespective of who may be the beneficiary designated. Such problems become of the utmost importance at the time of probate or divorce. If you pass these problems up at such a time, you are creating a mess. This mess will result in profitable litigation for some one, hut probably not for the person who makes it.

TUESDAY, JULY 2, 1940

(Afternoon Session)

PRESIDENT ANDERSON: Will you please come to order. We are honored to have with us, and privileged to hear, Mr. Robert F. Maguire, a member of the Board of Governors of the American Bar Association from Oregon's metropolis of Portland. At this time we will hear from Mr. Maguire on the subject of "The American Bar Association—Its Value to the Lawyer and the Public."

MR. MAGUIRE: Mr. President, members of the Idaho State Bar, and honored guests, —

No lawyer from another state could help hut feel proud and gratified at being accorded an opportunity to participate in the proceedings of the Idaho State Bar, and to partake of the hospitality for which it has been so long and well known. That I should be one of those so fortunate is a matter which I shall long remember and always cherish. Too often we of the legal profession find ourselves treading and retreading the well worn path between office and courtroom, so engrossed in our own immediate duties in the assertion and protection of the interests of our clients that we fail to avail ourselves of the valued companionship of our brethren, and too late find our mental horizons cabinned and confined hy the multitude of daily demands of practice so that we cease to he able to fulfill the largest and more important duties of good citizenship and to become leaders of forward thought and action for which the bar is particularly fitted.

Occasions like this are welcome cases where we may exchange thoughts and ventilate, perhaps renovate, our views and opinions and discuss and attempt to find solutions for common problems.

No one need relate to you or to the members of any state bar the work which has been done and which is being carried on by these organizations. The public which we serve and by whose confidence alone we can survive and prosper is rapidly learning and even more rapidly appreciating the accomplishments of your and other like organizations, and this in turn has in a large measure restored the standing and reputation of the lawyers of the court which was for so long the subject of critical attack, innuendo, and slander. The fact that the lawyers have embarked upon a program of seriously attempting to improve the administration of justice, of eliminating delay and quibhling over refinements of procedure, of casting out from their ranks those who have lost sight of the necessity for decency and honesty toward clients, brother lawyers and the courts, of insisting that any man desirous of practicing law shall be reasonably educated and prepared for his task, —these have done more for the profession in a decade than all the sporadic and uncoordinated efforts of individuals or small groups were able to do in several earlier generations.

It would be a pleasant assignment to review in detail what has been accomplished by your organization and those of other states, but I must refrain and proceed with the subject which has been allotted to me, —the American Bar Association's Value to the Lawyer and to the Public.

I think the subject is particularly apt and well chosen, but I would feel much more comfortable if I had some assurance that I I could adequately handle it.

In view of the fundamental changes which have been made in the last four years in the organization of the American Bar Association with the declared purpose of broadening its scope of work and coordinating the efforts of associations of lawyers throughout the country and cooperating in their work, it is indeed fitting that the members of this and every other bar in the country should

know something of what the American Bar Association is, what it does, and it proposes to do, what it has accomplished, and what it hopes to accomplish, that these things be evaluated and that the American Bar Association either grow to the fulfillment of a dream or that it may be relegated to a membership of those lawyers who desire to gather together occassionally on a "postman's holiday."

All organizations must be prepared to justify their existence, to demonstrate not only that there is something of value which they can do, but that during the years they have fulfilled in a substantial degree, the purposes for which they were created.

The American Bar Association was formed in 1878, and has grown from a mere handful to a membership of over 30,000. It is fitting, therefore, to apply the acid test of utility to it and its works.

First, what are the objects of the American Bar Association. Its constitution provides they shall be.—

> "to advance the science of jurisprudence, promote the administration of justice and uniformity of legislation and judicial decision throughout the Nation, uphold the honor of the profession of the law, encourage cordial intercourse among the members of the American Bar, and to correlate the activities of the Bar organizations of the respective States on a representative basis, in the interest of the legal profession and of the public throughout the United States."

These I think we will all agree, are wholly worthy of a profession, which in the English speaking countries, at least, has been ever in the forefront of the struggle to maintain and protect the rights of the individual against the oppression of kings and ministers of state, and of temporary majorities and mobs.

How then, is this organization set up and governed, who are eligible for membership, how does it function, and what has it accomplished?

Any person who is a member in good standing of the Bar of any State or Territory of the United States, or of any territorial group, or of any Federal, State or territorial court of record, is eligible for membership.

There is no thought of distinction, between the lawyers of the east, and those of the west, the city practitioner, and the lawyer from the smallest community, between the law school teacher, and the courtroom advocate, between the corporation lawyer and he who represents individuals, between the prosecutor and the defender.

Let me say here, that this equality is not a matter of theory

and lip-service; it is real and it is sincere. Those who have sat in the Association's House of Delegates, will bear me out that some of the men who are listened to with closest attention and interest, are what may be termed small town lawyers, and some of those who are listened to often with audible impatience, occupy positions of affluent corporation counsel. It is the man, his intelligence, candor, and sincerity, which count.

So, I can assure you, that no lawyer need feel that the American Bar Association is formed by, for or of the members of the profession who have been fortunate enough to have made a monetary success in its practice. It is least of all an assembly of "silk-stockings."

But you may ask, what of its government, where lies the control, who dictates its policies? Is it democratic and representative?

It has two deliberative bodies, —The Assembly which is composed of all members of the association who attend any meeting, which receives and acts upon resolutions, conducts open forum sessions, recommends action to the association's other deliberative body, —The House of Delegates, and if the latter declines to approve the former's recommendation, the Assembly may require a reference to the whole membership.

The House of Delegates has immediate charge of the administration of the Association. It again is a democratic representative body. It consists of State Delegates, elected one from each state by the members resident in that state, and State and Local Bar Association delegates, elected by the State Bar Associations, and such local bar associations which have sufficient membership to entitle them to a delegate, but provision has been made to closely limit the number from any state, thus preventing states like New York or Pennsylvania from obtaining an undue influence in the affairs of the Association.

In addition to these delegates, eight are elected by the Assembly, while the Attorney General, Solicitor General of the United States, the President of the Association of Attorneys General, the Chairman of the National Conference of Bar Examiners, the President of the National Conference of Commissioners on Uniform State Laws, the Chairman of the National Conference of Judicial Councils, the President of the Association of American Law Schools, the Officers of the Association and the Members of the Board of Governors, are likewise members and the Members of the Board of governors are likewise members of the House of Delegates.

Thus, it is apparent that the governing body of the Association is responsive not only to its membership, but to the desires of the Bar Associations of every state in the Union, for it is not a test of eligibility of a State Bar delegate that he be a member of the American Bar Association.

The officers of the Association are elected by the House of Delegates; they are the work horses of the Association, and I use that term advisedly and without exaggeration. They and the members of the Board of Governors are charged with responsibility for the activities of the Association when the House of Delegates and the Assembly are not in session.

When the Association was reorganized some four years ago, the principal objective was to make it a democratic body, to prevent, so far as it was humanly possible to do so, its government by a small clique or faction, to make it responsive and responsible to the entire bar of the country, and to insure that it would answer their needs, and carry into definite action their desires, aspirations and hopes.

So much then for the framework, the political machinery whereby the Association functions; but what does it do, and how does it function in fact? Are these merely finely drawn plans which in actual practice "gang aft agley," or is something substantial and real accomplished. These are inquiries which every intelligent lawyer would ask, and which should be answered.

The work of the association is largely carried on by committees, and without making this paper a mere tabulation or index, it is necessary to be somewhat specific.

There are, first, those committees which deal with particular branches of the law, whose duty it is to keep abreast with the development of those branches, to study their respective problems, to make suggestions and recommendations as to substantive or procedural amendments or changes, and to direct the attention of the Bar to development, change and the need for change.

Such are the Committees on

1. Admirality and Maritime Law.
2. Aeronautical Law.
3. Commerce.
4. Communications.
5. Customs Law.
6. Commercial Law.
7. Criminal Law.
8. Insurance Law.
9. Mineral Law.
10. Municipal Law.
11. Public Utility Law.
12. Real Property, Probate and Trust Law.
13. Taxation.
14. Patent, Trademark and Copyrights.

In some of these classes investigation and research are handled through sections, which themselves subdivide the subject, and place

these subdivisions in the hands of smaller committees. I shall not take the time or infringe on your patience by going into the various sub-classifications as to each subject, but will take only one as an example.

Such, for instance, is the Section on Real Property, Probate and Trust Law: It divided its work among the following committees:

1. Changes in substantive real property principles.
2. Real property financing.
3. Standards.
4. Conveyancing and records.
5. Conflicts of probate jurisdiction and practice.
6. Guardianship administration.
7. Current trust litigation.
8. Recent and pending trust legislation.
9. Creation and administration of trusts.
10. State and Federal taxation.
11 Trust and estate decisions.

You will note that the function of this section is to keep abreast and to inform the bar generally, and the members of this section particularly, with all the trends of decisions relating to these subjects, and to keep them advised of what is proposed by way of legislation or regulation. In addition thereto, the section, from time to time, has made suggestions and recommendations to correct anomalies and inequalities in the law, and to endeavor to bring about uniformity in the states both as to legislation and regulation, so that in the end the lawyer of Idaho may have some assurance that what he knows of real property, probate and trusts under the laws of Idaho, will not be far different from the legal principles governing in New York or Texas.

Obviously this objective is not to be attained in one year or two, the task is a heavy one, but constant thought and effort given by these committees is gradually bringing about a result that is bound to be of benefit to every practicing attorney in the United States.

The next division of the Association's activities may be properly labeled those relating to the public, in performance of the duty which as lawyers we owe to those whose confidence we seek, and on whose good will we depend for a livelihood.

The Committees on,—

1. American citizenship.
2. Labor, employment and social security.
3. Legal aid.
4. Legal clinics.
5. Security laws and regulations.
6. International and comparative law.

In this same field lies the work of another committee whose work has, I think, not only a direct bearing on the interests of the public, but is of especial benefit to the practicing lawyer. The special committee on Administrative Law.

Time was, when to most of us, lawyer and layman, administrative tribunals, bureaus, boards, agencies and authorities touched no part of our lives, our practice, or that of our clients. It was largely limited to the regulation of public utilities, railroads, telephone and telegraph companies, and the like. We were not greatly interested in what happened to them, and most of us felt not only that they were quite able to take care of themselves, but probably needed over them the strong hand of government to prevent the abuse of powers arising from their particularly strong and peculiar position.

But government regulation, supervision, and administration of the affairs of men has long ceased to function only with regard public utilities and railroads; it has in recent years been extended to practically every human activity. It governs the relation of the employer and his employees, hours of labor, rates of pay, conditions of employment; it exacts taxes from both to cover old age and unemployment insurance; it tells the sheepman and stockman where he shall graze his stock, the farmer how much he shall raise and what proportion of what he raises he may sell; it tells the trucker whether or not he may engage in the transportation of commodities, between what points, and under what conditions. Governmental regulation impinges on nearly everything we do.

Some of these agencies have proceeded wisely, fairly and impartially; as to others there has been wholesale and in part at least, justifiable criticism. There has been no uniformity of rules for hearing, notice, right of process, or review.

The American Bar Association, expressing no opinion either as to the necessity or wisdom of these increased governmental activities, addressed itself to the problem of endeavoring to study and make recommendations as to means for insuring that the individual affected thereby should be given an opportunity to know what the regulations were, how they were to be administered, to insure him the right of a fair and impartial hearing, to give him the right of process for the production of testimony, the right to representation by counsel, and finally the right to a review by the courts of administrative action, so far as this could be done without crippling or destroying the efficiency of such action.

That committee labored for four or five years, its membership was made up of lawyers who specialized in practice before governmental agencies, and of men who were themselves lawyers for administrative agencies, and of lawyers in the general practice, who, it was thought might bring to the committee's labors, the

viewpoint of the nonspecialists, of those, who only occasionally represent the public in its dealings with the government.

As a result of these labors, there has been drafted, approved by the Association, presented to Congress and passed by the House what is known as the Logan-Walters Bill. It has been studied and received the approval of leaders of business, of organized labor and scholars in the science of government, it has been attacked and criticized by some, but on the whole I think it represents a tremendous advance, and if it becomes a law, will I am firmly convinced, in a large measure restore the confidence of people in the evergrowing and necessary work of administrative bodies.

Another branch of the Association's activities relate to the Improvement of Jurisprudence and Law Reform, and the correlated work of the Commissioners on Uniform Law, the Law Institute, out of which has grown the Re-statement of the Law.

You may he surprised, as I was, to learn that the Commissioners on Uniform Laws, have drafted, and had approved 78 forms of uniform laws covering subjects running from Absence of Evidence of Death and Absentees' Property to the Written Obligation Act. Not all of them have been generally adopted as yet, but a surprising proportion have received statutory approval by a large nnmber of the states, and each year the tendency grows in the several states to look with favor and approval of the work of this Conference.

Finally we approach those activities of the Association which look to the improvement of the lot of the lawyer.

The Committee on Unauthorized Practice. We have all seen the encroachments of the Trust Company in the drafting of wills, trust agreements, contracts, escrows, deeds and mortgages. We have noted sometimes with amusements, and more often with irritation the realtor who attempts to draw the legal documents necessary for transfer of real property, or leases and mortgages; the notary public who helps the testator to cause trouble and expense to his estate and his heirs by drawing for him his will, the lay adjuster for insurers who attempts to advise claimants as to their legal rights. Some of us have taken a philosophical view of the matter, that when the untrained attempt to do the work of the lawyer, they often make work for the lawyer. But I fear that this is the attitude of lazy indifference to the interests both of the bar and the public.

The Committee on Unauthorized Practice, working with like committees of the state and local associations has made real strides. Through persuasion and confidence in many instances, through prosecution in others, it is gradually returning to the bar the performance of services that can best be done by the lawyer. I do not mean to intimate that the work is by any means completed,

or that there is no further need for vigorous effort, but much progress has been made, and as time goes on the results of its work will become more and more apparent.

The question of why too often lawyers, young and old, reasonably able and efficient find it difficult, if not impossible, to earn a reasonable living has not been forgotten, and the Committee on the Economic condition of the Lawyer has been and is making studies. Its work has been hampered by lack of funds, and it has found that the bases of the problem are not always general, but in many instances local. But insofar as it lies within the power and ability of an association of lawyers to deal with this perplexing and difficult question, it is manfully attempting to do so.

One of the banes of a lawyer's life is the multiplicity of law reports, the length, if not the breadth and depth, of judicial opinions, and the vast numbers of texts, digests and what not, which he feels compelled to buy, but unable to afford, which when bought, take space for which he everafter pays rent, and which from their very number he knows he will never be able to read. To ameliorate this situation has been objective of the Committee on Legal Publications and Law Reporting. Their efforts are slowly getting substantial results. It is difficult as you will appreciate, to convince the law publisher, whose business it is to publish law books, that so many are not needed, or to convince judges that brevity and conciseness are the soul of good opinions as well as of wit.

Next is the Committee on Law Lists. I venture to say that if the American Bar Association had done nothing else for the lawyer during its entire life, what it has done here, would fully justify its existence.

The publication of law lists had become a racket, taking hundreds of thousands of dollars every year from the pockets of the bar and giving little or nothing in return. Do not misunderstand me—there is a real necessity for and benefit from law lists, properly prepared and honestly conducted. The evil arose from the other kind, whose sole objective was to take our money, feed our vanity, and give us less than nothing in return.

The committee on law lists has held hearings, and requires every publisher of a list, or who proposes to issue one, to appear before it and justify his practices, explain how his list is prepared, to whom it is issued, and what, if any, benefit it will be to the bar. Unless he can obtain the approval of the Committee, —by a new canon of ethics, it is improper for a lawyer to list his name with such publications.

The Committee issues a roster of approved Law Lists, which is published in the annual report, and as new publications receive approval, or have such approval withdrawn, such action appears in the Journal of the Association. Let me give you a word of

advice, —when a law list salesman comes to your office, insist on his establishing whether or not it has received the approval of this Committee. If it has not, waste no more time with the gentleman, and you save both time and money.

The question is often asked what do Bar Associations do for the lawyer in a practical way. Do they afford anything else than an opportunity for lawyers to gather together once or twice a year in social sessions, and to engage in a sort of eleemosynary purlic activities, These are questions which are entitled to frank answers and discussion.

If it is expected that the American Bar Association is to function as an advertising or sales agency for the legal profession, the answer is, —NO. It neither can, nor should it attempt to do so.

Insofar as such an association can protect the profession against exploitation, insofar as it may prevent those not qualified to practice law from so doing, insofar as it can save to the lawyer the work of a lawyer, insofar as it can aid in relieving him from burdens unnecessary to the practice, put at his disposal, in a readily obtainable form, changes and developments in the law, if it gives him an opportunity to listening to, working and discussing with men who specialize in particular subjects of the law, and finally insofar as its labors give confidence to the public that the organized lawyers of America not only realize but are actively engaged in rendering a service to the public and to society, then it is of definite practical value to the lawyer.

As lawyers we justify our existence and we receive remuneration for our labors only because the layman appreciates a necessity for our services. The more rapidly we eradicate the erroneous impression that we are a group of tricksters, that we live by splitting hairs and distinguishing between Tweedledum and Tweedledee, and give the public to know that we are alive to necessity for the pure, expeditious, sound and simple administration of justice, the quicker and oftener will the layman arrive at our doors and demand our labors.

The efforts of bar associations, and particularly of the American Bar Association, must necessarily be bent to that end if as we practicing lawyers are to obtain practical benefits from their existence.

Such is not only a matter of good morals and of professional duty and honor, but of hard common practical sense.

Now, let me impress on you that the American Bar Association is not a group of the middle-aged, rotund, prosperous, self-satisfied, complacent and stodgy. Its membership is drawn equally from every group and class of the bar, the lawyer who represents labor, and claimants for personal injury, the lawyer who rep-

resents large corporate interests, the lawyer who has a general practice (and he is of the vast majority), the prosperous, and those whom prosperity has passed by, the old, and the young, the conservative, the liberal and the radical. Each has an equal voice, each is listened to with interest and appreciation of viewpoint, and each plays a vital part in the activities and in determining the policies of the Association.

The creation and the work of the Association's Civil Rights Committee, its activities in defending the rights of those whose views are repugnant to the beliefs of the vast majority of all lawyers and all citizens, because our Constitution and ideals of government demand that a free people can only remain free if they permit those with whom they disagree liberty to express their beliefs, is the best answer to the charge that the American Bar Association does speak the voice of the lawyers of America.

Let me urge upon each of you the pleasure and benefit you will gain by becoming members of and actively participating in work and labors of the American Bar Association. It wants you and it will welcome you, gaining from your experience, intelligence and vision, and giving to you new friends, cordial companionship, new ideas and practical aid.

PRESIDENT ANDERSON: Thank you Mr. Maguire. This year we are indeed fortunate in being able to procure capable gentlemen from outside our own state to come and give us their time and enlighten us on many questions. I am sure that we will all appreciate Mr. Maguire's coming to us today and I am sure that we have all been benefited by hearing him. At this time, we have with us another distinguished gentleman who has very kindly consented to speak to us, Mr. W. C. Stanley, President of the Kansas Bar Association. It is a pleasure to introduce to you, Mr. Stanley.

MR. W. E. STANLEY: Mr. President, members of the Bar of the State of Idaho: I knew that Mr. Maguire would do this to me. I am in the position in that apt old story, of the man who got stuck in the mud with a heavy load; he got off and, a little bit at a time, finally got everything off; he climbed up on his truck and sat there scratching his head, and finally said, "My God, here I am stuck in the mud and nothing more to unload." That's why I haven't any manuscript. I knew that I would just have to follow along and pick up a thought here and there, because I knew when the Colonel got through he was going to leave nothing for me to talk about.

I do feel that we are facing troubleous times. We are looking at a condition in Europe where mankind has apparently splintered apart. We view a condition where laws of order and justice have been completely set aside. We look upon a scene where England, the home of our common law, in the interests of its own security

has cut down those safeguards to free men which were written into the Magna Carta and the Bill of Rights.

What of our own country, We are apparently living in an age of expediency instead of experience. We're apparently facing a demand for change and we are taking any kind of change—mostly short change, and we're going somewhere so fast we haven't even got time to consult a road map. Strange ideas, regardless of their parentage apparently are replacing ideals; forethought is replacing background. We're getting ballyhoo all mixed up with leadership.

It reminds me that sometimes in my community we like to go out to the darky church. That's the favorite place to go in a political campaign because you can always make a speech and they will raise so much Cain that you think you've made a good speech. One of our most eminent lawyers had just made a speech, and from the front row, an old darky, a vociferous old man, called out all during the speech. "Slam, bang, hit 'em again." Finally a darky at the back of the church got up and said, "Brothers and Sisters, I wants to tell you that this is the most conglomerated group of idiosyncrasies I has ever heard presented in such a mass, and forced on the American people." Then the other old darky got on his feet and said, "My God, I don't know." I am sometimes of the opinion that many of us are in the shoes of that old darky.

Changes have been coming so thick and fast that we haven't had time to orient ourselves. We haven't had time to think it through. Why, we are at the present time a nation of idol worshippers, and most of us are so busy looking for a new idol to worship that we haven't time to make ourselves idols. We manufacture leadership exactly on the same basis that we do electricity, refrigerators, automobiles and washing machines. A man becomes a leader not on the basis of his qualifications but on his publicity. Many a man in your state and ours thinks that he has become eminent when he has only made a newspaper headline.

Now, what has this all got to do with the lawyer? Out of it all I see a provident opportunity for the legal profession, if the legal profession can only seize it. Nations, no more than individuals, can act straight unless they think straight. The legal profession has at least been trained to think. And I say to you that the United States, in fact the world, today is in need of men who are trained to lead it—who are willing to think through the problems and then who are willing to give their time and energy and effort to meet the problems that we are called upon to face.

I feel, and feel sincerely, that there has never been a time in the history of this Republic of ours when there is such an opportunity before the American lawyer as exists in this country today. It was a convention largely dominated by lawyers, who gave to

this Republic its Constitution, that has made this country what it is today. And that Constitution was the result of profound thought on the part of those lawyers who read the story of the past told by the history of nations. And that's one of the values of the legal profession—that they are not afraid to chart the course into the futnre by the lines of the past. To the legal profession, two plus two equals four; it always has and it always will, and before they dive off the deep end, they are willing to take a few fundamental facts into consideration and to plan the next move before making it. And so today, in this era of chaos, in this era of change, when apparently hysteria has supplanted thinking with all of us, when apparently we're not sure where in hell we're going, don't you think with me, that the opportunity for the legal profession is here? For Americans now have to think and to chart a course that is straight and is based upon fundamental rules of action and rules of law that will bring order out of chaos. That's our opportunity—but you may ask, how can we do it?

That compels me to diverge a little bit to discuss the lawyer. I don't know a profession today that is having more rocks thrown at it—mud thrown at it—than the legal profession. The public is prejudiced against the legal profession. Yon know what prejudice is though. Somebody said that prejudice was being down on something that you're not up on. And that's the trouble. The public today comes in contact with our profession in time of economic unrest. It costs money. We can't tell them that in most cases if they'd consulted the lawyer several months earlier, they'd have saved themselves all the trouble, instead of having become involved with real money. They don't understand the technicalities of our courts and our judges.

It is technical. The Legislature has vested in us the responsihility for that. Now, what's the problem? The legal professiou, the lawyers, have largely been called to the service of their clients. They have spent their energy and their time to perform such duties as are requested of them by their particular clients. And you ask—isn't that the job of the lawyer? And my answer is "no".

I say to you that the lawyer, if he is to be a real lawyer, must necessarily move into spheres of activity. The first sphere is his duty to his client. That necessarily is one of confidence and responsibility in the interest of the individual. To some extent, this makes the lawyer a conservative, an individualist, largely devoting himself to some particular problem. But that's not all. In the other field of the lawyer's responsibility, he moves with respect to the public, the State and the Nation. That responsibility as an officer of the court was vested in every single lawyer of this state and in every other state when he took his oath as a lawyer. It is a responsibility to the public. In the old days, before complex economic affairs developed, and before the speed with which we move today, the lawyer, acting as an individual perhaps

could perform that responsibility in both spheres, acting, as I said, as an individual. He was of great public importance in his community and his voice was the voice of some authority and respect.

Bnt what has happened? We lawyers are largely responsible for it, this change in the public's attitude. We saw that business couldn't go forward unless it was organized, moving forward as a collective unit. I could speak to you long of organized labor. The laboring man no longer acts for himself, but as a unit, through organized labor; and that record of organized labor and its adjustment of the laboring man's ills is a record of which they may be proud. And yet the lawyer, who has been busy building up these instruments through which those men could act and speak effectively, what have we done? We have a Bar organization in the United States—the American Bar Association— with 30,000 members, out of over 180,000 lawyers in the United States. Yet the public says, "What of that? It's only just a small percentage of the lawyers. It doesn't speak with the voice of authority."

I had one of the men in my office check up on labor organizations and how much the members pay—these workmen on small salaries. And it ran from $25.00 a year $50.00 a year that they pay to become an integral part, to assist in carrying on the work for the benefit of all of them. And how much does the average lawyer contribute to the work of the organized Bar?

I do not intend to berate lawyers because they are not members. All I want you to do is this. Answer this question for me—"What can you do?". What can you do individually today in the United States? Can you help to make better the administration of justice, can you help to improve the machinery of the law, to streamline it and speed it up? No!

Any man in this room, or any other individual lawyer in the United States, is like a voice crying in the wilderness. The public attaches no importance to him. If you are going to receive the respect that we, as practicing lawyers, have a right to demand, we must bind ourselves each to the other as an organized Bar, speaking as technical experts. What we have got to do is to build up a confidence between the Legislature and the organized Bar. And if we will cooperate—if we will lend our assistance, you'll find that the Legislature will respond. I didn't come out here to point incidents from my own home state, but I'll say this—that in the 1938 legislature, we had one of the finest examples of cooperation of which I have ever heard, resulting from mutual confidence and cooperation.

The lawyers there, after a period of about five years' study, developed a new corporation code; then we brought it to the legislature. As one old farmer from western Kansas said, "I don't know one damn thing ahout the corporation code—I don't expect to. We're only going to be here for three months, and I can't learn

it then, but I believe that the lawyers of the state of Kansas aren't going to ask us to pass and make a law, and do it knowing that it is detrimental to the best interests of Kansas, and I say let's pass this law which they recommend. Their's is the responsibility." —and they passed it. Since then, the Bar has observed a number of changes that should be made, criticism has arisen, and again we'll go to the Legislature and say, "These things aren't perfect and here's where they ought to be changed," and you'll find those changes accomplished.

Our Legislature has a tax problem, and the Legislature is working with the State Bar Association—we're trying to draft a bill. Anyway, we're cooperating so that the Legislature will realize that in the Bar of our state and in the judges of the state, they have the technical advisors upon whom they have a right to depend, and upon whom—when responsibility is placed—it will be met.

The Lord gave us two ends—one to think with and one to sit on. And how far we get in this world depends on which one we use the most. It's heads we win and tails we lose.

I say to you that we have got to now meet this emergency with which this country is faced, with which the administration of justice is faced, by standing shoulder to shoulder to meet the responsibility of this time—speaking through an organized Bar, which has the complete cooperation and respect of every single lawyer that is a composite part of it. That's our problem, and it is one which we must meet. Justice Hughes, in the last meeting of the American Law Institute, spoke something like this. "If democratic institutions are to survive, they will not depend upon majority rule alone or in meeting changes quickly, but on a sense of justice. It will not long survive unless judicial process can survive."

We're the ones who are responsible for judicial process. We understand the machinery of the courts, and when the public doesn't get an adaptation of our machinery to meet modern economic needs with speed and sureness, the condemnation falls upon the Bar.

I come back again to that which I mentioned before—what can you do about it? Is there a man here who thinks he is big enough, has the ear of the public—regardless of how many millions he might make—who thinks he could advance a cause, even get to first base with it? Of course not. Now, how are we going to build this up? We want to have public confidence in the Bar. Proper public relations today are the most important thing that the practicing lawyers face. It is one of the most important things that the Bar must face.

We have a public relations committee of the American Bar. Some of you may have seen sometime ago a moving picture which was put out with reference to the practicing lawyer. I don't remember the title, but I think it was "Each Dawn I Die", or some such phrase, and it had to do with a lawyer defending a criminal.

knowing he was guilty of murder, and had him acquitted. Then the murderer, to get a hold over the lawyer, ran off with the lawyer's daughter, and the lawyer, in a fury, had to kill the criminal, and then he found himself in the same position. It made your blood boil—all that any of us individually could do with respect to that picture was just simply to boil. That's all.

But Phil Smith's committee of the American Bar Association got in touch with Will Hayes and called him on the carpet and then got a nasty letter back, telling Smith in so many words to keep his nose out of the moving picture business and he's be better off. So Smith said, "All right, if that's what you want. If you want to buck the entire legal profession—O. K. By the time we are all done bringing suits and a few other things, the moving picture business will know that they have been in a first class fight." He got an apology, explaining that the script of that movie was based upon actual facts. The facts were true, so far as they went. The actual facts had taken place as they had been in the picture. So Phil wrote back and said, "Yes, but there's the trouble with your picture. The difficulty was that you didn't tell the whole story. You didn't tell the public the fact that that man had been disbarred within two weeks after the first trial took place. Why didn't you let the public know that they are protected against that type of unscrupulous lawyer?" And what happened?

I can't give you the name of the picture—it's slipped my mind —but another one came out shortly after this one I have mentioned—a very similar plot, and the starring role was played by Edward G. Robinson. This lawyer that was depicted in the picture was a pretty bad actor. After the picture was over, Robinson came on the screen and said, "Ladies and Gentlemen, I want you to understand that what you have just seen portrayed here is merely an incident that has been portrayed for your enjoyment because of its dramatic possibilities. In no sense is it intended to intimate that it reflects in any way the attitude of the practicing lawyers of this country, the thousands of practicing lawyers throughout the United States who are engaged in upholding justice. And I want to here pay tribute to the lawyers of the United States who never violate a trust," et cetera.

Now, gentlemen, that was the result of this committee of the American Bar Association. Could you have done it? Could anybody here in this room have done it? No! It could only have been done by reason of the fact that the organized bar struck, and when they help you help build public confidence in the Bar, they are helping you help the practice of law.

Mr. Maguire has mentioned the illegal practice of law. Our Bar Association was the first one to carry that case to the Supreme Court of the United States. Could you as an individual have done it? No.

We can only make our voices heard when we speak through the organized Bar. When we give our time to the organized Bar, when we make our voices effective through the organized Bar and when we do that, I say to you all, the public of the United States will listen.

But that alone is not all. We have a responsibility to ourselves. No longer are we mere expert individuals here to pull white rabbits out of the hat that the other lawyers couldn't. We realize that. There are too many developments in the field of law for anyone of us today to become informed and expert enough to be able to properly serve his client with respect to all things. How much do any of you here in the room know about all of the various things that have been thrown in our laps in the last four or five years—labor relations, wages and hours, taxation. We all know something about it, but not enough. The lawyer has a particular problem; he hasn't the time to familiarize himself with the details of these things. But it is embarassing when a client comes into his office, and this client maybe has been taking a trade journal with a fine instructive article written by some expert in the east, and he wants to consult you on the subject, and you and he find out the client knows more about it than you ever heard of. But how will we change this?

We'll work together, men; we've got to pull together and do it through the program of institutes. The lawyer today in the United States is going to work and finding out these things. Another specialist in your own state can come and help the rest of you. I happen to have been years ago at Boston when they passed a resolution to educate the practicing lawyer. And they made me chairman of the committee and dumped that thing in my lap. And we still want to do the job. You may not realize it, but we have had twenty-six states that have already organized institutes. In my own state this year we had twenty of them, with 1300 practicing lawyers trying to find out how to try law suits; we have been talking about practice in the Supreme Court, something about labor laws, administrative law, and this year, we're organizing the section on legal education. That's what we're doing—and how? This is the point.

We have gone out and made them realize that they must help each other and that we can't carry these things on unless they realize that. If you won't give your time and services, if you've got to sit in your office and practice law, God knows there are thousands of lawyers who will give their time to solve these problems and will benefit, if they do it effectively, as they have done, and will carry on.

I am not here asking you to join the American Bar Association —that is the last thing that I would do. I am only asking you to think this thing through, think about it the same as you do a law suit, the same as you do a problem in law. How can I meet this responsibility to the public? How can I win public approval for my profession? What's my contribution?

My friends, all I want you to do is to answer that question—what can I do to carry on this fight? When we have thought it through, everyone of us can help. Everyone of us can be a part of it. Every one of us can, shoulder to shoulder, meet the responsibility of an age of chaos—every lawyer in the United States, if he will but do it, has the opportunity to join the fight today to serve human rights, freedom of the individual in the United States. And now I'll leave you because, as I said, all the interesting things Colonel Maguire has said, and I just had to talk to you. Thank you.

PRESIDENT ANDERSON: I am sure that everyone here has been greatly benefited by what we have heard, and that we all deeply appreciate this privilege and honor of listening to the two able attorneys we have heard this afternoon. And I believe that I can see, in looking out over the crowd, quite a few converts for the American Bar. I think the American Bar will see the effect from Idaho of these addresses.

(Vice President Goff, at the request of President Anderson, presided)

VICE PRESIDENT GOFF: We have two more matters to consider today before we close and take part in those physical joys that have been promised. First, Suggestions and Recommendations of Prosecuting Attorney's Section—Mr. Donald B. Anderson of Caldwell.

MR. ANDERSON: We held our regular prosecuting attorneys' meeting, and took up matters pertaining mostly to prosecuting attorneys, but you defense attorneys will no doubt be interested in some of the bills we want to pass.

It is rather unusual when prosecuting attorneys recommend that the punishment be lessened. But in one case, we would like to cut down from five to life to one year to life, and leave it to the Judge to decide the proper sentence.

We also want to clear up the statute with reference to accidents and duty to stop when there has been an automobile accident.

Then there is a typographical error referring to a punishment as being provided in Section No. 48-528, when it should be Section 48-560. There will be no objection to that.

We had our election of officers and Mr. C. M. Jeffery of Pocatello was elected President. John Kenward, Payette, Vice President, and H. W. Furchner was elected Secretary-Treasurer.

We have a committee working on several advance matters that apply to our Association, but we have nothing further to report at this time.

VICE PRESIDENT GOFF: We take up the subject of Elimination of Appellate Procedure Technicalities. Judge McNaughton of Coeur d'Alene was selected to make this report but was unable to get away to attend this meeting, and Mr. O. W. Worthwine has very kindly agreed to present such facts as he has. There is a special committee to be appointed to consider carefully your remarks. I will appoint Mr. A. L. Merrill as chairman, John Graham and Mr. Wilbur Campbell.

O. W. WORTHWINE: Mr. Chairman, members of the Bar: As you know, Judge McNaughton was to present this subject, and I was merely to discuss it. I expected, until advised this morning, or late yesterday afternoon, that he would be here.

I surmiee that most of you say that we have no technicalities in our method of perfecting an appeal, so that a question will be presented on its merits to our Supreme Court. On the whole, I think the members of this Bar will agree and are satisfied with much that we now have in our statutes concerning appeal. I personally believe that the method of serving a notice of appeal and filing an appeal bond within five days, ordering and paying for n reporter's transcript, etc., is perfectly satisfactory and I doubt if this system can be improved upon.

Some twenty-nine years ago, when I graduated from the law school, I was advised that some 35 or 40% of all of the cases decided by our appeal courts were decided upon points of procedure. I thought that possibly that percentage had been lessened and that the members of the Bar had enough sense to perfect our machinery in administering justice so that the just criticism of the public was no longer merited. But I found that the number of cases thrown out on technicalities is now greater than it was then.

A member of the Bar here today advised me that today 53% of the cases that are appealed in the United States are disposed of upon questions of procedure.

Now, gentlemen, how can we follow the enthusiasm engendered to us this afternoon by these distinguished speakers if we permit that condition to continue?

Nothing that I may say here is to be taken or considered as a reflection on either our Courts or our Legislature. My sole purpose is to point out some things that may lead to an improvement in our judicial system; that will improve the machinery that we use in administering justice; that will lead to greater respect on the part of our citizens for our courts and our profession.

It must be conceded that the sole purpose of our Idaho judicial system is to administer justice and the freer this administration is of delays, technicalities and pitfalls the more speedy and efficient it will be and this in turn will create respect for the courts and the bar of the state. The citizens and taxpayers have the right to demand of us the very greatest efficiency.

The 1939 session of the Legislature appropriated to the District Courts the sum of $225,550, and to our Supreme Court the sum of $89,135, and an additional sum of $15,726 for our Supreme Court library, and in addition to paying these sums the taxpayers of this state pay for clerks of the district courts and their deputies, bailiffs, and the fees of jurors. In view of this the litigant who goes into court at all, is entitled to have his dispute passed upon, upon its merits by the highest tribunal of our judicial system.

The remarks that I have to make here have no personal application, because personally I have never been caught by any of the traps and pitfalls that appear in our appellate procedure.

It so happened that at about the time I was admitted to the Bar of this state our appellate procedure was changed and I had occasion at that time to brief rather extensively the method and manner of completing an appeal. Then for a number of years my work was confined largely to the Federal Courts, and it was my duty to prosecute numerous appeals to the Circuit Courts of Appeal and also to apply for Writs of Certiorari to the Supreme Court of the United States. The appellate procedure in our Federal Courts at that time was much freer from technicalities than our state practice. However, with the adoption of the new rules of federal procedure it would clearly appear that it is almost impossible to have a case dismissed where the faintest resemblance to an appeal is attempted.

At the Bar Association meeting last year one of my good friends, a member of the Bar, suggested to me that he saw nothing particularly wrong with our appellate procedure and that it should be retained as it is. The other day I was advised that I was to discuss this very matter here. Consequently, I reversed my former approach which was to say how an appeal could be properly perfected, and devote a very brief time to ascertaining some of the pitfalls that are recorded in our Idaho reports.

Section 11-202, I. C. A. provides:

> "An appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and serving a similar notice on the adverse party, or his attorney. The order of service is immaterial, but the appeal is ineffectual for any purpose unless within five days after

service of the notice of appeal, an undertaking be filed, or a deposit of money be made with the clerk, as hereinafter provided, or the undertaking be waived by the adverse party in writing."

The above seems perfectly simple, clear and easily followed, but our Idaho reports show that many members of our profession have had difficulty following the same.

ADVERSE PARTIES:

Failure to serve notice on an adverse party that is interested in the litigation has been held in numerous Idaho cases to be fatal to the appeal.

Let us assume a case which is common to all of us. We institute an action to quiet title to a piece of property and join unknown owners. In order to state a cause of action it is necessary to allege that they claim an interest adverse to our client. One person appears as a defendant and default of all other unknown owners is taken. The person appearing as a defendant desires to quiet his title as against all persons and he joins unknown owners, and likewise alleges they claim an interest adverse to him. Defaults of the unknown owners are entered and one of the appearing parties desires to appeal. All appearing parties have alleged the unknown owners are necessary parties and claim to have an adverse interest.

How can the attorney for the appearing party get service of the notice of appeal on the adverse parties in this action? In civil cases no provision is made for serving notices of appeal by publication, and failure to serve necessary adverse parties with notice of appeal has been the cause for a great many dismissals. See those listed in SONLEITNER v. McLAREN, 52 Idaho 791, at page 793.

TIME OF FILING BOND

From the reading of the above statute it might appear to the inexperienced that whether a bond on appeal was filed two minutes before the notice of appeal, or two minutes after was immaterial, but it is the law in this state that if the appeal bond is filed before the notice of appeal is served and filed with the clerk that the appeal is ineffective for any purpose and it will be dismissed.

See Healy v. Taylor, 37 Idaho 749;
Peoples' Saving Co. v. Rayl, 45 Idaho 776.

WHO MAY SIGN AN APPEAL BOND

Apparently a married woman cannot sign an appeal bond because she has no right to contract except possibly in regard to her separate property, and where married women have signed appeal bonds the appeals have been dismissed.

Craig v. Lane, 60 Idaho 178;
Beckwith v. Gee, 58 Idaho 758;

SERVICE OF NOTICE OF APPEAL ON ATTORNEY

We all know that in a criminal case the Attorney General must be served with a copy of notice of appeal. However, our Supreme Court has held that this must be actual personal service, and that service by mail is not valid.

The criminal code provides that service may be had by publication in a criminal case, and it has been held that service upon the Attorney General by publication would be effective where, if a copy of notice of appeal were registered to him with return receipt demand, it would not be effective.

See State v. Paris, 58 Idaho 315;

While we are familiar with the statute requiring service upon the Attorney General in a criminal case there are certain cases where he must be served with certain parts of the record in civil cases.

It is the duty of the Attorney General to appear for all Counties in the federal courts and in the Supreme Court. Although that is his solemn duty and cannot be handled by anyone else, just recently Ada County appeared in Federal Court and the case taken to the Circuit Court of Appeals, and the Attorney General did not participate in, and probably did not know about it.

How about a County case that goes to the Supreme Court?

The statute says that the Attorney General shall represent the County in the Supreme Court; the Supreme Court does not obtain jurisdiction, however, until after the appeal bond is filed and you can't file the appeal bond before you serve notice of the appeal.

It is a fatal error not to serve the transcript on appeal on the Attorney General and have him participate in its settlement.

Corker v. Elmore County, 11 Idaho 787;

In the Corker case the record had been settled by stipulation of the county attorney, the record on appeal had been served on the county attorney, and still the Supreme Court dismissed the appeal because the record on appeal had not been served on the Attorney General.

JUDGMENT ROLL:

Section 11-212, I. C. A. provides that a judgment roll must be

furnished by the appellant.

Section 7-1107, I. C. A. defines a judgment roll and according to that definition all of the pleadings, regardless of the number of amended complaints filed, would be necessary for the record on appeal. However, our Supreme Court has, by judicial interpretation, eliminated the necessity of taking anything more than the last amended complaint, calling this useless trouble and expense.

Ryan v. Old Veteran Mining Company, 35 Idaho 637.

APPEALS FROM ORDERS DENYING OR GRANTING MOTIONS FOR NEW TRIALS.

We have not yet by statute clearly defined the paper that is to be filed where a new trial is sought. Section 7-604 refers to it as a "Notice of Motion", while Section 7-605 refers to it as "Notice of intention to make a Motion."

Section 7-605, I. C. A. provides; for the hearing of an application for new trial and states among other things:

> "and when the motion is made on the minutes, reference may be had to any depositions, documentary evidence and phonographic report of the testimony on file."

In a case where a new trial was based on the files, documents and exhibits in the case, and a new trial was granted on insufficiency of the evidence, the Supreme Court set aside the order granting a new trial because of lack of jurisdiction of the trial court simply because the motion was not made upon the minutes of the court.

Poiteven v. Randall, 57 Idaho 649.

Section 7-607 which relates to order on appeal from order granting or refusing motion for new trial, states:

> "The judgment roll and the affidavits, or the records and files in the action, as the case may be, used on the hearing, with a copy of the order made, shall constitute the record to be used on appeal from the order granting or refusing a new trial, unless the motion be made on the minutes of the court, and in that case the judgment roll and a reporter's transcript prepared in the manner prescribed by section 7-509 of this code, with a copy of the order, shall constitute the record on appeal."

Attention is called to the peculiar wording of this statute, and the question is: can an appeal be taken from an order granting o. refusing a new trial where affidavits were filed or records and files in action were referred to and where the minutes of the court were used?

Attention is called to the use of the disjunctive 'or' and the use of the words 'in that case.'

Rule No. 23 of our Supreme Court is the one requiring the certificate as to papers used on any contested motion, and a great many cases have been dismissed because of the failure of the trial judge to sign the certificate in the proper form and in accordance with Rule 23. One was dismissed on the ground that the Judge bad not sufficiently identified the reporter's transcripts.

Brooks v. Lewiston Business College, 48 Idaho 71.

Should we not correct the machinery whereby the Supreme Court, instead of dismissing appeals where there is a defective certificate, have the Clerk of the Supreme Court contact the District Judge and have the record properly completed so that the matter could be passed upon its merits. Are not the taxpayers of this state who may become litigants entitled to this service?

PENALTY FOR FAILURE TO FURNISH PAPERS

Section 11-217, I. C. A. provides:

> "If the appellant fails to furnish the requisite papers the appeal may be dismissed; but no appeal can be dismissed for insufficiency of the undertaking thereon if a good and sufficient undertaking, approved by a justice of the Supreme Court, be filed in the Supreme Court before the hearing upon motion to dismiss the appeal."

Rule No, 26 of our Supreme Court provides:

> "A strict compliance with the requirements of the rules concerning preparation of transcripts will be exacted of the appellant in all cases by the court, whether objection be made by the opposite party or not; and for any violation or neglect in these respects which is found to obstruct the examination of the record, the appeal may be dismissed or the court may order the offending party to pay the costs of such transcript, or any part thereof, unless the matter objected to is inserted by order of the court or judge below."

The above rule is contrary to the spirit shown in the new federal rules of Civil Procedure relating to appeals. Subdivision (a) of Rule No. 73 of the New Federal Rules provides:

> "a party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal."

I urge tbat Rule No. 26 should be amended to read somewhat as follows.

"A strict compliance with the requirements of the rules and statutes concerning the completion of an appeal and the preparation of transcripts will be exacted of the attorney for the appellant in all cases by the court, whether objection be made by the opposite party or not, and for any violation or neglect in these respects which is found to obstruct the examination of the record, the court will require the attorney for the appellant, under penalty of disbarment, to complete the record and if his failure to strictly comply with the statutes and rules regarding the preparation of the transcript, and the papers completing an appeal, is due to his negligence or incompetency, then all costs shall be assessed against the offending attorney and the matter referred to the Bar Commission, and if it is found the failure to strictly comply with the requirements of the rules is due to the attorney's negligence or incompetency, he shall be disciplined."

Such a rule would undoubtedly discourage dilatory appeals, appeals taken merely for delay, and would make it practically impossible for an appeal to be dismissed without the consideration of the same upon its merits, and would undoubtedly tend to increase diligence of members of the bar in looking after appeals.

If you will examine the reports of the Supreme Court of the United States in the last twenty years, you will see case after case where an appeal was taken when an application should have been made for a writ, and that Court has said in a number of cases that what was done was to be considered as an application for a writ. I remember once an objection was made in the Circuit Court of Appeals, and the presiding justice looked down and said, "Mr. So and so, have you actually been prejudiced?" When he said "No", the justice said, "We will have a hearing on the case on the merits". That was the attitude of our Federal Courts even before the adoption of the new rules of civil procedure.

I know that a bank sends valuable papers by registered mail. In business affairs, what business man now takes documents of importance personally over to another town or city? He trusts the registered mail. Now, oughn't we to have our Legislature provide that a man in Pocatello or Montpelier doesn't have to hunt up the attorney general and serve that notice of appeal personally? Could we not take a business man's view and have the attorney general served by registered mail?

It seems to me that we should correct this situation like Judge Wilbur of the U. S. Circuit Court of Appeals, when the attorney wanted the case dismissed; he looked at him and said, "Mr. Attorney, have you been prejudiced by not settling this record? We'll postpone the hearing and you look over the record and if you have any prejudice state it. These appellants have been up here and we think they are entitled to a hearing on the merits."

Really now, shouldn't we get together and do what businessmen would do and change the statute so that if we happen to get the appeal bond filed before the notice of appeal, the courts will hold the surety company liable on the taking of appeals? My experience has been, in trying to defend them, that surety companies are usually liable. Shouldn't we straighten this matter of judgment roll out?

What I'm trying to do is to get over the spirit of this thing so that we can get rid of these technicalities. The attitude of the opposing counsel and of the court. Can't we fix it so that the Court may say: "We don't want to dismiss this man's appeal. His client has put up this money." How are we to keep the trust and confidence of the American people when we do not correct the defects in our own statutes?

Why in the name of comon sense should not this be so? I trust that you will appreciate the fact that I am not blaming anyone, because that isn't the spirit I want to convey.

In the Federal Courts, under our new Federal laws, it is almost impossible for you to dismiss a case. If you don't get it of record all right, the Circuit Court of Appeals will keep after you until you do. It was easier before the new rules to get a case dismissed. Now the new rule, drafted by some of the most learned men in America, is working to bring about more respect for the courts and Bar. You file your notice of appeal, get your appeal bond in, and you're on your way and it is practically impossible for that appeal to be dismissed. I submit to you, gentlemen, that this is the spirit and attitude that we in Idaho should put in our Statutes so the Supreme Court won't be called upon to dismiss appeals. I submit these remarks to you, knowing that you appreciate the motives—to help you and to bring about this feeling of respect by businessmen, have them respect the Bar and not be critical of it because of our technicalities.

E. B. SMITH: What do you think about the present Statute requiring twice the amount of judgment in a supersedeas bond?

MR. WORTHWINE: That's a good thing for the Surety Companies, Mr. Smith. It seems to me that as to Surety Companies who are qualified to do business in this State the amount of the judgment, plus a sufficient amount to take care of interest for a couple of years, should be adequate protection.

MR. SMITH: It has always appeared to me that Rule 26 is in direct conflict with our general statute which requires that the statutes shall be liberally construed. The court, in adopting this rule 26 in the dim distant past, I assume, forgot this statute and adopted a rule which has the effect as though the statute said, "In this one instance, we have strict construction". Shouldn't it be changed to a liberal construction?

MR. WORTHWINE: I favor any system so that when one of you is making an appeal, regardless of the matter of construction and how we arrived at it, the appeal should be heard on its merits. If it requires a change in the statute, let's get it—just so we get this spirit of getting away from technicalities.

VICE PRESIDENT GOFF: The meeting is adjourned until Wednesday morning, July 3rd, at 9:30 o'clock.

WEDNESDAY, JULY 3rd, 1940

(Morning Session)

PRESIDENT ANDERSON: The matters coming up this morning are the reports of the special committees appointed during this meeting upon special subjects. "The Procedure to Effect Rule Making Power"—Mr. O. W. Worthwine.

O. W. WORTHWINE: We, the Committee appointed to consider the Report of the Committee on the method of effecting the transfer of the rule-making power to the Supreme Court, hereby recommend that the second recommendation be adopted, that is, that the Legislature be requested to pass an Act similar to the Act of Congress which authorized the Supreme Court of the United States to adopt the new rules of civil procedure for United States Courts.

Attached hereto is a copy of a proposed Bill:

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF IDAHO:

Section 1. That the inherent power of the Supreme Court to make rules governing procedure in all the Courts of Idaho is hereby recognized and confirmed.

Section 2. That the Supreme Court shall prescribe, by general rules, for all the Courts of Idaho, the forms of process, writs, pleadings and motions, the manner of service, time for appearance, and the practice and procedure in all actions and proceedings. Said rules shall neither abridge, enlarge nor modify the substantive rights of any litigant.

Section 3. The Supreme Court is hereby authorized to appoint from among the district judges of Idaho and the members of the organized Bar of Idaho such persons as it deems advisable to assist it in the formulation of such rules.

Section 4. Such rules, when adopted by the said Supreme Court shall take effect six months after their promulgation and thereafter all laws in conflict therewith shall be of no further force or effect.

I move the adoption of the report.

This motion was seconded by Mr. Goff.

A. C. CORDON: Does this effect probate matters in probate courts?

MR. WORTHWINE: Yes, all the courts in Idaho, eliminating municipal courts.

PRESIDENT ANDERSON: Any further discussion? Then we will proceed to vote by District Bars. You understand how we vote in the matter. The Secretary will call the roll of District Bar Associations and you can record your vote accordingly. Let us proceed with the roll call.

SECRETARY GRIFFIN: You will remember that under the new rule, the members present from a District Bar vote the entire vote of that Bar. For instance, the First District has 27 votes. If there are just two of you from there, you can divide those votes. Is there anyone here from the First Judicial Bar Association? They pass. Second and Tenth Districts—the Clearwater Bar Association, —Yes, 58 votes. The Third District, —Yes 122 votes. The Fourth and Eleventh Districts, 56 yes, 22 no. The Fifth and Sixth Districts, yes 75 votes. The Seventh District with 52 votes. They are absent this morning. The Eighth District, yes 32 votes. The Ninth Judicial District, with 52 votes, absent.

The vote is 343 "yes" and 22 "no".

PRESIDENT ANDERSON: The report is adopted.

The next question coming up is the elimination of Appellate Procedure Technicalities. We are ready for the report of the Committee composed of A. L. Merrill, John W. Graham and Wilbur Campbell.

MR. MERRILL: We, your Committee to whom was referred the "Technicalities in our Appellate Procedure," by Oscar W. Worthwine, beg leave to report as follows:

I.

We approve and commend the theory of minimizing and, as far as possible, removing all technicalities which might otherwise prevent or interfere with a fair presentation of an appeal upon the merits of any case appealed to the Supreme Court.

II.

We recommend that said report be referred to the legislative committee of the Bar with the request that proper statutes and amendments to statutes be prepared and presented to the legislature at its next session, aimed at correcting said matters pointed out in said report, more particularly as follows:

(a) That provision be made for service upon the County

Attorney of notice of appeal and all papers required in prosecuting an appeal in criminal cases, and that all notices otherwise required under the law to be served upon the Attorney General, be served personally or by registered mail addressed to his office at the State House.

(b) That tbe statutes be so amended to provide that notice of appeal need only be served upon parties who appeared in the trial court.

(c) That Section 11-203, I. C. A.. be so amended as to permit the correction of a void as well as a defective undertaking.

(d) That the statutes be so amended as to permit a correction or amendment of any notice of intention to move for a new trial or any certificate of papers used by the trial court on considering a motion for a new trial or the supplying of such certificate, if one is omitted from the transcript, even after appeal to the Supreme Court, and that no appeal be dismissed on account of any irregularity in the form of certificate or the failure to supply one, but that such certificate be required to be certified to the Supreme Court under proper order of the Court.

III.

That it be recommended to the Supreme Court that Rule 26 he amended so as to provide a "reasonable" rather than a "strict" compliance of rules concerning preparation of transcript.

I move Mr. President, the adoption of this report.

The motion was seconded from the floor.

PRESIDENT ANDERSON: Any further comment? If not, we will proceed with the voting. We will call the roll by Districts. Those present vote the entire strength of the particular Bar Association or District to which they belong.

SECRETARY GRIFFIN: The First Judicial District? Absent. The Second and Tenth Judicial Districts? 58 yes. The Third District Bar Association? 122 yes. The Fourth and Eleventh Judicial Districts? 78 yes. The Fifth and Sixth Judicial Districts? 75 yes. The Seventh Judicial District? 52 yes. The Eighth District passes. The Ninth District? 52 yes.

437 votes "yes" and none vote "no".

PRESIDENT ANDERSON: The report is adopted.

The next is the committee report on Proposed Legislation—Messrs. Schmike, Blaine and Witty.

JAMES BLAINE: Mr. President, the committee recommends that the Legislative Committee continue on its present legislative program and further recommends that as soon as practical after this meeting, the Legislative Committee of the Idaho State Bar will draft the proposed legislation which the Bar will sponsor and send copies of these bills to the various District Bar Associations, who will be expected to present and acquaint the legislators in their District with the bill and use what individual influence is possible, and when the Legislature convenes, the Committee will present it to the Legislature and see it through the regular Legislative process.

I move the adoption of this motion.

This motion was seconded from the floor.

PRESIDENT ANDERSON: It has been regularly moved and seconded that the Committee's report be adopted. Are you ready for the question? Very well, then, we will proceed with the voting.

SECRETARY GRIFFIN: First District, absent. Clearwater Bar? —58 votes "yes". Fourth and Eleventh Districts? —78 votes "yes". Fifth and Sixth Districts? —75 votes "yes". Seventh District? —52 votes "'yes". Eighth District, absent. Ninth Judicial District? —52 votes "yes". 437 votes "yes" and none "no".

PRESIDENT ANDERSON: The report is adopted. We are ready for the recommendations of the District Bar Associations.

E. B. SMITH: We, your special committee on recommendations of local bar associations, report as follows:

1. We recommend that the recommendations of all local bar associations, with reference to proposed legislation, be referred to the State Legislative Committee of the Idaho State Bar and that recommendations with reference to abstracts of title and correlated matters be referred to Titles Committee of the Idaho State Bar.

2. That the Commissioners of the Idaho State Bar recommend that each local bar association hold regular meetings at least quarterly; that a copy of any proceeding or matter of general or statewide import be referred to the Secretary of the Commission and by him suhmitted to each local bar association for action.

3. That matters, desired by any local bar association to be presented at the annual meeting of the Idaho State Bar, be submitted to the Secretary of the Commission, as far as practicable, by April 15th of any year.

I move adoption of the report. Seconded from the floor.

PRESIDENT ANDERSON: It has been regularly moved and seconded that the report of the Committee be adopted. Any discussion? It not, we will proceed with the roll call.

SECRETARY GRIFFIN: First District, absent. Second and

Tenth Districts? —Yes, 58. Third District? —Yes, 122. Fourth and Eleventh Districts? —Yes, 78. Seventh District? —Yes, 52. Fifth and Sixth Districts? —Yes 75. Eighth District, absent. Ninth District? —Yes, 52. There are 437 "yes" and none "no".

PRESIDENT ANDERSON: The report is adopted. Now, we come to "School for Practicing Lawyers" —is that committee ready to report?

PAUL HYATT: We met with Mr. Stanley, who spoke to us yesterday—he is the chairman of this committee for the American Bar Association, and he tells us that it has been so successful there that the lawyers are crying for it. They don't have to ask them to come to it—they let the thing kind of work itself out in this way.

Local areas, when they were ready for it, could get this school. In Kansas they have a state that is 400 miles across, so they had to handle it in local divisione, as we would. In Kansas, they did not go into many subjects. They started out by sending out a quastionnaire of 12 to 15 subjects, and determining from this what the lawyers wanted, and then their committee met and made a selection of a few subjects.

I don't think it is going to be possible here in Idaho at the present time to have very many different subjects. I do think, however, that we do need some clinics. Federal procedure, federal taxes, wages and hours, practice before the various Federal Boards, which none of us know everything about handling, would be good.

Everybody in this committee felt that those are the things that are best. Therefore, we recommend that a committee be appointed, consisting of one member from each of the local Bar Associations with the Chairman to be in Boise, and that this committee formulate the program; that is, the suggestions that are put out and when they are to have these meetings, and the places they are to have them, and working with the Bar Commissiou, arrange for the speakers and those you will want to come and conduct these clinics.

We further recommend that if it is possible, we should have it in five places—Coeur d'Alene, Lewiston, Twin Falls, Pocatello and Boise.

And that they be gotten underway this fall with the idea of having at least one this fall and one in the spring to start off with—two for the first year. I move the adoption of this report.

Seconded from the floor.

PRESIDENT ANDERSON: It has been regularly moved and seconded that the committee's report be adopted. Any discussion?

A. C. CORDON: I am inquiring as to whether or not there is sufficient machinery now, or whether the Bar Commission would have the power to expend money to carry on this work?

PRESIDENT ANDERSON: There is no question but what the Bar Commission can expend the appropriation for any purpose it sees fit. There is no limit on their powers to expend the appropriation.

SECRETARY GRIFFIN: There might be on the amount only.

MR. HYATT: Of course, the expense of it is going to have to be borne by the members in each locality by a small registration fee. Mr. Stanley says that in Kansas they charge enough for the banquet to take care of the expense. I think that we would probably charge a registration fee of $2.50 or $5.00 to pay for these meetings of ours.

SECRETARY GRIFFIN: I think that this is the practice over the country. You first get an indication of how many want to come and then fix the registration fee for enough to cover the expense. Then those who register first send a deposit and they then take the course without further charge. But perhaps the commission could bear some of the expense out of its appropriation and assist the local Bars to some extent.

PRESIDENT ANDERSON: I happen to know that Montana has instituted a local Institute this year for the first time. I don't know how their plan is working, or just what it is but I expect to be up there and I will be glad to give the committee the benefit of anything that I may learn as to how they may start off. Any further discussion? If not, we will call the roll. I may say, however, that I assume that the new president and the new Commission will appoint this committee under this motion. I wouldn't want to be called upon to do it now, in such a short time.

SECRETARY GRIFFIN: First District, absent. Second and Tenth? —Yes, 58. Third District? —Yes, 122. Fourth and Eleventh Districts? —Yes, 78. Fifth and Sixth Districts? —Yes 75. Seventh District? —Yes, 52. Eighth District, absent. Ninth District? —Yes, 52. 437 "yes" and none "no."

PRESIDENT ANDERSON: The report is adopted. The next matter coming up is the report on the Idaho Law Journal. Dean Howard, are you ready with your report?

DEAN PENDLETON HOWARD: Your special committee appointed to consider the matter of the publication of an Idaho Law Journal is of the opinion that the proposal is both financially and editorially impracticable at the present time.

We deem it a highly desirable project for further consideration at some future time, when conditions make it possible for the State Bar and the College of Law of the University of Idaho to cooperate

in such a venture. Until such time, we recommend that the matter be held in abeyance.

Mr. President, I move the adoption of this report.

P. J. EVANS: Mr. President, I move that we dispense with calling of the roll on this particular matter and vote by acclamation.

L. E. GLENNON: I second the motion.

PRESIDENT ANDERSON: It has been moved and seconded that the roll call he dispensed with. All in favor signify by saying "aye". Opposed? We will dispense with the roll call. All in favor of adoption of the report of this committee signify by saying "aye", Opposed "no". The "ayes" have it, and it is so ordered.

Do you want to take any action with respect to the hill creating a legislative drafting bureau? We haven't a committee on that, but do you want to take any action on it? That would probably be handled by the legislative committee.

P. J. EVANS: I move that this matter be referred to the legislative committee, with power to act.

The motion was seconded from the floor.

PRESIDENT ANDERSON: It has been moved and seconded that this matter be referred to the legislative committee. Any comments? We would not enact or create a legislative drafting bureau. It is up to the Legislature to do that. The committee would have nothing to do with it, other than introduce a bill to the legislature to create some sort of a bureau like this.

JESS HAWLEY: If that is the purpose, I don't know that I disagree with it. I assume that it will do away with the practice of appointing an attorney to draft bills for the House and one for the Senate, hut it is not intended by this bill that our Bar take over the business of drafting laws?

PRESIDENT ANDERSON: No.

SECRETARY GRIFFIN: First District, absent. Second District? —Yes, 58. Third District? —Yes, 122. Fourth and Eleventh Districts? —Yes, 44 and No, 34. Fifth and Sixth Districts? —Yes, 75. Seventh District? —Yes, 52. Eighth, absent. Ninth District? Yes, 52. 34 votes "no" and 403 votes "yes".

PRESIDENT ANDERSON: The motion is carried.

J. L. EBERLE: I move that we recommend to the Commission of the Idaho State Bar that the 1914 Annual Meeting be held at Sun Valley.

The motion was seconded from the floor.

PRESIDENT ANDERSON: It has been moved and seconded that

the recommendation be made to the Bar Commission that the 1941 meeting be held at Sun Valley. Any discussion?

JOHN W. GRAHAM: Mr. Chairman, this meeting automatically goes to North Idaho, does it not? I do not think we ought to infringe upon the authority of the Commission as to when and where this next annual meeting is going to he held.

PRESIDENT ANDERSON: This is a recommendation. The Commission can go over it and do what it pleases.

ABE GOFF: Mr. Graham, The Northern Idaho fellows will come down to Southern Idaho, hut the Southern Idaho men won't come to North Idaho—it's all right with us to go to Sun Valley.

PRESIDENT ANDERSON: In the absence of any objection, I will dispense with the roll call. All in favor, let it be known by saying "aye". The "ayes" have it—it is carried.

Are there any other recommendations

J. L. EBERLE: Mr. President, the matter of sending the President of Idaho State Bar to the American Bar Association's annual meeting has come up for discussion. I understand that we are entitled to a delegate. I move that we recommend to the Commission of the Idaho State Bar that the President of the Idaho State Bar be sent each year to the annual meeting of the American Bar Association at the expense of the Idaho State Bar.

Seconded from the floor.

PRESIDENT ANDERSON: Any discussion?

P. J. EVANS: Personally, I want to go on record as being opposed to this hasty expenditure of the funds of the Idaho State Bar without any adequate consideration of the matter at all, and I want to state frankly that I don't think that we should act on matters of this importance without bringing it up through our local Bar Associations and giving the membership of the Idaho State Bar an opportunity to consider a matter of this kind.

We have staggered along so far without doing this and I do not helieve that it is of sufficient importance that the "rag tag and bob tail" of the Idaho State Bar sitting here this morning should take unto themselves the authority to send a president of our Bar on a trip of this kind until we have all had a chance to think it over.

My position is solely this—I don't know whether there is sufficient merit to this motion to enable me personally to vote intelligently upon the matter and I'll be damned if I'll vote on something I don't understand.

MR. EBERLE: We have discussed this now for several years and have deferred it to give the members an opportunity to think

about it. I think we can probably be guided by what other associations have done. Apparently, last year Idaho was the only state in the Union which did not send its president to the Bar Association. None of our presidents, has ever attended this national meeting. Apparently, other states have felt that this was beneficial. Each year one of the ranks rises to President. When he attends this meeting, he comes back with a new spirit, and apparently every other Bar Association in the United States has been justified in this expenditure. Through our President, we would become familiar with the events that are being met by Bar Associations elsewhere. That's the only thought I have. It does seem to me that, after thinking about it for several years, we ought to make up our minds one way or the other, and then drop it.

A. L. MERRILL: I am thoroughly in sympathy with this motion and I intend to vote for it. It is certainly a matter that the Bar Association, in my judgment, should consider. What Mr. Eberle said is certainly true. In every American Bar Association meeting I have ever attended, there is a familiarizing influence and if the President of the Bar of this State will attend, it will probably be as much as any other single influence in the development of the spirit of the Association—the injecting of new ideas into the program of this Bar. The matter of expense, of course, is a matter that would deter the Presidents of the Bar from attending. It ought to be borne by the entire Bar. I think any of us who belong to other organizations recognize the fact that it is a common practice generally. The Rotary Club, for instance, almost invariably sees that the president of the local club goes to the Association meetings of the organization at the Club's expense, because of the things he can bring back to the club. It ought not be lightly done, of course. At the same time, I am thoroughly in sympathy with it.

P. J. EVANS: I offer an amendment to this motion. For the reason we have another National Law Association in this country that has the support of a large number of the members of the American Bar, I don't know why we should pick out one of them to send a representative to. So I move that we also send the President to the meeting of the other national Bar Association, so that we will have representation at all of them.

PRESIDENT ANDERSON: May I inquire what is the association you refer to?

FROM THE FLOOR: The Lawyers' Guild.

PRESIDENT ANDERSON: Is there a second to that motion to amend the original motion? I declare the motion to amend lost through the want of a second.

JOHN W. GRAHAM: I heartily approve of the policy of sending the chairman of the Commission to the American Bar Association. It is a connecting link between our State Association and

the American Bar Association, and he can go there and become enthused and come back as an inspiration to the rest of us. The question in mind is this—whether we should adopt at the present time a policy to incur the expense each and every year thereafter? Whatever we do now will become the policy of the other Bar Commissions. The question as to whether or not the expense should be taken from the funds of the Bar should be given due consideration. We haven't got too much money. I'm in favor of the motion in spite of that fact because I think it will be returned in the positive benefit such as contact will bring to the State Bar.

W. H. WITTY: The two addresses that we heard here yesterday afternoon are sufficient evidence of the value of this contact on the part of our State Bar. These addresses were inspired by the contact these men have had with the American Bar Association and that ought to be all the evidence we need.

PRESIDENT ANDERSON: Any further discussion? If not, the secretary will call the roll by Districts.

SECRETARY GRIFFIN: First Judicial District, absent. Clearwater Bar? —29 "yes" and 29 "no". Third District? —Yes, 122. Fourth and Eleventh Districts? —Yes, 78. Fifth and Sixth Districts? —67.5 "yes" and 7.5 "no". Seventh District? —Yes, 52. Eighth District, absent. Ninth District? —Yes, 52. Total: yes, 400.5, no, 36.5.

PRESIDENT ANDERSON: The motion is carried, and the president goes to the American Bar Association meeting provided he can get the money out of the Commission.

Are there any other arguments or any other matters that anyone wants to bring before this meeting?

JESS HAWLEY: I am not clear in my mind what should be the power of a local district to express its sentiments in a binding way upon its members. The matter is of come importance and I believe that we should discuss it. Therefore, I move that this Bar, in its meetings shall recognize the right of each individual present to vote as he pleases and that his individual vote shall be counted as he votes. That in the event his District has at a local meeting instructed its delegates to vote for or against a definite proposition—that if the record certified by its president and secretary shall establish that a majority of the attorneys in that district have voted formally on the proposition and instructs—that it shall bind all of the delegates of the division present in the annual meeting excepting only for the individual's right to vote as he pleases. That may be a little involved, but it embraces what I conceive to be the majority and best opinion of a discussion held in Boise recently. The delegates who are here represent themselves of course, but they do not represent the men who for one or another reason cannot be present. I was not impressed

with the principle of the instructed delegation when we met at Boise, but thinking the matter over, it seems that it would be unfair to those who are away to deprive them of the right of expression through instruction of their delegation.

I believe as Brother Evans has rather fatuously put it, but not without some background of fact—that the "rag tag and bob tail" of the Bar meeting here this morning really do not and should not control the Bar. That if it is known to the Legislature or any other person to whom we present our resolution that we only had one tenth of the Bar present, the effect we wish to make will be lost—they will slight our efforts. "Why, there were only fifty or sixty present, and how can they bind the Bar? If the matter here were presented to the body of the Bar, we would find out that one half of them would be against what the convention has done."

I have seen the Legislature practically alive with forces to thwart resolutions presented by the past meetings of the Bar. If we could see that the delegates vote not only their own sentiments, but that they vote the sentiments of the Bar at home through instructions, there would be more respect for our deliberations and our resolutions and it would be probably more binding upon the Bar as a whole. It is important to secure the sentiment of the members of the Bar both present and those who are not present.

Seconded from the floor.

J. L. EBERLE: That motion is not an amendment to the rule? It is merely a matter of procedure to follow, Mr. Hawley?

MR. HAWLEY: Yes.

JUDGE CHAS. F. KOLESCH: I move an amendment to this effect. That the votes be cast by the individuals present and that each individual cast such number of votes as he represents in proportion to the number of delegates that are present. In other words, if Ada County had ten delegates and one hundred members, then let each one vote ten votes. I am opposed to Mr. Hawley's motion for this reason. Suppose a local Bar Association passes a resolution upon a subject of some wide importance. We come to the State Bar meeting and the subject is discussed there. I see that the local Bar Association has the wrong slant on it. I am convinced by the argument that I hear that the resolution passed by the local Bar Association is wrong; yet I am bound hand and foot except for my own vote.

Generally the local associations have very few present and only a small portion there pass this resolution, and bind those coming to the State meeting.

JUDGE DOWNING: As I understand the meaning of the motion, it was that the delegates attending the State Convention came as the directly accredited representative of the entire body of local Associations? Is that correct?

MR. HAWLEY: This is the point. It was moved in Boise that the members of the Bar be instructed to vote in favor of a certain proposition. Some of us objected, stating that the delegates who would attend here at Pocatello should not be bound to vote the entire strength of the Third District by instruction; that each delegate should vote the proportionate share of the Third District's strength that he represented at the meeting. Now, that idea prevailed and it was our sentiment that there be no instruction of its delegates. But this suggestion was made—that each delegate present be allowed to vote his individual vote but that he, as a representative of the men who were not present, be obligated to vote as per instructions. For instance, as Ada County has one hundred members and we have ten present, each of us vote ten votes. Under the motion that I have made, if each of us is against the instructions after we have heard the discussion, we vote ten votes which we individually have against the instructions, but we vote the ninety votes of our local Bar as that Bar has told us to do.

HARRY BENOIT: Mr. Hawley, I understand that you have one hundred members in your local Bar. At this particular meeting you mention, how many were present?

MR. HAWLEY: About sixty.

MR. BENOIT: Assuming there were but fifteen of them present, and that your local Bar pretended to instruct your delegation, you couldn't say, then could you, that that expressed the majority's opinion?

MR. HAWLEY: My motion specifically states that the instruction must he made by a majority of the vote of the District.

MR. BENOIT: Then your local Bar could not instruct your delegation to this Convention unless fifty-one were present?

P. J. EVANS: I think that these matters that would effect a change in the by-laws of our Association should at least be given over to discussion by our members through our local organizations. I don't think we have the right to make these drastic changes here not only without sufficient consideration but without any consideration, and the overwhelming vote of the members of our profession. I think, gentlemen, we are making a serious mistake.

C. W. POOLE: If what Mr. Evans says is true, the motion is entirely ont of order, in the conflict with the rules that have already been adopted. I rise to a point of order.

PRESIDENT ANDERSON: I am inclined to agree with you, Mr. Poole.

A. L. MERRILL: I move as a substitute for everything that has gone before that Mr. Hawley's resolution be filed with the secretary, and that the secretary submit the matter to the local bar associations and that the same be acted upon in due time.

Seconded from the floor.

PRESIDENT ANDERSON: Are you ready for the question? That's to refer this whole business through the secretary to the local Bars.

SECRETARY GRIFFIN: First District, absent. Clearwater Bar? —Yes, 58. Third District? —Yes, 122. Fourth and Eleventh Districts? —Yes, 78. Fifth and Sixth Districts? —Yes, 75. Seventh District? —Yes, 52: Eighth District, absent. Ninth District? —26 "yes" and 26 "no". 411 vote "yes" and 26 votes "no".

PRESIDENT ANDERSON: The matter is referred back to the locals.

We'll pass to the staudardization of preparation and examination of abstracts.

R. D. MERRILL: The committee is not making any recommendations, Mr. President, in regard to the examination of abstracts, but we do want to make an oral report, as follows:

That an abstract committee be appointed to make recommendations to the Legislative Committee for action on the following:

1st—Validating and making it impossible to attack title because of any defect prior to 1914.

2ud—Setting out a form of affidavit to be used for an order for publication of summons.

3rd—Cutting down the time in which defaults can be set aside where substitute service has been had.

Then we further recommend that the abstract committee, which is to be appointed, continue the work that has been done by the present abstract committee. I move the adoption of this report.

Seconded from the floor.

PRESIDENT ANDERSON: Any discussion?

SECRETARY GRIFFIN: First District, absent. Clearwater Bar? —Yes, 58. Third District? —Yes, 122. Fourth and Eleventh Districts? —Yes, 78. Seventh District? —Yes, 52. Fifth and Sixth Districts? —Yes 75. Eighth District, absent; and Ninth District? —Yes, 52. 437 "yes", none "no".

PRESIDENT ANDERSON: The report of the committee has been adopted.

JUDGE J. L. DOWNING: A committee consisting of Judge Downing, Mr. Millar, Mr. Eberle, Mr. Hawley, Mr. Graham and Mr. Evans reports the following motion:

The Idaho State Bar, in regular convention assembled, suggests that in this time of National stress, we reaffirm allegiance to the Constitution and laws of the United States and of the State of Idaho, and as an association of officers of the Courts, we will continue to seek to uphold and sustain such laws for the protection of the rights of the people in this free democracy and oppose all activities in any way in conflict with the fundamental principles upon which this country was founded.

We warn against hysteria and mob condemnation of any citizen without giving him a fair chance to defend himself.

We condemn Fifth Column and subversive movements advocating to overthrow our government by force.

I move the adoption of this motion.

The motion was seconded from the floor.

PRESIDENT ANDERSON: The secretary will call the roll.

SECRETARY GRIFFIN: First District, absent. Clearwater Bar? —Yes, 58. Third District? —Yes? 122. Fourth and Eleventh Districts? —Yes, 78. Fifth and Sixth Districts? —Yes, 75. Seventh District? —Yes, 52. Eighth District, absent. Ninth District? —Yes, 52. Total, 437 "yes", none "no".

PRESIDENT ANDERSON: The motion is carried.

I will appoint Mr. Eberle, Mr. Graham and Mr. Hawley, if they can find out who the new president is, to conduct him up here to be introduced.

Mr. Abe Goff was at this point escorted to the front and was heartily applauded.

PRESIDENT ANDERSON: I want to say that I am glad to find out who the new president is and I want to say, in introducing him as the new president, that I now introduce the biggest president the Idaho State Bar has had.

PRESIDENT ABE GOFF: Thank you, Walter. After the service Walter Anderson has given us, having served us for six years, we all want to express our thanks. We're going to pnt the new Commissioner, Mr. Glennon right on the job. He'll begin at 2:00

o' clock. I'll do my best, too, to carry out the standard Walter has given us, and that's about all I can say.

WALTER H. ANDERSON: Mr. President, there was a motion by Mr. Hawley that a committee be appointed to study and report back at the next convention the economic conditions of the lawyer, and I didn't have time to give that any consideration. I'd like to pass that over to you to look after it in your efficient manner.

PRESIDENT GOFF: It shall be done. Is there anything else to bring up before we adjourn? It is the sentiment of everyone here to honor our past president and to thank the Pocatello Bar and the citizens of Pocatello for their courtesy. We are adjourned.

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