PROCEEDINGS

of the

IDAHO STATE BAR

VOLUME II, 1926
VOLUME III, 1927

Second Annual Meeting
POCATELLO, IDAHO, JULY 19-20, 1926

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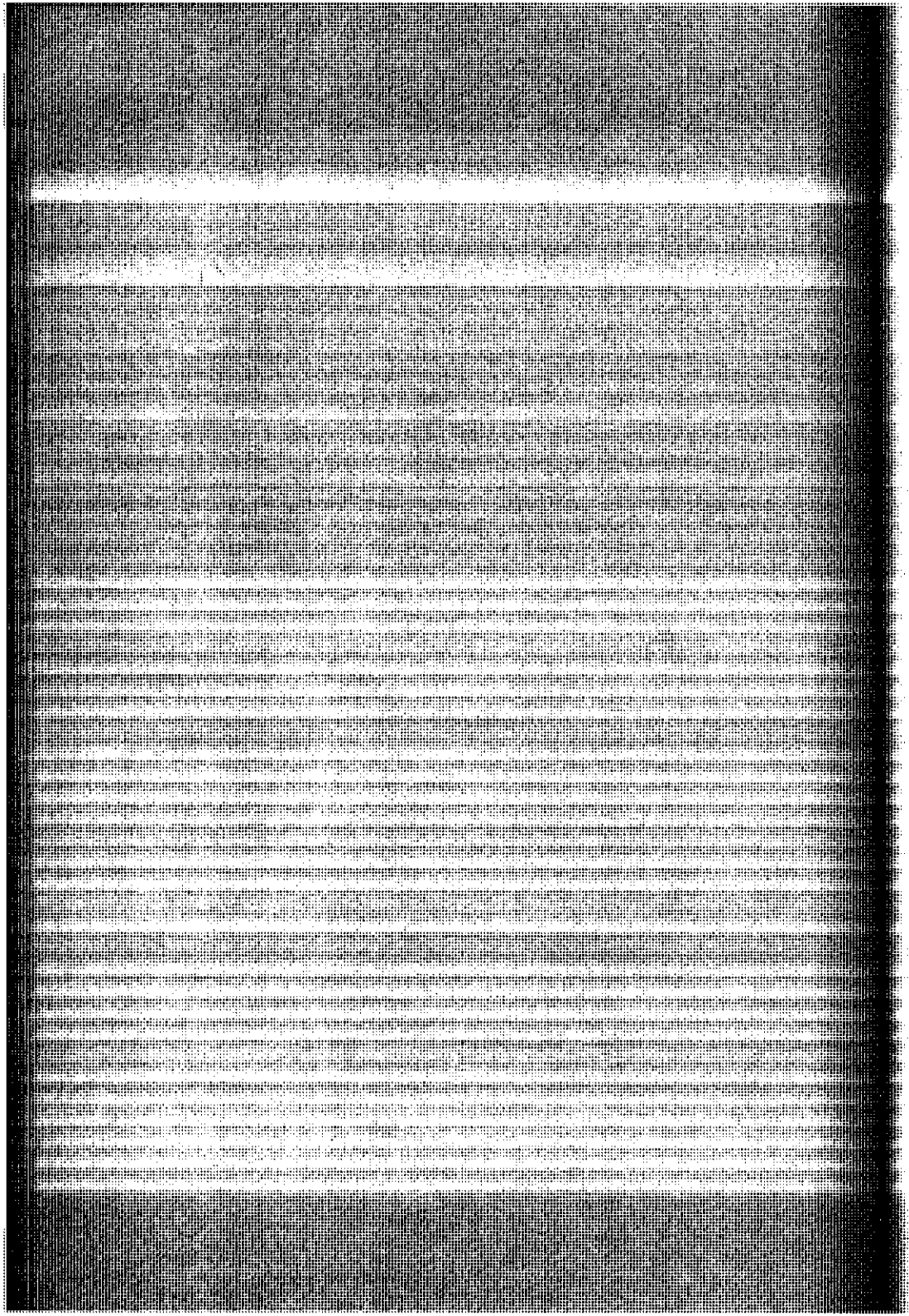

REPORT OF ANNUAL MEETING

OF THE

IDAHO STATE BAR

Volume III, 1927

THIRD ANNUAL MEETING

THE MOSQUE

BOISE, IDAHO, AUGUST 12, 1927

10 A. M.

PRESIDENT MARTIN: Will those present please occupy the front seats. The hall is rather large, and I think you will find the front seats just as comfortable, and it will be much easier for those who are to address you.

I will now introduce Dr. Cunningham, of the United Presbyterian Church of this city, who will deliver the invocation.

(Invocation by Rev. J. George Cunningham, United Presbyterian Church, Boise.)

PRESIDENT MARTIN: Mr. Brasie would like to get from you the names of those of you who have your wives here with you, so that an entertainment may be arranged for them. Will any of you who have your wives here with you kindly indicate it.

(Certain names furnished to Mr. Brasie.)

PRESIDENT MARTIN: I am asked to announce that at eight-thirty tomorrow morning the alumni of the University will meet at a breakfast at the Owyhee Hotel.

I will now introduce to you Attorney General Stephan. General Stephan.

MR. STEPHAN: Mr. President, members of the Idaho Bar, and friends: I don't know of any place that I would rather have on this program than the place that has been assigned to me, and in which I am entitled to extend to this organization and the members of the Idaho Bar a hearty welcome.

To the lawyers of the country has always fallen the responsibility of discharging the greatest civic duties, and it seems to me that our profession has always quite honorably discharged that responsibility. To the lawyers has fallen the responsibility of upholding and defending the fundamental laws of our land, of drafting the bulk of our statutory law, of interpreting it, and, in a great majority of the cases,

enforcing it. It seems to me that the future is about to demand greater activities on the part of the lawyer. His responsibilities are going to be greater in the future than they have been in the past, and it is because of this outlook, and with the hope of preparing the bar generally for those greater responsibilities, that that very wholesome organization, the American Bar Association, has been organized and developed. The same thing that has prompted the growth of that organization has also prompted the organization and growth of the various state bar associations, and we believe that this Bar organization of Idaho is functioning more effectively today than it ever has in the past, that it is raising the standards and the plane of the Idaho lawyer higher than ever before.

The organization has a great deal of pride in the program that it has provided for this meeting. The committees have planned carefully to prepare a program which they believe will be effective and which will help to improve the bar, and it is with great pleasure that I extend to you, on behalf of this organization, the welcome of the organization to attend these meetings, take part in the program, and help in every way possible. I thank you. (Applause.)

ADDRESS OF THE PRESIDENT, FRANK MARTIN

Gentlemen of the Bar:

It is my duty as president of the organized bar of Idaho to render a brief statement of the work of the State Bar Commission, and also my privilege to make such suggestions of activity for your consideration, as my experience and observation in office have led me to believe may be of benefit to the profession and to the state.

A survey of the situation shows that the opportunities for unselfish service are many, only a few, however, at any one time, may be undertaken. We must select these few in which we are to engage with care and wisdom, remembering further that the time which we may snatch from a busy professional life is limited and that our first duty is to the client who has entrusted to our care his interests.

Idaho was in the first group of four states to organize its bar by legislative enactment. The plan for an organized bar in the various states by legislation was approved and recommended to the states by the American Bar Association. The Idaho Act follows very closely the lines so suggested. The benefit of the plan to the lawyer and to the public is readily apparent. The purpose is to give to the bar of the state a working organization by which it can bring a united effort of its members to the performance of the duties especially entrusted to its care by the act and also in the consideration of subjects of interest and benefit to the profession and to the public alike.

Under the terms of the law, a State Bar Commission elected by the members, is created which, under rules approved by the Supreme Court shall have power:

1. To examine applicants for admission to practice law and to make recommendations to the Supreme Court for its action upon such applications.

2. To conduct hearings or trials upon charges filed against attorneys and to make findings and recommend a judgment to the Supreme Court.

3. To cause division meetings and the annual meeting, of the State Bar to be held for the consideration of matters of general importance to the bar.

Admission to the Bar. Our Legislature has placed practically no restrictions on those entrusted with the power of determining the qualifications of an applicant for admission to the bar. The only legislative requirements are: that the applicant be a resident of the state and a citizen of the United States, or one who has declared his intention to become such, that such person be twenty-one years of age, of good moral character and possessed of the necessary qualifications of learning and ability. What shall constitute the necessary qualifications of learning and ability and what proof shall be required of good moral character has been left entirely to the tribunal upon whom the duty is cast of deciding the matter, which in the first instance is the State Bar Commission, but finally the Supreme Court of the State. The admission of attorneys is properly placed wholly within the power and jurisdiction of that court, which may say what qualifications as to learning and what standard of character the applicant shall possess. The State Bar Commission, under rules to be approved by the Supreme Court, may determine the qualifications and requirements for admission to practice law, and the rules under which members of the profession may be disciplined for misconduct. The action of the Commission in every instance, before becoming effective, must be approved by the Supreme Court. The relationship of the Commission to the Supreme Court in these matters is the same as a referee appointed by the court to investigate, take testimony and report findings and judgment for the consideration of the Court. In conducting examinations and in disciplinary proceedings the Commission has acted through, or been assisted by, committees of the bar and the loyal and willing service rendered, when so called upon, has been not only a source of pride and satisfaction to the Commission but a guaranty of the devotion of our members to their profession and to the public service.

In conducting examinations for admission we have inquired into (a) the moral equipment of the applicant, (b) his pre-legal education, (c) his legal training.

Moral Character. Our statutes require that the applicant shall be of good moral character, leaving the exact standard, however, to be fixed by the court. This requirement is one of the utmost importance and in my opinion rises above all other requirements for admission to the practice of law. The Commission from its organiza-

tion has so treated it and has made the most painstaking investigation of every applicant for admission. Unless the applicant satisfies those who must decide that he is upright in every particular, and fundamentally honest he should not be admitted regardless of his learning and ability. The investigation should extend to his ideas of duty to the government and to society in general. Above all, he should have an understanding of, and a devotion to, the ideals of the profession long established by custom and court decisions, and as embodied in the code of ethics promulgated by the American Bar Association. The fact that unworthy men have and will obtain admission is only another way of stating that no human endeavor can accomplish perfect results. Men entirely upright when admitted afterwards fall from this high state and become unworthy to be an element in the dispensation of justice. Such, when discovered, should be promptly eliminated. It must be admitted by all that it is useless to require of an applicant for admission a high standard of honesty and morality unless he is also required to maintain such standard after his admission and during his membership in the profession. Good moral character as required by the statute is general character for honesty and morality and devotion to law and justice. The applicant when admitted must take an oath, among other things, to support the Constitution and laws of the United States and of this state; to maintain the respect due to the courts of justice and to employ for the purpose of maintaining the causes confided to him such means only as are consistent with truth. This requires more than honesty and morality in his professional dealings with the business of a client. This the lawyer might scrupulously observe and still violate many of the laws of the United States and of this state which he has sworn to support. The lawyer might deal honestly with the business of his client and the professional matters entrusted to his care and yet violate the criminal laws of the United States and of this state and shock the public conscience by acts of immorality entirely outside of any professional connection.

This leads us to consider whether the practice of law shall be regarded merely as a business or whether the lawyer shall be regarded as a part of the administration of justice and shall bring to that high service clean hands and an upright life.

It is true the banker or the merchant may be convicted of a crime involving moral turpitude, serve any sentence imposed, and at the end thereof justice may be considered to be satisfied and he may return to his bank or to his merchandise and again carry on his business. May the lawyer also, when punished for a crime against the law which he has sworn to support, be considered as having expiated his crime and be permitted to return to the temple of justice and again administer in its most sacred trusts? For myself, I believe not. The courts have the inherent right to purge from the ranks of the profession the morally unfit. This right is not dependent upon

any act of the legislature. The legislature, a coordinate branch of the government, may lend its moral support to the courts by requiring that the name of the attorney who commits certain crimes be stricken from the rolls, but this in no way lessens the power of the court to keep the profession clean. In this work the court should have the active and moral support of every member of the Bar. The acts of the unworthy are charged against the profession as a whole and as in most cases of wrong doing, it is not the wrong doer alone that suffers. No line of departure can be permitted between the honesty and morality of the man in his private life and in his professional practice. The principle of a dual capacity or responsibility in such matters cannot exist.

Prelegal Education. The amount of prelegal education which shall be required for admission to the bar has been one of discussion and wide difference of opinion. My experience has convinced me that nothing short of the equivalent of a two-year college training should be accepted. It is true that many men have attained eminence in the profession without this requirement. This has been due, however, to the natural endowments of the man and not to the system. He doubtless would have acquired still greater eminence and greater usefulness had he had the extra training. The man who is to discharge the important duties of a lawyer should at least have the foundation of general learning necessary to make him familiar with the approved use of the English language and a general knowledge of the history of the English speaking people, their laws and customs and of those events in their lives which gave force and trend to their legislation and judicial interpretations. It is the experience of every law examiner, that many present themselves who are deficient in general education and are unable to express their ideas in either grammatical or intelligent English. The ability to express ideas in reasonably concise and grammatical language is a prime necessity of one who seeks the privilege of drawing pleadings, preparing briefs, contracts and other legal documents and of arguing in court the matters which affect the rights and vital interests of his clients. To admit an applicant who in fact is not reasonably prepared to perform the high duties of confidence and trust imposed upon lawyers is a calamity not only to the public and the legal profession but to such applicant himself.

Legal Training. As to legal education the requirements should not be less than the equivalent of three full years study in a law school giving the course approved by the Association of American Law Colleges. If this equivalent can be procured by study, supervised by a competent attorney, good and well. That the study should be performed in a law college is much preferable. This gives the student the benefit of personal contact with professors, lawyers of high standing and character, with an appreciation of the highest ideals and ethics of the profession. This association and training

gives not only a better understanding of the true ideals of the profession but a grasp of basic legal principles and a power of reasoning and analysis not obtained in a study of the law by private reading.

We should strive by legislation and otherwise, to raise and maintain the moral and educational qualifications of those who are to be admitted to our ranks.

Disciplinary Proceedings. In every disciplinary proceeding the Commission has made or caused to be made a careful investigation to the end that justice might be done, not only to the party complaining, but to the attorney against whom the complaint was made. Prior to the organization of the Bar Commission the duty of disciplining members of the bar was left entirely to the courts with such assistance as the voluntary bar association could render. The voluntary association had no funds to pay expenses of investigations and the legislature persistently refused appropriations to the court for such purpose so that only the most flagrant cases of violation of professional duties could be handled. The act organizing the bar was passed in 1923 but by reason of a defect in the enactment it was more than two years before the Commission created thereby could function. The defect was cured by the act of the 1925 session of the legislature. Thereafter considerable time elapsed before the Commission could be organized for service, and rules prepared and approved by the Court. During this priod of about three years, when the voluntary association was dormant and the new organization not working a large number of complaints against attorneys in various parts of the state had accumulated. The investigation of these charges by the Commission showed that in the vast majority of the cases the charges were without foundation in fact. They were made either through cupidity or ignorance, or else grew out of an honest difference of opinion in regard to matters which had been handled by the attorney. In all such cases after being in possession of all the facts the Commission candidly submitted them to the complainant and in almost every of such cases satisfied the complainant that he was in error and that the attorney was not justly subject to criticism. In this way the Commission has been able to render great service to the profession and it is well calculated to act as a shield to the upright attorney unjustly accused. In other cases where the Commission found there was just cause for complaint it did not hesitate to require such an accounting of the attorney as justice demanded even to the extent of recommending that his name be stricken from the rolls of the profession.

It has been the fixed policy of the Commission to hold each attorney in the state to a strict accounting of his conduct and professional dealings. I urge the bar of the state to stand solidly behind the Commission in this effort to keep the character of the bar above reproach and to maintain the ancient and honored traditions of the profession. Courts must construe a statute as they find it and not attempt legislation. If the result is disappointing the remedy is by

a change in the statute. I believe that sound public policy requires that the same force be given to a decision of the United States District Court of Idaho in regard to violations of the federal statutes by attorneys as are given to a like decision of our state courts upon violations of the state laws.

The Commission has now reached a conclusion upon practically all of these pending matters and except for current matters our records are cleared. It has an established and well organized plan of conducting examinations, it has submitted to the Supreme Court certain amendments to the rules increasing the qualifications for admission which is being considered by the Court. The time has now arrived when the Commission may well, with the approval and support of the organized bar, undertake additional activities in the line of service to its members and to the public. I therefore, suggest for your consideration these further matters.

1. That this body create a number of sections or committees to co-operate with the Commission for the study of questions referred to them and recommend action thereon. For illustration:

(a) A judicial section composed of the judges of the Supreme, District and Probate Courts to consider and formulate rules for conducting the business of the courts in regard to getting causes at issue and the actual trial of cases. That these be simplified and made uniform throughout the state, also to consider other matters which would tend to simplify and expedite the business of the courts.

(b) A section or committee on judicial systems to study our present judicial system with reference to making improvements and changes therein, or the adoption of a new system if found to be more economical and effective. I suggest as a subject for study and investigation a unified court system for the state, by which there would be elected a chief justice and a fixed number of associate judges whose duty it would be to handle all the judicial business of the state. The chief justice to direct and assign the work of each of the associate judges both on the Supreme and trial benches. I believe with this system the judicial work of the state could be handled with a less number of judges and with greater efficiency.

(c) A prosecuting officer's section. To this could be referred questions affecting our criminal laws and procedure and expediting criminal trials, also such questions as juvenile delinquency and kindred subjects.

(d) A special revision committee to investigate with a view to simplifying, co-ordinating and harmonizing statutes relating to court procedure, to questions of general public interest, and to prepare and report bills to accomplish that purpose. For example, a general statute for the issuance of municipal corporation bonds, eliminating special provisions in regard to highway bonds, irrigation district bonds, drainage district bonds and other bonds of that character, making one law apply to all so that when the statute is construed by the courts the interpretation will apply to all bond issues of that character. A statute in regard to private corporations that will provide for such records in the County

Recorder's office as can be abstracted in the matter of titles. Many other subjects will suggest themselves from time to time as the work proceeds.

(e) A committee to investigate the feasibility of service to members in such matters as, circulation of advance sheets of opinions of the Supreme Court; sticker annotations of code amendments, repeals and decisions of the Court, briefs on special subjects of Idaho law and of federal law affecting Idaho interests or practice; publishing a directory of Idaho lawyers and generally making this organization a clearing house for matters of interest to the profession.

(f) The formation of local bar organizations, to work in conjunction with the State Bar.

(g) The bar should claim as a right a larger influence in the selection of judges. There are none so well qualified as lawyers to select from their number, the ones best fitted by nature and legal training to perform the delicate and important duties of these offices. A system should be brought about by which the judges are proposed for nomination in conventions of the bar rather than in political conventions as at the present. Judges should not be subject to frequent elections. The term of office should be increased and a salary provided reasonably commensurate with the duties required. It should also be understood that when a judge is once placed upon the bench that so long as he is properly performing the duties of his office he will not be disturbed.

I submit these suggestions for your consideration feeling that we should make the largest use of the means which the legislature, in organizing the bar, has placed in our hands so that as the years go by the bar will become an ever-increasing power in the state for good.

We must always remember that courts are in a delicate situation when their decisions are made the subject of criticism. They are not in a position to reply or to make a public defense of a decision. The attitude of the bar to the courts should always be that of loyal friendliness and not sycophancy. When unjustly criticized the lawyer should defend the court. If he feels a decision is wrong he should attempt to have it reconsidered or righted through the proper channels and should never join in any promiscuous criticism. He, of all men, must know that however much they may be criticised, the courts of our land are the chief bulwarks of our liberty. They are in the vast aggregate able, honest, fearless and fair, occasionally weak, but seldom corrupt. They are confronted with difficult and perplexing problems to solve. It might prove profitable to one inclined to undue and constant criticism of courts to imagine himself placed in the position of the judge or even the lawyer in the trial of and important question. He might thus enable himself to sense the responsibility of the court in such matters and thereby cause him to think more and speak less. We should at all times be fully alive to the dignity, honor and greatness of our profession. We should promptly resent slighting remarks by whomsoever made, directed to the law, lawyers or courts. This mode

of speaking and of thought begets indifference and disrespect for law, for government and for justice.

In closing, may I be permitted to say that I have enjoyed my term of service as an officer of our organization and have to the best of my ability, at all times, used every effort for its advancement. (Applause.)

PRESIDENT MARTIN: At this time I will appoint the committee to canvass the vote for the election of Commissioner in the Western Division. The polls will close at twelve o'clock. Anyone present, entitled to vote, who has not already voted, may do so, obtaining a ballot from the Secretary, enclosing it in an envelope, and writing his name on the back of the envelope, and delivering it back to the Secretary. A number of ballots have come in without the name of the person who voted on the envelope. It is impossible to tell whether such a ballot is genuine or not. The only check we have on the persons entitled to vote is the name appearing on the envelope. We have brought those down to the hall and they have been placed on this table here, and if anyone is here who cast one of these ballots, and if you can identify your handwriting on the envelope, on the address to the Secretary, you may write your name on the envelope and return it to the Secretary.

The committee to canvass this vote will consist of General Walters, of Caldwell, E. J. Frawley, of Boise, and Mr. T. K. Hackman, of Twin Falls.

I will at this time appoint a committee on resolutions: Chairman, Mr. John W. Graham, of Twin Falls, from this western division; Mr. G. L. Tyler, of Pocatello, from the eastern division; and Mr. A. Goff, of Moscow, from the northern division.

PRESIDENT MARTIN: The next subject for discussion is the "Condition of the Work in the Supreme Court and suggestions for expediting the determination of appeals," by Hon. William E. Lee, Chief Justice, Idaho Supreme Court. Members of the Bar, Chief Justice Lee.

JUSTICE LEE: Mr. President and gentlemen of the Bar, I shall detain you but a very short time. When the committee asked me to make an address to the Idaho Bar I found that I couldn't afford to take the time off from the work of the court to prepare an address. The committee asked me, however, to give the Bar some idea of the condition of the work of the Supreme Court and to make some suggestions that might result in expediting the determination of causes appealed to the Supreme Court. While the subject might in that respect be a little misleading, I decided, under the circumstances this morning, it might be well for me to stick to the subject, although I might be compelled to go outside the subject a little bit.

I have some statistics. People like to hear them. I just got hold of them this morning, but they are from the records of the Supreme Court. On the 1st day of January, 1927, there were pending and un-

disposed of the following appeals in the Supreme Court: In the Boise division, 195; in the Pocatello division, 90; in the northern division, 43. Due to the fact that the major portion of the undisposed of business of the court was in this division, the Supreme Court determined to hold only one term in the north this year, and to hold only one term in the Pocatello division this year, in order to try to bring the Boise business as nearly as possible up to date.

On the 5th of August of this year the undisposed of cases were as follows: Boise division, 167,—the former figure was 196; Pocatello division, 100; and the northern division, 32. So that on the 10th of August there were 299 causes undisposed of.

Now, just as an illustration, I will say that in 1925, on the 1st of August, there had been disposed of, with opinions, 95 cases, without opinions 17 cases, making a total of 112 cases disposed of up to August 1st, 1925. August 1st, 1926, there were 113 cases disposed of, both with and without opinions. The total number of cases disposed of up to August 1st of this year was 193. So that gives you the figures as to the condition of the work of the Supreme Court. I might say that the court will not hold a term in Pocatello this fall, and will not hold a term in the north. That will enable the court to devote more of its time to the work in the Boise division.

Because of the condition of the business before the Supreme Court, the Legislature of 1923 passed an act authorizing the Supreme Court to call in certain District Judges to sit as Commissioners with the Supreme Court in disposing of its work. The court has at various times called in Commissioners, who sat with the Supreme Court and heard arguments, and to whom the cases were assigned for writing. About a year ago indirectly I learned of an idea that Judge Rice had expressed, and that was that we should call in three District Judges to sit as Commissioners of the Supreme Court, and hear cases, and write opinions, and submit them to the Supreme Court. The first of this year the Supreme Court decided to follow that plan, and we called in three District Judges, who sat, as you all know, by themselves, and heard arguments, and the cases were assigned to the different judges who sat as Commissioners, and they wrote their opinions and sent copies to the other members, and finally sent their final opinions to the Supreme Court. I think that plan is a good one. I think it has resulted, and will result, in expediting the decision of cases in the Supreme Court. The plan so far has had some defects, some that we have discovered. On the 5th of September three other District Judges will come here and sit as Commissioners of the Supreme Court, Judge Babcock, Judge Featherstone, and Judge Adair. So that during the remainder of this year the Supreme Court and three Commissioners will devote their time and attention to the work of deciding cases in the Supreme Court that come from the Boise division.

Now, of course, the reason why the Legislature, or the people, changed the Constitution some years ago and provided for five judges instead of three, was that the lawyers and everyone thought that it would result in the Supreme Court being able to keep up with the work of the court. That hasn't proven to be true, and there are a good many reasons why that isn't true. A great many men have asked me what I had to suggest, that might be practicable, toward bringing about a situation where cases could be decided more promptly and within a shorter time after an appeal is taken. It is a hard question, and the only thing anyone could do was to guess what might be done. I have come to the conclusion that the best thing to do is this, if it is possible to do so,—and I have discussed it with a number of lawyers,—is to procure an amendment to the Constitution, not to increase the members of the Supreme Court, but to provide that the Supreme Court may call in District Judges to sit as members of the Supreme Court, and that the Supreme Court may sit in departments; for instance, call in one or more District Judges, so that the Supreme Court can sit in departments. As it is now, of course, the members of the Supreme Court have not only to agree on the work of the Supreme Court, but they must agree on the work of the Commissioners. That is the best suggestion I can make. I leave it with you for what it is worth. That completes the thought that I wanted to give you this morning.

I thank you for your attention.

(Applause.)

PRESIDENT MARTIN: Judge Lee, I assure you that the bar appreciates your presence here this morning, and this instructive and important information in regard to the matters before the Bar.

We will now take a few minutes for discussion of this matter; if there is anyone who has anything to say we will be glad to hear from you.

MR. JOHN W. GRAHAM: Mr. President, might I ask a question?

PRESIDENT MARTIN: Yes, Mr. Graham.

MR. GRAHAM: In regard to the form of the ballots, I find that there were three or four members of the bar of Twin Falls who were unable to get official ballots, that is, their official ballots were sent to them and were thrown in the waste paper basket, and when their attention was called to it, on account of the absence of the Secretary, they couldn't get official ballots, or they made out ballots on legal paper, and enclosed them in an envelope and filed the envelope. The only difficulty is that they are not on the official ballot. I was wondering what objection there was to those ballots being counted.

PRESIDENT MARTIN: You mean they prepared ballots themselves?

MR. GRAHAM: Yes.

PRESIDENT MARTIN: I hardly feel, Mr. Graham, that it is the province of the chair to rule on that matter. I feel that it should be referred to the canvassing committee.

SECRETARY GRIFFIN: The rules provide that the Secretary shall prepare an official ballot and mail it, and also provide that no member shall vote any ballot other than the ballot furnished him by the Secretary.

PRESIDENT MARTIN: Well, that settles the matter, Mr. Graham, and only an official ballot will be received. I might suggest, however, that while we are permitting those who have failed to put their names on their ballots to do so, that they might procure an official ballot, and vote before noon, and state on the envelope that such a ballot was prepared, so that it can be destroyed when found, so that a person who has not cast a legal ballot may do so before twelve o'clock.

MR. GRAHAM: I feel that possibly that rule is rather an injustice to some of the members of the bar, and I am going to make this suggestion: I am going to move that all ballots, be they official or otherwise, which are in legal form, be counted.

PRESIDENT MARTIN: Mr. Graham, it will be impossible for the chair to entertain your motion. These rules are prepared and approved by the Supreme Court, and are not subject to change by this body.

MR. GRAHAM: Do I understand that these rules have been adopted by the Supreme Court?

PRESIDENT MARTIN: Yes, they have.

Is there any other suggestion, or any discussion of these matters before the Bar? If not, we will pass to the next number, which is music by the Boise Male Quartette.

(Music by the Boise Male Quartette.)

SECRETARY GRIFFIN: It is getting time for the election to close. I thought perhaps someone had come in who did not hear the names read before. I will read those names again, so that an opportunity will be given to vote. (Reading names.) If anyone of you whose names were called is present, I suggest that you get your ballot in proper shape now.

A. L. Merrill, Commissioner of Eastern Division, took the chair.

MR. A. L. MERRILL: And prior to 12 o'clock, gentlemen, when, under the rules, this voting must close.

MR. MERRILL: At this time it gives me very great pleasure to introduce to you William M. Morgan, former Chief Justice of the Idaho Supreme Court, who will address us on "The Indeterminate Sentence Law."

HON. WILLIAM M. MORGAN: Mr. Chairman, ladies and gentlemen of the Idaho Bar: Before starting to talk about the indeterminate sentence law I cannot refrain from suggesting that some of the people who have been contending the Idaho voter hasn't sense enough to properly discharge his functions at a primary election had better sit up and take notice. If any of you see Guy Bissell, tell him to come up and vote.

It has been said, ladies and gentlemen, that everybody is conclusively presumed to know the law except judges and lawyers, and since none of us here are favored by having been provided with a knowledge of the law of indeterminate sentence by that conclusive presumption, I suppose, as Harry Lauder would say, we had better read the thing, and then we will know all about it.

Back prior to the legislative session of 1909, when a man, or a woman, for that matter, violated one of the laws of this state, which did not involve punishment by the death penalty, he or she, as the case may have been, was committed to the Idaho penitentiary for a fixed and determinate period of time, which was subject to be shortened by good beheavior, and also subject to be dimimished by the grace of the Board of Pardons or Parole. In 1909 the Legislature passed a law, amended in 1911, and which is now Section 9035, and known as the Indeterminate Sentence Law, reading as follows:

"When any person shall be convicted of a felony, except treason or murder in the first degree, the punishment for which, as prescribed by law, may be imprisonment in the state penitentiary, the court imposing sentence shall not fix a definite term of imprisonment but shall fix a minimum term of imprisonment which shall not be less than the minimum prescribed by law, nor less than six months in any case.

"The maximum penalty provided by law shall be the maximum sentence in all cases, except as herein provided, and shall be stated by the judge in passing sentence.

"The maximum term of imprisonment shall not exceed the longest term fixed by law for the punishment of the offense of which the person sentenced is convicted, and the minimum term of imprisonment fixed by the court shall not exceed one-half of the maximum term of imprisonment fixed by statute: *Provided further*, That in all cases when the maximum sentence, in the discretion of the court, may be for life or any number of years, the court imposing the sentence shall fix a maximum sentence. The release of such person shall be determined as provided in sections 9220 to 9226."

In other words, briefly, the indetermine sentence law provides that where a man has been convicted of a felony which does not involve the infliction of the death penalty, and does involve imprisonment either for life or for a fixed term of years, since 1909 it has been the duty of the court to fix the minimum sentence. Take, for instance, the crime of burglary in the first degree, the minimum punishment for which is one year in the penitentiary, I believe, and the maximum fifteen. If a man is convicted of burglary in the first degree, then the maximum penalty has been fixed by law and cannot be disturbed by the court. The judge's discretion is invoked merely in fixing the minimum punishment. That minimum punishment has

been fixed by law at not less than one year, and it may be as much as seven and a half years. Therefore, in a case which involves no particularly aggravated circumstances the court might with propriety sentence the man to from one to fifteen years, for burglary in the first degree. If, however, the offense seems more serious, the court might give him a sentence of as much as seven years for a minimum, but it could not exceed seven years as a minimum or fifteen years as a maximum.

Take as a further illustration burglary of the second degree. Burglary of the second degree, as some lawyers know, is burglary committed in the daytime, the term of imprisonment for which is fixed; the maximum is five years, and the minimum isn't fixed at all. The judge in pronouncing sentence may fix the sentence as low as six months, as the minimum, but the law fixes the maximum at five years. The judge may fix the minimum as high as two and a half years, because that is half of the maximum.

Such was the condition of the law until 1923, when the Legislature gave us section 9035-A, which reads as follows:

"Any person convicted for the third time of the commission of a felony, whether the previous convictions were had within the State of Idaho or were had outside of the State of Idaho, shall be considered a persistent violator of law, and on such third conviction shall be sentenced to imprisonment in the state penitentiary for not less than five years and said imprisonment may extend to life."

So that it doesn't make any difference what felony a man commits in Idaho since 1923, if he has been twice before convicted of any felony anywhere his minimum penalty is five years in the penitentiary, and the maximum may be life, or any term of years which may be fixed by the judge presiding in the District Court wherein his conviction is had.

Now, after the man gets into the penitentiary Idaho has undertaken to do certain things for his correction, and those things are to be found commencing with Section 9216. The section is short, and that is one excuse for reading it:

"The board of pardons is authorized to parole prisoners confined in the state penitentiary in accordance with the provisions of this article. Wherever the term "prison board" is used in this article it shall be construed to refer to the board of pardons."

Section 9217. "It shall be the duty of the judge before whom the prisoner is tried and convicted, and of the prosecuting attorney, to furnish such prison board, together with the warrant of commitment, all information that they can give in regard to the career of the prisoner before the committal of the crime for which he was sentenced, stating to the best of their knowledge whether the prisoner was industrious or not, of good character or not, what his associates were, what his disposition was, and all the facts and circumstances which may tend to throw any light upon the question as to whether

such prisoner is capable of again becoming a good citizen; and the said prison board shall also have the power to call upon any other official or person for similar information, and, where practicable, shall procure such information from people who have known the prisoner."

Clearly the purpose of that is a good one. It is that the District Judge and the Prosecuting Attorney who have had charge of the case in the first instance will give to the prison board such information as will aid the board in administering the law with respect to that convict in such a way as will be best calculated to place his feet back again into the paths of rectitude.

The next section, 9218, is very much along the same lines, but it has to do with the duties of the board:

"It shall be the duty of the said prison board to adopt such rules concerning all prisoners committed to their custody, as shall prevent them from returning to their criminal courses, best secure their self-support and accomplish their reformation.

"When any prisoner shall be received into said penitentiary he shall be given a thorough examination in the fundamental studies which are taught in the common schools of the State of Idaho, and unless he shall be able to pass a satisfactory examination he shall be instructed in such studies as may be deemed practicable and advisable; and each and every prisoner shall be given such courses from the university extension department as may be found practicable."

That clause was adopted in 1917, and, so far as I have been able to find out, it has never been given a practical trial; in other words, no effort has been made to do it.

"When any prisoner shall be received into said penitentiary, the warden shall cause to be entered into a register the date of such admission, the name, age, nativity and nationality of such prisoner, with such other facts as can be ascertained of parentage, education, occupation and early social influences as seem to indicate the inherited, constitutional and acquired defects and tendencies of the prisoner, and based upon these, an estimate of the present condition of the prisoner, and the best probable plan of treatment. And the physician of said penitentiary shall carefully examine each prisoner when received, and shall enter in a register (to be kept by him) the name, nationality or race, the weight, stature and family history of each prisoner; also a statement of the condition of the heart, lungs and other leading organs, the rate of the pulse and respiration, the measurement of the chest and abdomen and any existing disease or deformity, or other disability, acquired or inherited.

"Upon the warden's register shall be entered from time to time, minutes of the observed improvement or deterioration of character, and notes as to the standing or situation of such prisoner, and of his progress in learning or any subsequent facts or personal history which may be brought officially to his knowledge, bearing upon the question of the parole or final release of the prisoner."

Section 9219. And, by the way, let me say in passing that the warden does keep such a register, and, it is my opinion, to the very best of his ability, with the facilities he has, he has recorded there the facts required to be recorded. But listen to Section 9219, and consider if Idaho, in your opinion, so far as the pronouncement of the law is concerned, hasn't taken an advanced position in the matter of the correction of what is ordinarily called the criminal class.

"The state board of education shall have prepared courses of studies for all grades and make provision for the giving of university extension courses to all prisoners held under the jurisdiction of the warden of the Idaho state penitentiary, and the state board of prison commissioners shall make necessary arrangements for putting into effect all provisions for the education of such persons as are prisoners of the state and held under the jurisdiction of said warden."

Now the man who has stolen a three dollar hog and gone to the penitentiary for from one to fourteen years is entitled, under the laws of the State of Idaho, to the benefits of that section, and they belong to him just in the same sense that the hog he stole didn't belong to him. There has never been any effort by the state board or anyone else to carry that out, and it is one of the conditions of his release from the penitentiary that the convict make progress along educational lines.

"The prison board shall have power to parole and release persons confined in the state penitentiary for felonies other than treason or murder in the first degree."

"No person shall be eligible for parole until he has served the minimum term fixed by law for his offense. No person who has served a previous term in any penitentiary shall be eligible for parole."

Then follows Section 9223, which provides for the watching of the prisoner, for an examination of how he progresses with his studies, which it is provided he shall undertake, and which shall be given to him under the direction of the state board of education, and shall be provided by the extension department of the University of Idaho, as I have just read, and that when he makes good, to use an Idaho expression, and not before, he shall be paroled, and after he has been paroled and served six months of his parole, if he is still making satisfactory progress, he shall then be eligible to be finally discharged by the board of pardons.

Now these provisions of the law do not seem to be difficult of understanding. It occurs to me that one who reads the provisions relative to the limitations upon the powers of the judge to sentence a man to the penitentiary ought not to have any trouble in applying those limitations and pronouncing sentence accordingly. It seems to me that the duties of the board of pardons are well defined. Iu other words, taking the statute which I have read, and the parole statute to which I have referred and have not read, it presents this sort of a situation, to my mind, that in the first instance it becomes the duty

of the judge who pronounces sentence to inquire into the history, the environment, the characteristics of that convict, and to pronounce his sentence accordingly, and to report the facts to the board of pardons, with the view of giving the board of pardons the advantage of the investigation which his honor has made, in order that this man may be corrected and cured of his evil tendencies. On the other hand, it is clearly the duty of the board of pardons, not to sit as a board of appeal over the District Court, but to carry out the sentence which the judge has pronounced, unless something very unusual happens to justify interference. I do not know whether the board of pardons has found that the courts in pronouncing sentence have paid no attention to the law and it has been necessary for the board of pardons to sit in review in different cases, or whether it is that the board has, in years gone by, so overruled the court, so to speak, that judges have finally gotten into a frame of mind of feeling that the man will be turned out anyway, and consequently generally made the sentence from the maximum to the minimum, regardless of what the necessities of the case may be. But whatever the cause is, I am prone to reach the reluctant conclusion that there is not now in Idaho any effort whatever between these two coordinate branches of the Government of Idaho to coordinate or to cooperate in any way, to the end that the criminal may be corrected of his evil tendencies.

I have been given an opportunity to go over the prison records out here, and I have collected here a few of the many cases where the law has not been fulfilled by the judges whose duty it was to reach over and open the boon provided for him by public expense and find out what the limitations upon his power may have been, when he sentenced his fellow man to the penitentiary, and I was astounded to find that in the administration of justice in Idaho there had been such carelessness in finding out what the law was. With respect, for instance, to a replevin suit over a scrub steer, under the same circumstances, the state would have risen up and turned in a riot call.

Convict No. 3181, received at the penitentiary on August 32, 1922, upon conviction of grand larceny, was sentenced to imprisonment for a term of not less than two nor more than five years. The maximum fixed by law in that case is fifteen years, and this man got five.

Convict No. 3399, received at the penitentiary on December 30, 1923, upon conviction of grand larceny, was sentenced to not less than two nor more than seven years. His maximum was 14 years.

Convict No. 3605, who was received at the penitentiary on January 24, 1926, upon conviction of grand larceny, was sentenced to not less than one nor more than two years. In this case, as above stated, the maximum sentenced fixed by law was fourteen years. The maximum sentence which could have been legally pronounced in either of these cases was 14 years, and the minimum was one.

Convict No. 3321 was admitted to the penitentiary on November 20, 1923, upon conviction of burglary in the first degree. He had been sentenced to serve not less than three nor more than seven years. The minimum sentence for that crime is one year and the maximum is fifteen years. The extreme minimum sentence which could have been given was one year, from one to fifteen, and the most severe sentence which could have been pronounced against him was seven and a half to fifteen years, and he got from three to seven.

Nevertheless, Convict No. 3689 was, on September 19, 1926, received at the penitentiary with a flat sentence of eight months, for burglary in the second degree. Gentlemen of the Bar, when that eight months expired that convict thought he had a right to be turned out, but the law has pronounced a five-year maximum in his case,—not less than six months or more than five years,—and consequently, of course, they didn't turn him out. The judge, out of respect for whom, before the sentence was pronounced upon him, he stood up when the court came in, pronounced an eight-months sentence against him, and the convict had a right to believe that the judge knew the law. He got out to the penitentiary and was told by the warden that the law wouldn't permit him to pay any attention to the sentence, and wouldn't permit the board of pardons to pay any attention to it, and you and I exact of that convict, and should exact of him, that his term in the penitentiary have such a beneficial effect or influence upon him that he will go forth with full respect for the law and those engaged in the administration of justice. He has got to have more sense than it requires of any man to be admitted to the bar if he is able to solve that problem. The judge pronounced an eight-months sentence upon him, and the board of pardons is forced to keep him there from six months to five years.

Let us go a little further. Convict No. 3620 was, on March 15, 1926, received in the penitentiary with an indeterminate sentence for burglary in the second degree of not less than eight months nor more than sixteen months.

Convict No. 3634 was, on March 21, 1926, received in the penitentiary to serve a sentence for burglary in the second degree for not less than one nor more than three years.

Convict No. 3635 was received in the penitentiary on the same date, to serve the same sentence for the same crime, pronounced by the same judge.

You will notice that convicts, like the courts, are known by number, and I am not mentioning the names of any of them. (Laughter.) I am not suggesting by any means that they are all in the same sense, of course, law breakers.

Convict No. 3754 was received in the penitentiary on February 18, 1927, to serve a sentence for burglary in the second degree, of not less than eight months nor more than sixteen months.

Convice No. 3392 was admitted to the penitentiary on July 12, 1924, sentenced to serve from one to seven years for forgery. As I recollect, the maximum penalty for forgery is fourteen years.

Convict No. 3592 was, on December 18, 1925, sentenced to serve from one to five years in the penitentiary for forgery.

Convict No. 3606 was, on January 24, 1926, admitted to the penitentiary and sentenced to serve not less than one nor more than two years for forgery. The minimum penalty for forgery is one year and the maximum is fourteen years imprisonment in the penitentiary.

In 1925 the Legislature enacted a law fixing the penalty for persistent violation of the prohibition laws at not less than two years or more than five years in the penitentiary.

On July 20, 1926, Convict No. 3674 was received in the penitentiary to serve a sentence of not less than two nor more than three years for persistent violation of the prohibition law.

On September 8, 1926, Convict No. 3684 was received in the penitentiary to serve a sentence of not less than one year nor more than two years for persistent violation of the prohibition law.

If this hadn't occurred in Idaho, gentlemen of the Idaho Bar, I would be reminded of a story a man told me last night of a judge down South, when a darky was brought before him accused of stealing chickens. And the judge said to him, "Rastus, your face looks familiar to me. Have you ever been in this court before?" "No, sir, boss," he says, "I hasn't." "But," says the judge, "look here,—your face looks so familiar to me that it seems to me I must have known you somewhere, and I can't understand how it could have been other than you having been brought before me for some infraction of the law." "Yes, sir, boss," he says, "I'se your bootlegger."

However that may be, since the enactment of the law providing for the incarceration of a man for not less than two years or more than five years for persistent violation of the prohibition law, that law seems to have been disregarded by some of the judges right here in Idaho.

The Legislature in 1923 enacted a law whereby one convicted for a third time of the commission of a felony is to be considered a persistent law violator, regardless of what the felony has been, and his term of imprisonment is fixed by law at not less than five years, and it may be extended to life.

On December 3, 1923, Convict No. 3328 was received at the penitentiary to serve a sentence of not less than one nor more than fifteen years for burglary in the first degree. He was an ex-convict from Utah for grand larceny, and from California for burglary. So that you will see that the salutary provisions of the 1923 law were absolutely disregarded.

On December 7, 1923, Convict No. 3329 was received at the penitentiary to serve a sentence of from one to fourteen years for grand larceny. He was an ex-convict from Washington and California.

Convict No. 3332 was received in the penitentiary on December 13, 1923, to serve from one to fourteen years for conviction of passing fictitious checks. He had theretofore served a sentence in the Oregon Reformatory, one in the Washington Reformatory, one in the Washington penitentiary, and one in the Idaho penitentiary.

On January 28, 1924, Convict No. 3343 was received in the penitentiary to serve a sentence of from one to fourteen years for forgery. He had theretofore served two sentences in the Idaho penitentiary and two in that of Utah.

On February 2, 1924, Convict No. 3348 was received in the penitentiary to serve a sentence of from one to five years for burglary in the second degree. He had theretofore served three terms in the Idaho state penitentiary and two in that of Washington.

What is the board of pardons to do in a case of that kind? Pay attention to the sentence pronounced by the court, or follow the law? It is very true that with respect to this last class of offenders, those who have become persistent violators of the law, it is possible the District Judge in pronouncing sentence doesn't know of these former convictions, and in that connection I recommend that there be a bureau of identification established here at the Idaho penitentiary, to cooperate with the National Bureau of Identification, the work of which is to place in the hands of every warden of every penitentiary in the United States a description and the Bertillion measurements, the photographs, and prison numbers and prison records of every convict, and particularly of every escaped convict, so that when a man comes before our district judge from a farm out here in the country, a man born here in the valley, possibly, or one who is well known or has been for many years, the court can find out by inquiry here as to what the nature of that man's antecedents is, and his history and characteristics and disposition, and the board can know, or by inquiry readily find out, whether he is an ex-convict. But in the case of the floater who comes through here and is haled before the court, and who pleads guilty, we will say, in order to create as little disturbance as he can, the court, instead of giving him the statutory one to fourteen years, could have the sheriff take the man's photograph and finger prints and send them right down here to our penitentiary, and the warden would be able to get a report back to him, regardless of where the court was sitting in Idaho, within 48 hours, giving the man's prison record, if he had one, in each state of the Union; and that ought to be done before the court is called upon to pronounce the judgment as to what that man's period of imprisonment shall be.

Here is a letter written by one of the best prosecuting attorneys in Idaho, to the board of pardons. He says:

"Concerning the above-named defendant, I desire to say that the defendant, after his apprehension, but before the preliminary examination, which he waived, made a free and voluntary confession of the crime of burglary, and it seems that he was in financial straits, in fact, he had nothing to live upon. After waiving the preliminary examination, he requested that he be taken before the court, then in session, so that he might plead and be sentenced.

"I do not know anything about the prior history of the defendant nor his career except those disclosed from his own statements, to the effect that he had been arrested once before upon an unfounded charge and was immediately discharged. From his statements made I would judge him to be a rather handy man, having had some experience in nursing, restaurant work, and that he is a shoe repairer. From my observation of the fellow during the time of his arrest, having had several talks with him, and the fact of his repentance, and the clumsy manner in which the crime was committed indicating a lack of skill or experience in such work, I do not believe the fellow a hardened criminal, but rather an unfortunate adventurer in need of guidance and proper direction."

The warden had occasion to check up that man, and he found that he was Convict No. 8094 from the State of Iowa, from the penitentiary of which state he was at that time an escape, and he found that he had served a sentence,—I have forgotten now what it was for, but I believe it was burglary or robbery,—at Sacramento, California. He found that he was an escape from the Spokane jail; that he had escaped from the jail in Salt Lake City, and that he had been arrested in San Francisco on a charge of shop lifting, and had escaped from jail there. Now the prosecuting attorney who wrote that letter didn't mean to mislead the board of pardons, and the judge who pronounced the minimum sentence thought he was doing his duty by a wayward boy, who should be given an opportunity to do better.

I say it is the duty of this Bar, in my opinion, to make a recommendation to those in charge of the administration of the criminal laws of Idaho that this bureau of identification be established. It can be established at very little expense. And thereafter no District Judge should pronounce sentence upon a man without first knowing what the law is, and, second, knowing what kind of a man the prisoner is.

I have approached this subject and discussed it, my friends, in a spirit absolutely free from criticism, and no criticism has been intended. But there has been a disposition, it seems to me, upon the part of these two coordinate branches of the Government not to cooperate. And I make this further suggestion for your consideration, and see if you cannot embody this in your recommendations, in addition to what I have already suggested: That the board of pardons and the district judges ought to get together and hold a joint meeting, and at that meeting see if it cannot be understood that the court will first ascertain what the indeterminate sentence law is, then ascertain as nearly as he can what the needs of the convict standing

before him are, and fix a minimum sentence which the judge in his opinion believes at the time ought to be given and carried out, and let the judge have the assurance of the board of pardons that the minimum sentence will be carried out; and let the two of them have an understanding with the convict that when he has served that minimum sentence, and served it in a manner which indicates his proper advancement along the lines of good citizenship, that he will be entitled to his liberty. As the matter now is, here is what seems to me to be taking place. I say it, as I said a while ago, not in a spirit of criticism. The judge says, "The board of pardons will upset my sentence anyhow." How will it seem to the boy to come out there for his first sentence, we will say, and find that one of the judges in the state is still trying to do his duty, and he has been sentenced, we will say, to from four to fourteen years, for his first offense,—how is that young man going to feel when he meets in the yard a man who is doing his fourth stretch, who got from one to fourteen years, for the same offense? How is a convict going to feel who has been given to understand that he has been given a comparatively short indeterminate sentence, and that if he obeys the rules and gets no black marks against him, at the end of that minimum sentence he will be released, how will that fellow feel, going in that way to the penitentiary, when the first man he meets within the walls has been there three or four times the length of time fixed by the judge? He will come to the conclusion that Idaho has made a promise to his ear and a false statement to his heart. And no man in those circumstances can be expected to come out of that institution with a proper regard for the administration of justice in Idaho.

I believe if the judges of this state and the board of pardons can get together, much good will come of it. The present board of pardons has been commissioned by the Legislature to make a careful investigation of prison conditions, and to make recommendations of such corrections as ought to be made back to the next session of the Legislature. I earnestly urge that the Governor and the Attorney General and the Secretary of State perform this duty at a date some considerable time before the next legislature shall convene, and, in the wealth of their experience and their observations there at that penitentiary, I feel in my mind that such recommendations as they see fit to make will be right, because we have never had a better board. I feel in my mind that these recommendations will be right, and I trust that a copy of their recommendations will be placed in the hands of every member of the bar of Idaho, and I hope that the members of the bar will see to it that their members of the legislature, the members from their counties, will carry out that program which has been provided by this present commission.

Ah, gentlemen, let me say that we cannot discharge our duty by our fellow men by a slack and a lax performance of the clear provisions of the statute, and it is incumbent upon us to see to it that

the fellow who is in may be accorded a fair deal at the hands of the State of Idaho.

(Applause.)

MR. KROEGER: Judge Morgan, may I ask a question?

JUDGE MORGAN: I intended to say at the outset that if ever in my life I made a talk that didn't start a laugh, it at least started a fight.

MR. KROEGER: There are certain crimes punishable by imprisonment for life. If a person is found guilty of an attempt to commit a crime that is punishable by imprisonment for a certain period of years to life, what in your opinion would be a proper sentence?

JUDGE MORGAN: I don't know what would be a proper sentence. That is always for the court. But the courts have pronounced from 25 to 50 years in cases of that kind, and it has been upheld. There are cases in California on that subject, where it has been deemed a proper thing for the court to do to consider vital statistics of the insurance companies in passing sentence, but sentences of that kind have been upheld.

JUDGE HERMAN H. TAYLOR: In the statistics you gave of those who were persistent violators, were they charged and convicted as such? Was the previous offense charged in the indictment?

JUDGE MORGAN: I think not.

JUDGE TAYLOR: Then would there not arise the question as to whether the judge had power to pronounce the defendants persistent violators?

JUDGE MORGAN: Very likely.

JUDGE TAYLOR: Wouldn't your recommendation be well made to the Prosecuting Attorney?

JUDGE MORGAN: The Prosecuting Attorney couldn't control the court.

PRESIDENT MARTIN: Gentlemen, the hour of noon having arrived, the voting for commissioners is closed. The ballots will be referred to the chairman of the committee as heretofore appointed, and that committee will attend after adjournment with the Secretary, and he will deliver the ballots to them and check up with them the recommendations of those entitled to vote.

At the beginning of the afternoon session an opportunity will be given to anyone who has a resolution to offer for consideration by the State Bar, to introduce it.

The program this afternoon will consist of an address by the Hon. E. O. Howard, President of the Walker Brothers Bank, music, and an address by United States Senator William E. Borah, on the Mexican Land Problem, and discussion. The chairman of the Legislative Committee, who was to report this forenoon, is not able to attend. I understand his car broke down on the road when he was coming in. I assume he is coming this afternoon. At least we will have the report some time during the meeting. Now what is your

pleasure? Do you wish to discuss for a few minutes the address of Judge Morgan, or do you wish to adjourn? What is your pleasure? Does anyone wish to discuss the questions just discussed by Judge Morgan? If not, without motion, I will declare the meeting adjourned until 2 P. M.

Adjourned until 2 P. M.

FRIDAY, AUGUST 12, 1927

2:00 P. M.

PRESIDENT MARTIN: I am going to ask the reception committee,—Judge Hartson, Mr. Eberle, and Mr. James H. Hawley, Jr.,—to conduct those who are to take part in the program this afternoon,—Senator Borah, and Mr. Howard, of Salt Lake,—to the platform, and also bring Governor Hawley, that he may sit here on the platform.

(The gentlemen named were escorted to the platform by the reception committee.)

PRESIDENT MARTIN: A number of members on the floor have inquired of me if I knew the result of the election, and in order to allay your curiosity I will say they have not finished; the committee is not ready to report.

We feel that we have a very nice program for you this afternoon, and that it will be most instructive and entertaining.

It is now my pleasure to introduce, as the first number on the program this afternoon, Mr. E. O. Howard, President of Walker Brothers Bank, of Salt Lake City, who will discuss with us "The Responsibility of the Legal Profession to Society," from the standpoint of a business man of large experience. We are very fortunate in having Mr. Howard with us. (Applause.)

MR. E. O. HOWARD: Gentlemen, Senator Borah, Judge Parker, and ladies and gentlemen, and member of the Idaho State Bar: I assure you I feel it a great compliment to have been invited to your convention and to be given the opportunity and to be paid the compliment of assuming that I have the experience and the capacity to speak to you on any subject. I have always regarded the legal profession as representing the aristocracy of intellect, and that of itself is rather appalling to the ordinary business man. I am not a trained public speaker, and I very rarely attempt to speak, except extemporaneously, moved by the inspiration of the moment and the mood that I happen to be in, and my first thought in connection with this meeting was to fill myself up with the subject to the best of my ability, by talking with lawyers, lawyer friends, and executives, and reading matters touching on the subject that I had in mind, but I felt in this case that I did not care to take the responsibility of depending on memory. I knew the inspiration would be here, as it already is here now, and as far as that is concerned I am entirely satisfied, and well equipped, but in view of what I think is the importance of the subject that I am going to try and get over, and the thought that I have developed with the help of some very splendid friends, I have reduced what I have to say to writing, and am therefore going to read it.

I want first to pay a tribute to a man with whom I have discussed this subject very recently, and since I have discussed it with him he has passed to his reward. To me he was a great statesman in business. He was a trained lawyer, graduated from the University of California, practiced law for seven or eight years in San Francisco, and assumed great business responsibilities after that time. I refer to Wigginton E. Creed, who died last Saturday in San Francisco, at the age of 50 years,—a tremendous man, to my mind, one of the most powerful, if not the most powerful, man on the Pacific slope. He was not only a great lawyer, a great executive, but he was a great patriot, a great statesman, a man possessed of great power, great wealth, and tremendous influence; but he was as democratic as he was as a poor boy when he started out to secure his education. I talked with him about this subject. He happened to be in my home in Salt Lake City the middle of June, and I told him of this opportunity, and I asked him if he thought there was really enough in it to prepare a paper on, and he said promptly, "There is. You have a real opportunity." I asked him then if he would help me, and he said, "I certainly will," and one of the last things he did before he died was to communicate with me and give me the benefit of his experience and his ideas, which I have used largely in the preparation of the paper that I am going to read to you. His death was a great shock. I don't know how well known he was in this community, but he certainly was a great captain of industry.

One of the most illustrious members of the American Bar, now gone to his reward, described the opportunities of the profession in this manner: "To be a priest, and possibly a high priest, in the Temple of Justice; to serve at her altar and aid in her administration; to maintain and defend those inalienable rights of life, liberty and property, upon which the safety of society depends; to succor the oppressed and to defend the innocent; to maintain Constitutional rights against all violations, whether by the Executive, by the Legislature, by the resistless power of the press, or worst of all, by the ruthless rapacity of an unbridled majority; to rescue the scapegoat and restore him to his proper place in the world; all this seems to furnish a field worthy of any man's ambition."

That is the best description of the opportunities of the legal profession that I have ever read. I quoted from Joseph H. Choate. And as we are discussing business and the legal profession I want for a

moment informally to state my ideas about the effect of business on the development of our country which has been accomplished in the last 125 or 130 years. Business has built our transportation, both land and water; it has established our great manufacturing plants; it has produced our fuel, our power, our great organizations, together with the tremendous influence and resourcefulness of the lawyer. Business has entered into almost everything in the development of our country. It now has become dignified, it has become powerful, it has become honest, and it has become patriotic, and has become imbued with the opportunity of service. Business has developed into all those elements in the last decade.

The demands of the business man may be influenced by his selfish viewpoint, while that of business, as a whole, is determined by what experience has shown to be for the general good of both the public and business. Any business policy which works to the detriment of the public-at-large, is poor business even though it may be at the time profitable and advantageous.

There was a time when business was seeking out the lawyer who could devise ways and means to circumvent the law, with the view of getting an unfair advantage over the public. That was the thing that called forth the great outcry against business as represented by the so-called trusts and monopolies during the McKinley and Roosevelt administrations, and the various trust-busting suits that were instituted by the government.

The people came to the conclusion that all big business was selfish, oppressive, and bad. This was not true any more than a statement made by a prominent journalist many years ago that "an honest lawyer was the noblest as well as the most difficult work of god."

In late years it seems to me the public have been coming to the conclusion that the evil lies not in the bigness of a particular business, or that it approaches to the point of monopoly; but rather the manner in which it is conducted. It appears that modern business is awakened to a realization of this, and that it is good business to be fair and honest with the public, and to obey the laws as passed, rather than to circumvent them. Business depends for guidance in this matter on the lawyer. It expects him to counsel how to comply with the law and not how to violate it. It is looking for the lawyer who can keep it out of litigation, and not the one with an easy conscience who can prosecute or defend a suit to a successful conclusion by fair means or foul. A good bargain is now one considered satisfactory to all interested parties.

The days of good morals in business are here, and the lawyer in demand is the one who appreciates this and knows how to apply it.

A lawyer is an officer of the court, and while he owes an allegiance to his client, he owes another and higher allegiance to the court and

public, and that is, not by unfair means to bring about a miscarriage of justice.

While modern business demands, and has a right to demand, loyalty on the part of its lawyers, it no longer expects that loyalty to be carried to the point where the lawyer must forget his conscience and that he has a duty to perform on behalf of the court, to make to the best of his ability a fair presentation of the facts and the law, to the end that justice may be done.

To lawyers has always been committed the trust to interpret and administer the law, to guide society and to protect and safeguard its legal rights, to solve the problems in accordance with law, to aid in enforcing rights and redressing wrongs.

In no country in the world have lawyers been called upon to exert so large an influence in government and social order. They have guided the American people in every stage of their national growth. They entered into the early Colonial counsels,—instances: Patrick Henry, John Adams, James Otis and a host of others, and then Hamilton and Madison,—in securing the adoption of the Constitution.

The Declaration of Independence was penned by a lawyer—four of the committee of five who reported it, were lawyers,—more than half of the men who framed the Constitution were lawyers,—the judiciary of the country, of course, have been lawyers who shape the course of the common law,—in the legislative department they have predominated,—in the ranks of congressional statesmen, the names of Clay, Calhoun, Webster, Lincoln and Douglas, Benton, Chase, Seward, Sumner, Conkling, and a score of others stand out above their colleagues. Three of the four in Washington's cabinet were lawyers; six of the seven of the War Cabinet of Lincoln were lawyers; during the whole period of more than one hundred thirty-five years the office of the Secretary of State of the United States has been filled by a lawyer, with the exception of a brief period by Edward Everett, a preacher, and a period by James G. Blaine. For more than three-fourths of the time the office of the President of the United States has been filled by a lawyer. In no other country of the world have lawyers exercised such a far-reaching influence.

The lawyer in this day is an integral part of all business due to the great number and complexities of laws affecting it.

Congress at every session passes hundreds of laws influencing business. The legislatures of every state, likewise, pass yearly or biyearly, thousands of laws to those already directed at the regulation or control of business. Boards and Bureaus, state and national, fill volumes annually with rules and regulations that tread upon the heels of business.

Many lines of business must report to scores of governmental bodies from city councils up to great bureaus in Washington. Others pay from ten to a dozen varieties of taxes, ranging from town tolls to federal assessments on income. Still others have their rates fixed

by law, and cannot borrow or invest money without permission of some board or commission. And so on, indefinitely, wherever business turns, there it finds law and regulation. Business literally moves in a wilderness of laws and statutes.

Only lawyers can interpret and apply these multitudinous laws and regulations. Business, therefore, constantly seeks the counsel and advice of lawyers. So necessary has the lawyer become to business that many large enterprises maintain law departments within their organizations. These law departments are as much a part of the organization as are the accounting or the sales departments. Banks in large cities have lawyers on their office staffs. The point is, there is so much law and so much regulation that a banker or business man must have a lawyer at his elbow just to do the business of the day. Indeed, the need for lawyers in business is often so imperative that lawyers are placed at the head of great corporations. There are many examples. Prominent among them are: Gary, Holden, Sargent, Cravath and Creed.

Business, beset as it is by laws and legislation, is rapidly establishing new standards and making for new ideals. It is looking further into the future than ever before. It is striving harder than ever in its history to be right.

In this situation the men who succeed in business are those who have vision and courage, those who try new methods and develop new ways of gaining public confidence. Successful business no longer depends alone on experience or on the rule of thumb. It thinks and sees ahead. The efficient businessman, is always growing, changing, progressing. Someone has said that the successful businessmen of today "place all knowledge and experience under tribute."

The lawyer playing his part in business must fit into that situation. He must have vision, he must be able to devise and apply new standards. He must advise and plan with courage.

It is common knowledge that the average lawyer is steeped in precedent. His training causes him to look backward rather than forward. He tries to find precedent before he acts. Usually he prefers to walk in a course mapped out by others rather than strike out a new course for himself.

A distinguished governor of California, himself a practicing lawyer, once told a convention of lawyers that they lived among the tombstones. He said their faces were turned towards the past rather than the future. As a rule, he said, they refused to act unless they could do so on precedent. If there was no precedent, they hesitated and often took no action at all. This, of course, is an extreme view. It is belied in a large measure by the careers of lawyers who have become business executives, referred to. Yet, is there not in the history of law and lawyers some justification for the point of view expressed by the California governor?

The lawyer comes from a profession which has to do with the decisions of judges and the works of law writers long since dead. Custom and time have given great weight to these decisions and writings, so much so that some lawyers regard them almost with reverence. Now, this background has its limitations. It tends to make lawyers over-cautious. It takes from them initiative and courage, it has a tendency to withhold from them the vision and grasp of the future that is so necessary to present day progress.

There is here no intent to cast aspersions upon precedents or decisions. We all know that many of the great precedents are founded upon undying principles and upon the experience of the ages. We all know that in many cases they are the very foundation upon which our institutions rest.

The point is that precedents can and sometimes do make intellectual slaves of lawyers.

If business were to depend entirely on precedent and on what man did in other times, it would not make the progress that it is making today. It is only by striking out into new fields and setting up new standards that business moves forward.

The call to the lawyer is to move forward with business, or at least to help business in its forward movement. The lawyer who is helpful to business is the lawyer who sees above and beyond precedents. I believe he is one who uses the precedents as guides and sign posts, rather than as hard and fast rules to be applied at any cost.

There is sometimes a tendency on the part of the lawyer to rely too much on laws and government. He often thinks that the government can do things for business that business cannot do for itself. It doesn't occur to him that business can be regulated from within; that it can be given new standards and made to conform to public opinion by its own officers, if they are men of vision and ideals. He, therefore, turns to government and asks it to regulate business and in cases to manage or own business. Yet government has largely made a mess of ownership here and everywhere else in the world. Our own government has exercised very poor business judgment in its management. This is in a large measure acknowledged, but the thought persists that somehow the government, even if it cannot manage on its own account, can by some species of regulation save itself and all of us from the economic consequences of the day. Herein the lawyer makes a grave mistake. Government in the very nature of things is not as well fitted for the management or the improvement, or the purification of business, as is business itself. Business today commands more talent than government. It has within itself all the ability and power that is needed to keep it in the right path. Whenever it lacks morale or

ideals, the responsibility is upon the leaders in business and upon their lawyers. Business has just so much morale and ideals as we business men and lawyers put into it.

What business needs in most emergencies is guidance and leadership, not restraint or regulation. These the lawyers, who are in contact with business, should stand ready to furnish. Lawyers should help business to help itself and not join those who seek to pass the responsibility to the government.

The position of the lawyer as adviser or leader demands that he have breadth of view and vision. He must see the problems of business not in the light of precedent alone, but in the light of progress and development. Business is growing in morals and in its sense of service; lawyers who best serve it are those who grow with it and help it along the way, those who have vision and courage and are able to guide or lead it on to better things.

For those who serve business there are great rewards. If compensation is to be the reward there is compensation that is limited only by the material results achieved; if power is to be the reward there is all the power and authority that goes with the management of great banks and great business enterprises—power over men, over business and sometimes over public affairs, and above all, power to help and build up individuals, communities, and even cities and states.

The late Mr. Wigginton E. Creed, said:

> "Business has been revolutionized in its ethics and standards. Its ideals must be and now are service, and it is worth-while devoting one's life to making this new ideal a reality to the people. The slogan is: "What can I give?" instead of "What can I get?"

Wealth, power, fame, they are all there for the lawyer who will guide and direct business right—but to attain the heights the lawyer must serve with vision and courage. He must be a builder among builders.

Finally, the call to the lawyer is to understand business. Business began as mere trading. In the early history of peoples, the traders ranked low. Today business has become a great institution of general human service. It must be understood in that light and the lawyers who serve best will be those who see it, understand it and serve it as an institution moving forward steadily to broader avenues of service to society as a whole and to the advancement of mankind.

I recall a glorified stanza of Emerson's, that he wrote in connection with an appeal to the young men of the nation during the

Civil War times, which in a great measure applies to peace-times, in the great responsibilities that you men must assume:

> "So nigh to grandeur is our dust
> So near is God to man,
> When duty whispers low 'thou must',
> The Youth replies 'I can!'"

(Applause.)

PRESIDENT MARTIN: We thank you, Mr. Howard, on behalf of the State Bar of Idaho. Your discussion was very instructive. This outside view of a distinguished business man as to the profession is certainly one that will be of benefit to us all. We feel grateful for your address.

MR. WALTERS: We are ready to report any time you want it.

PRESIDENT MARTIN: We will now hear the report of the committee on canvassing the vote for commissioner in the western division. Are you ready to report?

MR. WALTERS: We are ready to report, Mr. Chairman.

PRESIDENT MARTIN: Mr. Walters.

MR. WALTERS: We, your committee who canvassed the returns of the election of commissioner in the Western Division, beg to report that there were 146 ballots offered, of which 26 were rejected, leaving 120, which were cast as follows: Mr. Jess B. Hawley received 78; O. O. Haga, 41; and Frank D. Ryan, 1. Respectfully submitted.

I move that the report be adopted.

MR. E. J. FRAWLEY: I second the motion.

PRESIDENT MARTIN: Gentlemen, the committee reports a total of 120 votes cast, of which Mr. Hawley received a majority of all votes cast. I therefore declare him elected commissioner for the Western Division for the term of three years.

PRESIDENT MARTIN: The next number on the program will be a discussion of the Mexican Land Problem, by one who perhaps is the best able to discuss it of any man in the United States. The next speaker is in the home of his friends. There is nothing too good for him, nothing too big for him, and nothing that he cannot do, if you ask the people of the State of Idaho. He is not only the foremost citizen of the State of Idaho, but he is one of the leaders of thought in the world, and perhaps the greatest student of international questions in the world. It is now my pleasure and honor to introduce to you our distinguished senator from Idaho, Honorable William E. Borah. (Applause.)

SENATOR BORAH: Mr. Chairman, Governor Hawley, and members of the bar: I was greatly interested in the very able ad-

dress of Mr. Howard upon the relation of the lawyer to the business world. I think he did not overdraw the picture. It recalled an incident in the cloak room of the Senate some years ago. One of the topics which we like to discuss is the profession to which most of us belonged before we went into public life. And one day in the cloak room we were discussing trial lawyers in the United States. In the cloak room at the time was old Senator Frye, who was then in his last months of service, and he had a habit of sitting in the cloak room for hours and paying no attention to any conversation that was going on, taking no part in it, apparently asleep. While we were discussing these trial lawyers, those whom we knew, their failings and wherein they were most successful, and why, after our eastern friends had gone over the list, I said, "I would like to mention the name of a lawyer who has prosecuted more men for murder and convicted them, and defended more men for murder and acquitted them, than all your lawyers put together." Someone asked who it was, and I said it was Governor Hawley, of my state.

(Applause.)

Senator Frye waked up at that time, and said, "Well, Senator Borah, he was a little unfortunate in his associate, wasn't he, in the Haywood case?" (Laughter.)

In order to understand the Mexican land problem, as I see it, it is necessary to go back somewhat in Mexican history. Indeed, if we are to understand it in its fulness we would have to go back to the beginning of Mexican history, to the time when the Spaniards came to take possession of that marvelous piece of country. It will perhaps be sufficient, however, and time will necessitate it, that we begin at a later date, and for today's discussion I choose to begin with the reign of Diaz. Diaz became president, so-called, of Mexico in 1876, and reigned as president, with the exception of four years, until 1910. This interim of four years was not really a break in the reign of Diaz, as the man who served those years was selected by him, and in no sense broke with his administration or his policies, and it may be said, I presume, as a practical proposition, that his reign began in '76 and terminated in 1910.

Mexico had always been, from the time of the Spaniards, a country of large estates, but under the administration of Diaz he disposed of 134,447,886 acres of land, three times as large as that of New England, and disposed of it to his political supporters and retainers. In large measure it was given to them, but was so disposed of as to make it impossible for the common people of Mexico to secure any part of it. At the end of his reign, in 1910, there were 834 estate holders or haciendados holding estates ranging from 21,000 to 6,000,000 acres. At the other end of the social ladder were twelve to fourteen million people not only without land, but, under the system prevailing, without the opportunity or the possibility

of securing land. Not only did he dispose of the estates which may have been carved out of the public lands, but from the time of the Spanish kings the villages of Mexico had owned what they called communal lands. The holding belonged to the village, was inalienable, and was utilized by the village residents for the purpose of raising some means of subsistence or grazing an animal; in other words, it was the method and means of enabling them to escape absolute peonage or slavery. Diaz disposed of ninety per cent of these communal holdings, distributed them, broke them up and distributed them to the large estate holders, and when he did so he forced into serfdom 3,500,000 people. And when I say serfdom I am not using the term figuratively. I am using it as the term implies in its most cruel and drastic import. They had no homes, no means of livelihood, and so they came to pass, as a practical proposition, as a part of the large estate. In the state of Morelos alone 20 estate holders owned and controlled the entire state, while 180,000 inhabitants were landless. It has been said, and I think with some degree of accuracy, that 96 per cent of the heads of rural families in Mexico in 1910 were without land and without means of acquiring it. And so when Diaz' reign closed it may be said as a practical proposition that less than a thousand men owned and controlled the lands of Mexico, while from twelve to fourteen million people were landless.

I will not undertake today to describe the social structure which surrounded the Diaz reign. We are all familiar with the worst days and the worst seasons. We have all read something of the depraved era known in history as that of Louis XIV, but I venture to say that there was not to be found anywhere a more depraved society than that which surrounded and sustained the reign of Diaz. I could not describe it to you; I would not do so in a mixed audience. I do not, in speaking of depraved society, refer to political groups, but to a diseased and demoralized society. Neither will I take the time now to describe the common people of Mexico. They were without land, without means of education, hungry, living in huts, and actuated by a dumb sense of injustice. This was the condition of affairs when Diaz fled the country, when he went to Spain, and afterwards died in Paris. Mexico had to change; Mexico had to reform her land laws or perish. It is altogether probable that they were at a loss to know how, but anyone who reads Mexican history can have no doubt that the Mexican people, as a people, instinctively felt that the change must be had. No better evidence of the fact can be had than that which followed. Madero began to agitate against the Diaz regime in 1910. If we are to understand the Mexican situation and the Mexican problem we must understand that the revolution from 1910 to 1923 was not a political revolution, but an agrarian revolution. It is true, as it would necessarily be true, that there was politics in it, but the moving, controlling, impelling power behind the revolution

was the declaration in the Madero platform that the land laws of Mexico must be rewritten and the title to the lands placed back in the hands of the people.

Professor Hackett, of the State University of Texas, whom I regard as one of the very ablest, if not the ablest, student of this question, has this to say with regard to the revolution beginning in 1910;

At the outset it may be said that the Mexican Revolution which began in 1910 was as inevitable as the French Revolution, and the causes of the Mexican Revolution of 1910 are to be found in the history of the so-called thirty-five years presidential reign of Porfirio Diaz. And the fact that it was an agrarian revolution, understood to be an agrarian revolution, is best evidenced by the fact that less than ten days before Diaz fled the state he had brought in a bill before the Congress for a readjustment of the land laws of Mexico, for the restoration of the lands to the people of Mexico, and incorporating in the bill almost every objectionable feature, from a confiscatory standpoint, that is now claimed to be found in the Constitution. But it was too late. Belshazzar's feast was drawing to a close. The people were unwilling to trust him. He could not stay the revolution. Men all over Mexico who had been deprived of the communal holdings, men who had been deprived of their lands, refused to accept what might be considered a compromise, and the Madero revolution succeeded. If this is an agrarian revolution, if it involves the sincere change of the land laws to conform to the public want, it must necessarily present itself to you and to me from a different standpoint and a different standpoint and a different angle than if we should view it purely as a political revolution.

The Constitution of 1917 is a very drastic effort to accomplish what had been promised the people during the revolution. It provides in the first place that all mineral wealth belongs to the nation, and that the development of the mineral wealth of Mexico can only be had through concessions granted by the Government. It is well to bear in mind, as we are undertaking to find evidence of good faith, that this had been the law of Mexico from the coming of the Spanish conquerors down to 1884. The mineral wealth of Mexico had always been deemed to belong to the crown. But in 1884, under the administration of Diaz, although it took place at the particular time that the four-year gentleman was in the chair, the law was changed, for the first time in four hundred years the mineral wealth of Mexico was declared to belong to those who might own the surface. Only Mexicans, under this Constitution, can acquire the lands and waters of Mexico. Foreigners may acquire land and water, provided they agree to be considered Mexicans in respect to such property and not to invoke diplomatic aid. Foreigners may not obtain land within 100 kilometers of the boundary and 50 kilometers of the coast. That, too, is an old Mexican law, coming down from the days of the Spanish conquest. Communal lands are to be restored. Values of

the same are to be fixed at the declared taxable values, plus ten per cent. Large estates when taken are to be disposed of and paid for in the same way. Foreigners acquiring more than 49 per cent of the stock in land companies, after the adoption of the Constitution and prior to the regulatory law, may hold the same until death, but their children must dispose of the stock within five years, and if heirs find it impossible to dispose of the stock in five years an extension of time may be granted. If sale is not finally had, sale will be had upon public order, and distribution made to the proper parties. Corporations and like bodies must dispose of 50 per cent of the stock in 10 years. Holders of oil lands upon which no development has been begun are required to make applications for concessions, which may be granted for 50 years. The Supreme Court of Mexico has held that the Constitution does not apply where positive acts of developments have been begun, that all oil lands on which work has been done are exempt from the operation of the Constitution.

No one, of course, will deny the right of Mexico to change her land laws, so far as the future is concerned. Our able Secretary of State conceded that in the correspondence. The only matter of controversy between the Government of Mexico and the Government of the United States is whether the change which has been proposed affects vested rights, that is to say, affects and impairs the titles which had been acquired prior to the adoption of the Constitution. So in considering the matter we have little to do with whether it was wise or unwise as to the future. My own opinion is that it was not only wise, but absolutely essential. But we may dismiss that. We are interested alone in the question of whether vested rights have been impaired by the adoption of the Constitution.

Let us go a little further into the oil question, because that is the matter of greatest controversy. As I have said, until 1884 the subsoil wealth belonged to the country. The Constitution of 1917 undertook to restore it to the Government. The Constitution, under the decisions of the courts, has no application to oil holdings upon which work has been done. The Supreme Court of Mexico held that it is not necessary that actual physical labor be performed; it is only necessary that contracts or leases, or some manifestation of the intention and desire of the holder of the land to work the oil, has been expressed. If he has entered into a contract or made a lease or in any way given evidence of his desire to develop the oil, the Supreme Court of Mexico has held that he would be exempt from the operation of the Constitution. In the diplomatic correspondence it was agreed that the principle that acquired rights may not be impaired by legislation is not disputed. There has never been any discussion between the two governments as to the question of confiscation, based upon the claim of the Mexican people that they had a right to confiscate. The sole contention has been, the Mexican

people claiming that the laws are not confiscatory, that they do not claim the right to confiscate, and the American Government claiming that they are in effect confiscatory, and the question which I urge upon your consideration is not whether they are confiscatory, but does the contention, as it is presented, present a juridical question. How is the proposition as to whether these laws are confiscatory to be determined? Must it not be determined either by the Courts of Mexico, or, if we are not willing to accept the courts of Mexico, by an international tribunal, or by means of arbitration?

Legislation is retroactive when it interferes with acquired rights. What is an acquired right? It is quite different under the civil law and the common law. Under the civil law you do not acquire rights in oil until you find it and take possession of it, and our Supreme Court is tending in the same direction. The petroleum claims, about which the controversy arises, are, first, those upon which positive acts have been performed, and those upon which positive acts have not been performed; and really the only controversy is about those claims upon which no positive acts have been performed. The only titles in controversy, really, between the governments, are those titles which are held upon which no work has been done, no contract made, no leases executed, nor any evidence of an intent to develop the oil. The regulatory law required that all parties claiming title to oil must file their applications for oil within one year after the promulgation of the law, or forfeit all title. Three hundred and eighty companies, representing twenty-six and a half million acres, have accepted the Constitution, and twenty-one companies, representing a million and a half acres, refused to file. It may not be improper, as I am talking to my friends at home, to say that I got that information through direct inquiry. I saw in the public press a number of times statements to the effect that certain companies were accepting the Constitution, and there came into my office one day a gentleman who had been at one time prominent in a western state as an official, and who now has 40,000 acres of oil lands in Mexico, and stated to me that a great number of companies were accepting the Constitution of Mexico, that he himself had accepted the Constitution of Mexico, and that he would just as soon have a concession for 50 years on an oil well as to have the title itself. But each and every time that those facts were stated in the public press there emanated from a certain place of business in New York a statement to the effect that it was untrue, that no one would consent to accept the Constitution, no one of any moment, and that the oil companies were standing as a unit. I did not consider it improper, under the circumstances, to go to the source of authority, and I telegraphed or cabled direct to President Calles, and asked him how many companies had accepted the land laws of Mexico, and how much acreage they represented, and he replied that three hundred and eighty companies had accepted, representing

twenty-six and a half million acres, and that twenty-one companies had refused, representing a million and a half acres. And I haven't any doubt but what that is a correct statement; it has never been disputed, to my knowledge. And I asked him also who some of these people were who had objected, and I do not think it improper, in throwing light upon this controversy, to say that the principal oil interests in Mexico who have refused to accept the Constitution are the Doheny and the Sinclair interests. And my knowledge of the manner in which they do business would lead me to believe that they would hesitate to submit their titles to the confirmation of the Mexican Government.

In case application was filed and title sought, concession would be granted for 50 years, and in case the oil was not exhausted an extension could be had for 30 years. The average life of an oil well is something like 17 years. That being true, the oil claimant with a concession for 50 years, is in this position: No oil well has ever been known to exist for 50 years. Since I made that statement —I saw a statement a few days ago that there were one or two oil wells in Pennsylvania which continued to produce a small amount of oil for nearly 50 years. But I think, as a practical proposition, that is true. During that time, to-wit, 50 years, the right of use continued, the right of exclusion of all others continued, and the right to take possession and sell continued. Where, therefore, is the substantial injury? If at the end of 50 years the oil remains the concession may be extended.

When you boil this question down, my friends, the controversy is over the difference in value, or the substantial right involved, in the difference between a fee simple title and a concession to an oil well. After a concession is granted they have the same right precisely for 50 years that they have if they hold the title. Bear in mind that no restraint is placed upon the sale of oil when recovered. The only party hurt by the Mexican law is the speculator, the man who does not intend to work his mine, the man who secures his title and proposes to hold it for purposes of speculation.

Now, my friends, it has been generally assumed that Mexico in her land policy has pioneered a situation, but the fact is that Mexico has many precedents for her land laws. The Lord George laws proposed in England, and to some extent adopted, involve many of the things which may be said to be involved in this land law,—an attempt to break up the large estates. But the most specific example is that of Roumania. Roumania undertook to break up her large estates, and an examination of the Roumanian law and of the Mexican law will lead you to the conclusion that the confiscatory features of the Roumanian law are equally drastic with the Mexican law. And when a certain foreign government called Roumania's attention to the fact that the laws affected the government, Roumania replied that Roumania claimed the right to legislate within her territory.

I examined a few days ago the Texas law, and I also communicated with the Attorney General of that state, and I find that it is provided in the Texas law that all alien persons and corporations residing abroad are prohibited from owing land in Texas. Second, that resident aliens who are natural born subjects of nations having a common land boundary with the United States may own land, as long as they are bona fide residents of Texas. Third, that all aliens are required to sell their lands after five years, if they inherit or purchase them at foreclosure sale. Fourth, that all resident aliens must sell their lands within five years after ceasing to reside in Texas. Fifth, that no foreign corporations can purchase and hold lands in Texas. Sixth, that no one can hold property in trust for aliens. Seventh, that alien-owned lands must be registered.

Now that law preceded the Mexican law by a number of years, and it is barely possible that they were familiar with it.

In this connection it is well to recall a dispatch of Lord Curzon, foreign secretary of the British Empire, in reply to American inquiries regarding oil concessions within the British Empire. The dispatch reads: "Prospecting or mining leases have been in practice granted only to British subjects or to companies controlled by British subjects. That will be the policy in the future."

Trinidad: There is no nationality restriction, but the lessees must be British subjects or British controlled companies.

In other words, it is an effort which every nation now is seeking to put into effect, to retain the oil and to conserve it and control it by the Government. Everybody is doing that except the United States. It will be found that an English company, now controlled in part by the English Government, is securing the oil from one of the Naval Reserves of the United States. We are entirely too generous. Oil is the life of modern industry. It is vital and an indispensable element of national security. We have failed to agree with our English brethren about the ratio of cruisers. It is vastly more important that we conserve our oil interests, without which our cruisers in 20 years will be of little effect, if the report of the Federal Oil Board be correct, because our Federal Oil Board has reported to the Government that we have oil in sight to last only six years.

But there are other illustrations. When we passed the Eighteenth amendment we confiscated something like $75,000,000 belonging to foreigners. I really cannot see any difference, except in a social way, between Article 27 in the Constitution of Mexico and the Eighteenth Amendment in the Constitution of the United States. And when a foreign government called our attention to the fact that the adoption of our Eighteenth Amendment had resulted in the confiscation of the property of their nationals, our Government made the reply—and a very proper reply,—as follows: "The United States Government cannot discuss the legality in an international sense of the operation of an act of Congress or the effect of the Constitution of

the United States. While, therefore, the Department is not undisposed to give consideration in a friendly spirit to views such as those expressed in the memorandum with respect to the operation of the Constitution and the Act thereunder, the Department could not accept any suggestion questioning the competency of the Congress to enact such legislation or the people to adopt such constitution." Of course that is axiomatic; it is fundamental.

What is the question between Mexico and the United States? Mexico had a great problem to solve. In an effort to solve that problem Mexico adopted a certain constitution, and passed certain legislation. That Constitution and that legislation impaired rights of our nationals, and we call attention to it, and the foreign secretary of the Mexican government replies in practically the language in which we had replied to a foreign government in another matter. I do not say by that, my friends, that the property of Americans should not be protected. I do not contend that the Mexican Government has a right to confiscate that property, but what I do say is that when the sovereign rights of the nations to legislate come in conflict with the rights of foreign holders, under international law, that it presents a juridical question to be settled by peaceful methods. (Applause)

In conclusion, if I may speak in the first person, because I don't bind anyone else, neither my committee nor anyone else, the position which I have taken with regard to the Mexican problem is this: Mexico is acting in good faith in working out her land problems. I believe that; I have no doubt about it. This law itself shows every effort possible to avoid confiscation. The only conflicts where confiscation could arise are in two instances only, and a studied effort has been made to make it possible to avoid confiscation entirely. President Calles has said over and over again that he has no intent to confiscate property nor destroy vested rights. In other words, if that is the effect of the law, and if the courts so decide, Mexico retires from the controversy. Second, that the United States is concerned in our nationals and their reasonable protection, but the United States is also concerned in peace with our neighbors to the South, and interested in their development, and in the consideration of any question coming before our Government involving the rights of our nationals we are not permitted to consider their naked technical rights; we are to consider only their substantial rights. Where peace with our neighbor is involved, substantial justice is all the American interests can ask for. (Applause.) Third, that Mexico had the absolute right to adopt her Constitution and change her land laws. It was her sovereign right, which no man may challenge, and which our Government has not challenged. Fourth: In so far as and to the extent that this change affected vested rights of our nationals, it presents a legal question, a juridical question, to be determined by the courts or through arbitration or proper international tribunal. Fifth: That

where protection due to the property of aliens under international law comes in conflict with the sovereign rights of the nation to legislate and control property within its borders, it presents purely a legal question.

Let me call your attention to the conditions we would be in if we adopted a different view. During the World War the great nations engaged in that war put out the doctrine of self-government, the right of self determination, and advocated Democracy for all the people of the earth. We may not have, all of us, meant all that those words implied. The great leading nations may have spoken with more fullness than they intended. But there is no doubt, my friends, but what the small nations of the earth, the oppressed people of the world, understood what we said and took it for all that it expressed. (Applause.) And wherever you go, whether it is in China, or India, or Nicaragua, or Mexico, that doctrine has sunk in. And now, if in their struggle to better themselves and to right the wrongs in their own country, they pass laws which are in the interest of the community, shall we as a people, because it interferes with the naked technical rights of some, stop all progress in those countries? No. We will meet them in a friendly co-operative spirit, and if they do substantial justice to the American people the American Government will be satisfied. (Applause.) Sixth: That while it is true that the property of the alien is entitled to protection, and is always a matter of concern to the Government, this must always be considered in connection with another rule of international law: That foreigners are subject to the laws and policies and security of the state upon the territory of which they find themselves.

My friends, since the war closed we have loaned to foreign governments, invested in foreign securities, to the extent of twelve billion dollars. Those investments are found in all kinds of governments. We find investments in governments quite as weak as the government of Mexico. Now are we going to follow these twelve billions of investment with law, with justice, or with force. My contention is that if the Government of the United States must look out after foreign investments and protect them, then the Government of the United States ought to say something about what kind of investments our nationals shall made. (Applause.) I contend that as the interests of this nation or any nation may call upon us to modify or control the rights of property domestically, so the peace of nations may require us to modify or control the rights of property abroad.

A few years ago the State of Wyoming passed a law which resulted in the confiscation of a very large amount of property. The State of Wyoming claimed that it had the right to pass the law under the police power, and that, in the interest of and for the protection of the community, in the exercise of its police power, it was within its rights. The property holder, as the oil holder here, contended that it was confiscation. What did they do about it? They took it to

the Supreme Court, and the Supreme Court held the law valid. Who paid the men who had invested their money? No one. Now the same rule applies here, my friends, internationally. If Mexico, claiming under the police power, in the interest of the community passes a law, and our nationals contend that it is confiscatory, we must use the same channels of adjustment we would in our own affairs, if we are going to continue to be the great, enlightened, Christian nation that we have been. Due process of law is applicable in international affairs as well as in national affairs. The case presented here is identical in its judicial aspect with the cases presented under the Fourteenth Amendment, where state laws are contended to be confiscatory, to which I have just referred.

I contend that in dealing with foreign governments relative to property rights, where the question of peace or war may be involved, that we are to take into consideration the interest and the condition of the foreign government, as well as our own rights. We are deeply interested in those twenty-one republics to the South. We cannot afford to establish a standard that is not in harmony with their development. We are interested in an organized, unified, progressive, strong Mexico. We may not be able to get it,—I do not know,—but I do know that we are interested in having it, and that everything in our power that we can do should be done in order to bring that about.

So I conclude, my friends, by saying this: Do not understand me as contending for the right of confiscation. I am contending that the question of whether or not it is confiscation must be determined through judicial methods. When it is determined, Mexico's situation has been that she will retire from the contention, if it is determined against her. If it is determined against her and she does not retire, then an entirely different question is presented. But in the first instance let us lead out and give a practical demonstration of the doctrine which we have preached from the time that old Ben Franklin wrote it in the treaty with Prussia in 1789, and that is, that all questions relating to property shall be determined by means of arbitration. (Applause.)

PRESIDENT MARTIN: My friends, for me to comment upon the masterly address of our distinguished senator upon this important subject would be useless. It only remains, Senator Borah, for me to extend to you the thanks of the organized bar of Idaho for your participation in our program this afternoon.

Before proceeding with this program,—and we have several numbers yet,— I wish to announce, first, before adjournment, anyone having resolutions to hand in that they want to go to the Resolutions Committee will have the opportunity to do so.

We have arranged for tomorrow a very interesting program, which includes a discussion of "The Bench and Bar of Idaho That I Have Known for 25 or 30 Years," by Chief Justice Isaac N. Sullivan; a

discussion of the "Application of Psychological and Scientific Tests to Testimony," by Dr. J. W. Barton, and "Limitations in Uniformity of Laws," by Ex-Chief Justice Ailshie, in the forenoon. And in the afternoon a discussion of the American Law Institute, an institution attempting a re-statement and amplification of the laws of the land, to take from the shoulders of the bar and the courts, if possible, that Old Man of the Sea, the multiplications and contradictions of the decisions of the courts as we find them at the present time. And later in the afternoon a very important subject, "Building a Judicial System for Idaho," by Hon. A. H. Oversmith, of Moscow, a man extremely capable to handle this snbject. The discussion of Judge Parker of the American Law Institute will be most enlightening and of value. Judge Parker is a member of the Council of the American Law Institute, and he was selected not because he happened by accident to hold the office of Justice of the Supreme Court of the State of Washington, but because of his eminence as a jurist in the United States. We will have music, and the public are invited to these programs. We have tried to arrange a program interesting alike to the public and the bar. This evening the banquet will be held in the lower part of this building, open to the members of the bar, and all the visiting attorneys are guests of the local bar of Boise City. We hope that you will all be present. This will be at seven o'clock. At the same hour the wives of the visiting attorneys will be entertained with a dinner at the White Peacock, and a theatre party afterwards.

We will now proceed with the program. We are fortunate in having with us a soloist of more than local repute, who will render the "Invocation to Life," by Stroff, and "Happy Days," by Louis Victor Saar, Mrs. Myrtle Rosene.

MRS. ROSENE: I am going to sing first the "Hoping Song" for Mr. Borah.

(Solos by Mrs. Rosene.)

PRESIDENT MARTIN: We will now proceed with the regular program. All the attorneys, at least, will remain, as we have a little work to do.

We will now hear the report of the Legislative Committee, which we should have had this morning, by Hon. Jess B. Hawley, Chairman. Mr. Hawley, can you favor us with a report?

MR. JESS B. HAWLEY: Mr. Chairman.

PRESIDENT MARTIN: I might say, in introduction of Mr. Hawley, that he was chairman of Legislative Committee during the past year, and worked very faithfully for the organized bar of Idaho. I introduce Mr. Hawley. (Applause.)

MR. JESS B. HAWLEY: Mr. Chairman: Gentlemen of the Bar, the report of the Legislative Committee is really largely a matter of progress, rather than of accomplishment. The Committee was appointed on the 13th day of January by the Bar Commission in regular session, and it was commissioned to carry on a program of some pretension. The committee was appointed largely from Boise and the surrounding country, I assume on the theory that we were closer to the Legislature and probably would be able to give more time to it.

The Bar specifically referred to us:

1. The matter of increase of judicial salaries in Idaho.

I think that came first, largely, in our endeavors, for the reason that we believed, and still believe, that the District Judges and the Supreme Court Judges are underpaid. Now there ought to be some applause at that point. (Applause.)

I see two District Judges applauding.

But, seriously, we presented,—and in this we were only acting in conjunction with many members of the Bar who were not on the Committee,—bills looking to the increase in the salaries of both Supreme and District Court judges.

We also sought the passage of a bill which gave a thousand dollars blanket appropriation to each of the Justices of the Supreme Court, they to be free from the onerous and rather undignified practice that is prevalent now of requiring each of the members of this high and dignified court to present to the State Board of Equalization vouchers, receipts, for every expenditure made in private. This is embarrassing and unnecessary, and I believe you will agree with me that it is beneath the dignity of our court. The Legislature seemed not to think so.

The salary bill was finally passed, but our Governor had the idea that it should not become law, and vetoed that bill. So much for the efforts of your Committee on the first assignment.

2. An act to define the practice of law.

This was the most altruistic question which was given to us to formulate into a bill. I think that no one worked harder on this subject that the sub-committee appointed. Mr. James Pope of this city spent many days looking into the law, the statutes, and evolved a definition of the practice of the law that was very inclusive. In short, that definition was aimed at the prevention of the practice of law by real estate dealers and by bankers and by others than lawyers. The bill was presented to the Judiciary Committees of the House and of the Senate and I think acquiesced in by them, but I believe that the feeling which is common among legislators that anything that the lawyers present which may be twisted into something for their financial benefit prevented the passage of the bill. The legislators wrongfully assumed that this bill was for our benefit. I think there isn't a lawyer here, or, rather, there certainly was no lawyer present as a member of the Committee, who had not in his experience been benefited financially by the assumption of knowledge or authority on the part of some real estate dealer, banker, or someone else, also by the assumption of ability to draw a contract, a deed, or a will. As we talked it over informally, the source of many fees was the action

of these pseudo-lawyers in drawing instruments that attempt to convey interests in property. As a matter of fact, we are financially very much better off if those gentlemen continue to draw legal documents, but the Legislature couldn't see it that way. I assume the next Legislative Committee will carry on this particular work, and that some day the people of the state will realize that no one should take out an appendix except a doctor, and no one should take the task of conveying property or of setting down agreements unless he has the legal attainments so to do.

In this connection, there was a bill introduced, fathered by a member of our Committee, Mr. Eldridge, and that bill was aimed at the advertising by bankers and trust companies, advertising to draw wills, to probate estates, to act as trustees, to carry on the law business in an indirect way. We thought that that was an infringement upon our profession, and that it was also an indirect way of securing business for those gentlemen who happened to be the attorneys for the banks and the trust companies, because, certainly, these institutions do not pretend to draw the wills and the contracts and the trust documents themselves. They must hand it to some lawyer, and what the arrangement is no one knows. But it is prohibited by the new canon of ethics of the American Bar Association, as I read the ethics, and I think that the bill, though it did not secure much support, is a bill which ought at some time to pass.

3. We were assigned the task of "harmonizing of Sec. 6659 C. S. and 6677, 6678 C. S., as amended 1925 Session Laws, relating to publication of summons, either by repealing the 1925 amendment and reenacting the original provision, and conforming 6659 C. S. thereto, or by amending 6659 C. S. to conform to the 1925 amendment." The latter was done, and, as you know, much of the doubt concerning publication of summons has been set aside, has been dissolved, and that particular accomplishment I think the Bar may take some credit for.

4. "A request that a standing appropriation of $100.00 per annum be granted to help defray the expenses of the conference of commissioners on uniform state laws." We thought that was very worthy, but there had been already an attempt to secure the passage of such a bill, and our labors along that line were unnecessary, as someone else was looking after it.

6. "An amendment of Sec. 7152 C. S. in substance providing that when the object of suit is recovery of a money judgment involving $500 or less, appeal can only be taken to the Supreme Court as follows: After procuring transcript as now provided, there shall be attached thereto a petition setting forth the ultimate facts involved, and points of law relied upon for reversal, and the same presented to the Supreme Court or a justice thereof; upon consideration of the petition and record, appeal may be granted or refused; if refused by a justice, appellant may present petition to the court in term time, and the court may grant or refuse such appeal."

Our committee did not find itself particularly in harmony with this assignment, and, not having much force behind it, nothing was accomplished.

The report of the Chief Justice to the Governor, dated December 1st, 1926, was digested, and an attempt was made to secure legislation in conformity therewith.

Your Committee hopes that the next committee may be able to proceed better than we did. I think that it is the experience of all of us, of all you gentlemen who have had experience with the legislature, that it looks with much suspicion upon any suggestions that we may make. I find, however, after visiting the legislators session after session, that we are more in good standing now, since the passage of our Bar Bill, and since we have started to clean our own house and pay some attention to our profession, than we were regarded prior to that time.

I do not believe it is quite proper for the chairman of the committee to suggest any future legislation. I assume the Bar Commissioners will pass on that point, and possibly this convention will have something to say. I do hope, however, that the suggestion may come that the power of this Bar Association over its members be increased, so that it will be the same as that of the Supreme Court, in short, that not only will we have the right to investigate and prosecute our members for unprofessional conduct, but also for any violation of any other rule that should govern lawyers.

So far as criticising any decision of our court, I refrain from that. I assume that petition for rehearing stops the mouth of the average lawyer. But I don't think that the suggestion that I have just made is out of line at all with that decision, and I believe that so long as the Bar has been given part power, has been entrusted with the most important duty, that the legislature should go the rest of the way, provided that our Supreme Court doesn't see fit to do that which I sincerely trust it will do, make the statement unequivocally that the judiciary is an equal third part of the Government, and that the Supreme Court, and not the Legislature, has the right to say when and how its members may be disciplined.

I thank you.

(Applause.)

PRESIDENT MARTIN: I wish to say in connection with this report that the accomplishment of this committee was of considerable value. The chairman may feel that the results were hardly commensurate with the labor, and yet several acts were passed at the suggestion of the organized bar of the state, and those that were inaugurated and presented, and not passed, have at least a great educational value for the future. I want to say this, that we found the members of our profession in the legislature in complete accord in the work we attempted to do in giving an increased salary to the judges, in simplifying some parts of our practice, like the summons,

and other matters, and making the record on appeal in criminal matters the same as in civil matters; we found the members of our profession in the Legislature heartily in accord with the expressed action of the Bar, and they gave us very willing and effective help in all these matters. In fact our committee and the members in the Legislature secured some relief for our courts, but, as the chairman said, the Governor could not see that it should be passed at the present time.

Now may I ask you this, before adjourning; that you take your program and look it over, and be prepared to discuss these subjects. Most of the subjects tomorrow are open to discussion by the members of the bar present. Let us all be here tomorrow morning at ten o'clock, and come prepared to discuss the subjects. I hope if there are any questions of legislation that you have in mind, or any special work, that you will put it in the form of a resolution and get it in the hands of the Resolutions Committee, so that we will have a report on it and can consider it tomorrow.

May I say before we adjourn, also, that tomorrow will be largely a discussion by either the judiciary or by men who have been judges, and I would like to extend the invitation to all of our Supreme Court Judges and ex-Supreme Court judges, and to our distinguished Federal Judge, to take a seat on the platform, along with the speakers, tomorrow morning. Will our reception committee please look after that?

Is there anything further that any member would like to take up at this time? If not, we will stand adjourned until seven o'clock.

Adjourned until 7 o'clock.

A banquet, followed by entertainment, was given by the Boise Bar, complimentary to all visiting attorneys, at the Banquet Room, The Mosque, at 7 o'clock in the evening.

10 A. M. SATURDAY, AUGUST 13, 1927.

PRESIDENT MARTIN: Will the reception committee present the speakers who are to take part in this morning's program, together with the members of the Supreme Court, to the platform—Judge Ailshie and Judge Deitrich, the federal judge, too, if you please, and Judge Parker, and Judge Sullivan?

(The reception committee escorted the speakers and the gentlement referred to, to the platform.)

INVOCATION by Rev. C. E. Burgess, First Christion Church, Boise.

PRESIDENT MARTIN: If any member now has a resolution of any kind to offer we would be very glad to have you hand it to the Secretary, that it may go to the chairman of the committee on resolutions. If not, we will proceed with the regular program.

I wish to say, gentlemen, that the Bar Commission is reorganized, of course, once each year, after the election of the new member. The

new commission has organized and elected a President of the Idaho State Bar for the coming year. In retiring from this office I wish to sincerely thank the members of the Bar of Idaho for the loyal support which they have given the commission in the past and the assistance and support which they have given me during the past year as president of the Idaho State Bar. There has never been a more willing, loyal service than the members of this profession have rendered to the central organization of the organized Bar of Idaho, and it is only through that assistance that we have been able to meet the obligations which are placed upon us under the law and carry forward the work which we were required to do.

Now I want to introduce to you the new President. He is a man in every way qualified to lead this Bar, a man devoted to the best interests and the highest ideals of the profession. It is with a great deal of pleasure that I introduce to you the newely-elected President of the Idaho State Bar; Mr. Merrill, of Pocatello. (Applause.)

MR. MERRILL: Thank you, gentlemen. I sincerely trust that I may be able to follow in the footsteps of my good friend, General Martin.

The first order of business this morning is the report of the Secretary, Mr. Sam Griffin. I assume you all know Sam, but for those of you who perhaps do not know him permit me to say that the success of the organized Bar in Idaho is due very largely to the very splendid work of the Secretary. We will now hear the report of Mr. Griffin.

REPORT OF SECRETARY

Since the report made to the Bar on July 19th, 1926, at Pocatello, the Board of Commissioners have held seven meetings. A synopsis of the activities of the Board, aside from the routine matters in the office of the Secretary, and the necessary activities of Commissioners in making investigation of complaints, is as follows:

C. H. Potts of Couer d'Alene, having been elected Commissioner for the Northern Division upon the expiration of the term of R. D. Leeper of Lewiston, the Board met at Pocatello, July 19, 1926, and elected Frank Martin as President, A. L. Merrill, Vice-President, and Sam S. Griffin, Secretary. Four complaints were considered; one of which was referred to Prosecuting and Investigation Committees, one was dismissed as not against an attorney; in one, action was deferred for further preliminary investigation, and in one, which related to a layman practicing law, the Board considered that the Bar Act did not repeal the act permitting a layman to practice in Justice Court. Discussion was had relative to raising educational standards for admission to the Bar of Idaho, and tentative change in the Rules for admission were drafted. Examination date was fixed and arrange-

ments made for preparation of questions; action on all applications for admission was deferred.

On August 9th and 10th, 1926, the Board met at Boise and considered four complaints; two of which were referred to Prosecuting and Investigation Committees for disciplinary action; one dismissed, after special investigation, because of lack of evidence, and deferred for further investigation. One applicant for admission on certificate from Minnesota was, after investigation, recommended to the Supreme Court for admission and was subsequently admitted.

On October 15th, 1926, the Board met at Boise and considered eight complaints; one related to the filing of briefs in the Supreme Court in the case of E. R. Dampier, who had previously been recommended by the Board to the Supreme Court for disbarment; in one substitution of committee members was made at the request of prior appointees; one related to complaint against attorneys in Chicago, and complaint was forwarded to the Chicago Bar Association, which subsequently advised the Board that it had commenced disbarment proceedings; two were referred to Prosecuting and Investigating Committees for Disciplinary proceedings; one was adjusted and dismissed; and in one appearing that the matter had been determined in favor of the attorney in a civil proceeding, dismissal was entered; and in one the demurrer to disciplinary complaint having been sustained by the Investigation Committee, proceedings were dropped.

It was ordered that the Secretary file disciplinary complaint against attorneys who were delinquent in the payment of annual license fees.

Six applications for admission were considered; three were granted permission to take the examination; one was rejected for insufficient legal education; and two recommended to the Supreme Court for admission upon certificate from other states; three were subsequently admitted by the Court. Provision was made for holding examinations at Boise, Lewiston and Pocatello.

On December 4, 1926, the Board met at Boise and graded examination papers of eight applicants, all of whom were recommended to, and subsequently admitted by, the Supreme Court.

Consideration was given to payment of witness fees in disciplinary proceedings. Sixty-five complaints against attorneys for non-payments of license fees having been previously filed as directed by the board, thirty-nine were dismissed, having paid up, three dismissed because found not liable for payment, and one dismissed, the attorney having died; defaults for failure to appear were entered in twelve cases and in the one attorney was granted further time to appear; in three service of citation was not secured. Each of the Commissioners was appoined to hear the cases at issue in his division and hearing set for December 18.

One complaint was referred for investigation and later report. Arrangements were made to meet with the faculty of the College of Law, University of Idaho, and discuss admission standards.

On January 7th and 8th, 1927, the Board met at Boise. Six disciplinary proceedings relating to delinquent license payments were dismissed because of payment; two were continued; action on four general complaints was deferred for further investigation; one was referred to Committees for disciplinary proceedings.

One applicant for admission on certificate was recommended conditional upon the view of the Supreme Court as to the reciprocity rule; subsequently the Court denied admission; the applicant was a resident of Washington and it appeared that Idaho resident attorneys could not be admitted in Washington.

The reports, findings and recommendations of Investigation Committees in three disciplinary proceedings were considered; in the C. H. Edwards case judgment of suspension for one year(upon approval by the Supreme Court) was entered. This is also now before the Court for review. In the J. D. Zurcher case dismissal was ordered.

The board conferred with the Justices of the Supreme Court relative to proposed raising of the standard for admission to the Bar. A Legislative Committee was appointed, Jess Hawley, Chairman, and to it were referred suggestions of the Bar made at the Pocatello meeting of the Bar.

On April 7, 1927, the Board met at Boise. Nine applicants for admission were considered; six were granted permission to take an examination; one was rejected for insufficient period of legal study; one rejected because of failure to furnish data required; one deferred for further showing.

Eleven disciplinary matters received attention; one related to previous proceedings instituted; in one proceedings were ordered; four were deferred for further investigation; two were dismissed as unfounded; in two provision was made for review in the Supreme Court; and in one, John S. Codding of Burley, Idaho, judgment of cancellation of certificate of admission was ordered, subject to the Court's approval, the attorney having after institution of disciplinary proceedings, offered his certificate for cancellation. The court, on July 28th, 1927, approved the judgment of the Board.

Provision was made for an examination at Lewiston and for a conference of the faculty of the College of Law, University of Idaho, the Board and Justices of the Supreme Court relative to proposed changes in the Rules for admission. Consideration was given to arrangements for this meeting of the Bar of Idaho and to mectings of the Bar of the Northern and Eastern Divisions; and for the election of a commissioner for the Western Division, the term of Commissioner Martin expiring in 1927. New rules for admission to practice were considered and drafted.

On June 7th and 8th, 1927, the Board met at Lewiston, granted two applicants permission to take the examination, graded examina-

tion papers of eight applicants, recommended five to the Court, which subsequently admitted them, and rejected three.

Nine complaints were considered; two referred for disciplinary proceedings, five dismissed, two deferred. Three applicants were rejected, two for failure to make additional showing requested, one for insufficient legal education. One application for admission on certificate was reserved for further investigation of moral character.

At a conference between the Board, the Supreme Court, and the faculty of the College of Law, University of Idaho, proposed changes in the rules for admission were presented, and are now under consideration by the Court. The principal changes, other than those relating to a more thorough investigation of moral character, require after a period, one year, and later two years, of college pre-legal education, and registration with and periodic reports to, the Board of those intending to study law with an attorney.

The Board held two more meetings than were reported at the last meetings, and has been extremely active. Now that the routine of disciplinary proceedings and admissions has been pretty well established, it is hoped to extend activities of the Board and the Bar into other fields of usefulness, some of which have been discussed by the President in his annual address at this meeting. The interest, support and enthusiasm of the Bar, in the organization has increased remarkably. At Boise a monthly Bar luncheon club has been established, and the Board urges local organizations and meetings of members of the Bar for social intercourse, the discussion of local problems, and the crystalization of opinion upon matters of general interest to the profession and in the administration of justice.

The constitutionality of the Bar Organization Act is again before the Supreme Court in the matter of C. H. Edwards, a disciplinary proceeding.

The condition of the appropriation and the expenditures since the report at the Pocatello meeting are:

Balance on hand in appropriation July 10, 1926	$6,114.95
Balance on hand in appropriation Aug. 13, 1927	6,286.68
Expenditure, July 10, 1926, to July 29, 1927; Secretary's salary (13 months)	830.00
Office expense; stamps, telephone, telegraph, etc	183.84
Stenographer	102.81
Annual Bar meeting, Pocatello, 1926	311.04
Stationery and Printing	151.90
Examinations	70.96
Travel expense	766.44
Disciplinary proceedings	1,353.58
In re: Edwards	$956.53
Zurcher	174.35
Dampier	86.80
Downs	90.10
Henry	45.80
Total	$3,770.57

Membership on August 11th, 1927, being those whose 1927 license fees were paid and who were entitled to practice law in Idaho on that date, and judges of the Supreme and District Courts, and of the U. S. District Court:

Northern division	130
Western division	252
Eastern Division	128
Out of state	17
Total	526

Delinquencies on August 11, 1927, for 1926, and prior years are:

1923-26 inclusive, Eastern Division	1
Total	1

Disciplinary proceedings against the above delinquent are pending, For 1927:

Northern Division	19
Western Division	35
Eastern Division	33
Out of state	2
Total	90

Respectfully submitted,

SAM S. GRIFFIN,
Secretary

PRESIDENT MERRILL: Gentlemen, have you any suggestions or questions with respect to the secretary's report? If I hear none, I will order the same filed.

Probably there is not a lawyer in Idaho who is not acquainted personally with the next speaker. Perhaps all of us have our recollection, or a great many of us, at any rate, of the first time we appeared before the Supreme Court, and seeing the very kindly face

of Justice Sullivan. It is with a great deal of pleasure this morning that I introduce to you the Hon. I. N. Sullivan, who will address us upon the subject of "The Bench and Bar of Idaho That I Have Known." (Applause.)

MR. PRESIDENT AND MEMBERS OF THE IDAHO STATE BAR ASSOCIATION:

At the request of your Committee on Program I have the pleasure of presenting to you a brief address on "The Bench and Bar of Idaho As I Have Known Them," which, I hope, may be of some interest to you.

The Territory of Idaho was organized by an Act of Congress approved March 3, 1963, out of a portion of Washington, Utah, Nebraska and Dakota Territory. By the ninth section of the Organic Act the judicial power of the Territory was vested in a Supreme Court, District Courts, Probate Courts, and Justices' Courts. It was provided that the Supreme Court should consist of a Chief Justice and two Associate Justices, who were required to hold a term of the Supreme Court at the seat of government of the Territory annually. The Territory was divided into three judicial districts and a District Court was required to be held in the several organized counties of each district by one of the Justices of the Supreme Court, and the Justices were required to reside in their respective districts.

On the 10th day of March, 1863, seven days after the organization of the territory, President Lincoln appointed the members of the Territorial Supreme Court. They were Hon. Sidney Edgerton, Chief Justice; Hon. Aleck C. Smith, and Hon. Samuel C. Parks, Associate Justices. The first session of the Supreme Court was to have convened at Lewiston on the 1st day of August, 1864, but on account of the absence of the members of the Court, it was adjourned from day to day by the Sheriff until the 8th day of August, 1864, when Hon. Aleck C. Smith being present, the term was adjourned until the 4th day of December, 1864. The first record entry of the Court is found in the Supreme Court Record No. 1, at page 1.

On December 4th the record recites that the Supreme Court of the Territory convened at Lewiston on that day; present: Hon. A. C. Smith, Associate Justice, and there not being a quorum present, the Court was adjourned "until the next regular session unless sooner convened by law." So far as appears from the record the only act performed by Justice Samuel C. Parks, as a member of said Court, was his concurrence in the appointment of Major A. L. Downer, as Clerk of the Court. His successor, the Hon. Milton Kelley, was appointed April 17, 1865. Chief Justice Edgerton did not perform any official act so far as the records shows, and his successor, Hon Silas Woodson, was appointed July 28, 1864. He also failed to qualify and enter on the duties of that office, and the Hon. John R. McBride was, on February 14, 1865, appointed to succeed him. No term of the Territorial Supreme Court was held during the year 1865. An attempt

was made to hold a term in January, 1866, but the Hon. Milton Kelley being the only member present, adjourned to May 14, 1866. On that day Court opened, but only one of the Justices being present it was adjourned day to day until May 30, 1866. On that day Chief Justice McBride was present, but no Court business was done. On the 31st day of May all the Justices were present and the first business done was to admit H. L. Preston, Esq., as an attorney and counselor of the Court. Mr. Preston was the first person admitted to practice law in Idaho, and E. J. Curtis was second. During that term the following named twenty-eight attorneys were admitted to practice law in this Territory by the Supreme Court:

George Ainslie, Theodore Burmester, E. J. Curtis, Joseph Combs, N. T. Caton, W. Davenport II., William D. Douthitt, R. E. Foot, W. A. George, Frank Ganahl, A. Heed, George C. Hough, A. Huggan, William Law, Jr., John Landesman, Charles H. Larabee, Joseph Miller, N. W. O. Margery, E. W. McGraw, Franklin Miller, Samuel A. Merritt, H. L. Preston, H. E. Prickett, J. B. Rosborough, James S. Reynolds, I. N. Smith, J. K. Shafer, and C. B. Waite.

The first case submitted to the Supreme Court, as shown by the record, was that of Hill Beachy vs. B. F. Lamkin, Territorial Treasurer. This case was dismissed by the Court on consent of counsel.

The next session of the Court convened on January 7, 1867, Hon. John R. McBride, Chief Justice, and the Associate Justice, Milton Kelley, were present, and the following named six attorneys were admitted to practice law: W. S. Anderson, F. E. Ensign, George I. Gilbert, Henry Martin, Edward Nugent, S. P. Scaniker.

A term was held in August, 1867, when the three following named attorneys were admitted to practice law: R. Z. Johnson, J. A. McQuade and J. C. N. Moreland.

It thus appears that there were thirty-seven attorneys admitted to practice law in this Territory up to and including 1867. During territorial days, from March 3, 1863, to July 3, 1890, when Idaho was admitted as a state, the following named eleven Chief Justices had been appointed:

Hon. Sidney Edgerton, Hon. Silas Woodson, Hon. John R. McBride, Hon. Thomas J. Bowers, Hon. David Noggle, Hon. Madison E. Hollister, Hon. William G. Thompson, Hon. John T. Morgan, Hon. James B. Hayes, Hon. H. W. Weir, and Hon. James H. Beatty, and the following named fifteen Associate Justices had been appointed: Hon. Aleck C. Smith, Hon. Samuel C. Parks, Hon. Milton Kelly, Hon. John Cummins, Hon. Richard T. Miller, Hon. John R. Lewis, Hon. William C. Whitson, Hon. Madison E. Hollister, Hon. John Clark, Hon. Henry E. Prickett, Hon. Norman Buck, Hon. Case Broderick, Hon. C. H. Berry, Hon. John Lee Logan, and Hon. Willis Sweet.

The last term of the Territorial Supreme Court was held in January, February and March, 1890, and adjourned on the 5th of March, of that year. The Judges comprising the Territorial Supreme Court

at that time were Chief Justice James H. Beatty, Willis Sweet and C. H. Berry, Associate Justices. The Territorial Supreme Court rendered about 268 decisions during a period of twenty-seven years—an average of about ten cases a year, all of which appear in the 1st and 2nd Idaho Reports. I was quiet well acquainted with Chief Justices McBride, Morgan, Hays, Wier and Beatty, and a number of the Associate Justices. They were all good lawyers and splendid men, and their decisions which appear in the 1st and 2nd Idaho Reports will compare favorably with the decisions and opinions of the Supreme Court of any state in the Union. As before stated, Idaho was admitted into the Union of States on the 3rd day of July, 1890, and the first state election was held on the first day of October of that year. Under the provisions of Sec. 13 of Art. 21 of our State Constitution, all state officers elected at the first election were required to take the oath of office within thirty days after they had been declared elected by the State Canvassing Board. That Board finished its labors and issued Certificates of Election to the persons found by them to be elected to the several state offices. On the 3rd of November, 1890, the state officers so elected appeared at the State House and took the oath of office.

The first Governor elected was our beloved and lamented Senator Shoup. Judges John T. Morgan, Joseph Houston, and myself, were elected Justices of the Supreme Court. Under the provisions of Sec. 6, Art. 5, of our State Constitution, the terms of the Justices were fixed at six years, except the terms of the first three elected. There was a six year and two months term, a four year and two months term, and a two year and two months term for those Justices, and under said provisions of the Constitution the first elected were required to determine by lot their respective terms. The Justices elected assembled at Boise City on November 3, 1890, and it was agreed that Governor Shoup should prepare three ballots on one of which should be written six year, on one four year, and on one two year. He was then to put them in a hat, shake them up, and each Justice to draw one. The question then arose as to which Justice should draw first, and it was finally agreed that we should draw in order of our ages, the oldest one first. Judge Morgan being the eldest, put his hand in the hat and drew out the six year ballot. Judge Houston, next eldest, drew out the four-year ballot, and when I came to draw I did not have much choice. I thus become the short time Justice and by reason of that fact the first Chief Justice of our State Supreme Court. The last two years of his term, each Associate Justice elected for six years became the Chief Justice, thus making each Associate Justice the Chief Justice for the last two years of his term. Having served for the short term of two years and two months, I was re-elected four times for four full terms, and was a member of the Court from the 3rd of November, 1890, to the 1st Monday in January, 1917. Judge Houston, who drew the four year term, was re-elected

and served ten years and two months. Judge Morgan, who drew the six-year term, was succeeded by Judge Quarles.

Under the provisions of our Constitution, the Supreme Court was required to hold two sessions annually at Boise and two annually at Lewiston. The first session of the State Supreme Court convened in Boise on February 9, 1891, and adjourned on March 17th of that year. Twenty-three cases were submitted for decision during that term. While I was a member of that Court during twenty-six years, fifty-two sessions were held at Lewiston, and fifty-two regular sessions and a number of special sessions were held at Boise. The decisions of that Court, during that time, are found in the Idaho Reports from the 2nd to and including the 30th Report.

Since statehood, there have been fourteen Justices elected and three appointed, and the Court has been increased from three to five members. Judges John T. Morgan, Houston, Quarles and Stewart have died. The method of procedure in the Supreme Court, in deciding cases, is apparently not fully understood, and its decisions are sometimes referred to as one-judge opinions, meaning thereby that one Judge decides the case. This is not true. After the case has been appealed from the District Court, the Court hears oral argument, unless the case is submitted on briefs by counsel. The Judges carefully examine the briefs and hold a consultation, and when they arrive at a conclusion, if you gentlemen could hear the discussion on the points involved on the appeal and at times the great amount of noise they make, you would certainly not accuse the Court of rendering one-man opinions. I simply make these observations to indicate to the Bar Association the method of procedure in deciding cases in our Supreme Court.

I recall one of many amusing incidents that occurred. Quite a heated discussion occurred over an opinion in a certain case. One of the Justices was quite exercised because the other Justices could not agree with him. At the close of the discussion the dissenter arose and said: "Well, gentlemen, I shall write a dissenting opinion in this case that won't be sneezed at by the lawyers of this state," and one of the others replied, "Just go to ——— and write your dissent." Not long after, another discussion took place in which the dissenter arose and said: "Gentlemen, I see I can't get you gentlemen to take a correct view of this case and I shall write a dissenting opinion that the Bar of this state won't sneeze at." The dissenter in the former case replied, "You remember when you told me to go to——— when I told you I was going to write a dissenting opinion? You can go to the same place if you wish to."

The method and manner of presenting oral arguments to the Court is no doubt of considerable interest to the younger members of the bar, and at this time I would only suggest that a clear, forceful statement of each proposition relied upon is appreciated by the Court. In arguing a case to the Supreme Court, it is not necessary for coun-

sel to repeat a proposition as often as it might be deemed necessary to repeat it to a jury, and I would suggest, if it is thought necessary to repeat, there being but five Judges on the Bench, that it isn't absolutely necessary to repeat an oral argument more than five times —once for each Judge. Nor is it necessary, when stating principles of elementary law, to support them by reading from text books, for it is presumed that Judges of the Supreme Court understand some elementary law principles, however violent that presumption may be.

Referring to repetitions in arguments calls to mind an incident that occurred in the Supreme Court during the time that Mr. Sol Hasbrouck was Clerk of the Court.

Mr. Hasbrouck had lived in the Territory of Idaho and practised law for many years, had been Clerk of a Territorial District Court for a number of years, and on the 9th day of February, 1891, was appointed Clerk of the Supreme Court of the State. He served in that capacity for about sixteen years, until his death in September, 1906. Clerk Hasbrouck was a man of sterling qualities, an ideal man for that position, and one who could be relied upon under all conditions and circumstances. He had the happy faculty of seeing the amusing side of life and was possessed of a great amount of quaint humor. One day during the trial of an important case, one of the most eloquent attorneys at the bar was orally arguing it to the Supreme Court. The Court had extended his time on account of the importance of the case, and he was making a very exhaustive and eloquent argument. Mr. Hasbrouck was very much interested and left the Clerk's desk and went and laid down on a couch immediately in front of and so nearly under the Judge's desk as to be entirely out of their sight. After some time had elapsed and when the attorney was at the very height of his rhetorical flights, the entire court room was startled by an unmistakable snore proceeding from the couch occupied by the Clerk. It was so loud and sonorous that the attorney paused in the middle of a well-rounded period—but only for a moment—and then with studied gravity remarked: "I hope that my argument has not had the same effect on the Court that it has had on our Clerk," and then proceeded with his discussion. My associates retained their usual judicial gravity, but it was too much for me. The Clerk, in the meantime, awoke and stole quietly out of the room. At the close of the session, the attorney took the Clerk to task for his disrespectful treatment of him and his eloquent argument. The Clerk, never at a loss for a reply, explained about in this fashion: "I'll tell you, Jim, just how it was. I was very much interested in your argument, but you repeated so many times I got tired. Now, I listened carefully until you repeated ten times, but when you started in to repeat the eleventh time, it put me to sleep."

Miss Ola Johnesse was appointed Clerk of the Supreme Court September 10, 1906, to fill the vacancy caused by the death of Mr. Hasbrouck. She served as Clerk of the Court until April 15, 1907, when Irvin W. Hart was appointed Clerk and ex-officio Court Reporter. Mr. Hart prepared the Idaho Reports from the 11th to and including the 42nd Idaho Report. He was a very competent Clerk and good lawyer, and served in that capacity until his death on May 15, 1927. Since his death, Mrs. Edith J. Hearne was appointed Clerk of the Supreme Court.

The Supreme Court has original jurisdiction in a certain class of cases, and appellate jurisdiction in others. From the admission of Idaho as a state, there have been filed in that Court up to the present time a total of 5150 cases, an average per annum for thirty-seven years of about 140 cases. There are now pending in the Supreme Court about 300 cases undecided.

Some of my associates were so imbued with a keen sense of humor and an appreciation of the ridiculous that it has cropped out in some of their opinions. In the case of Hillman vs. Harwick, 3 Ida. 255, referring to a decision of the District Court in an irrigation case, Judge Huston said: "Heroically setting aside the statute, the decision, and the evidence in the case, he assumes the role of Jupiter Pluvius, and distributes the waters of Gooseberry Creek with a beneficent recklessness which makes the most successful efforts of all the rain wizards shrink into insignificance, and which would make the heart of the ranchers on Gooseberry dance with joy if only the judicial decree could be supplemented with a little more moisture." In Kinney on Irrigation, Sec. 242, is a reference to this case, and more than a page is quoted from it.

Rankin vs. Jauman involved the compensation and mileage of a County Commissioner who lived within one-half mile of the Court House and in one session of the Board he put in a claim for 380 miles' travel at 40 cents a mile for 82 days service. In the opinion it is recited that the Board was only in session 14 days. The Commissioner was a very fleshy man and was troubled with rheumatism in the feet. Referring to the mileage, the Judge said: "Certainly, this shows an exhibition of virile activity, which, while doubtless a subject of admiring wonder when displayed by a 'sprinter,' is devoid of much of its attractiveness when viewed or considered from the standpoint of a poor and overburdened taxpayer."

Judge Stockslager got a little amusing in the case of Latah County vs. Husfurther, 12 Idaho, 797, which involved the fencing up of a private road. The Judge had just recently been defeated as candidate for Governor of the State, and said: "The writer has had a recent experience that convinced him that it would have been better if there had been whole communities in certain portions of our State fenced in; at any rate, it was made plain that the residents of that section were not prohibited from exercising one of the privileges urged as a reason for petitioner's road—that is, the right to attend elections."

In several opinions of Judge Ailshie a little wit and humor crops out. In the case known as the "Whiskers case," which involved the question of whether barber work performed for jurors was a county charge, he said, among other things, "There is nothing peculiar or special about jury service that will cause whiskers and hair to grow."

In the case of State vs. Churchill, 15 Ida. 645, the defendant had been convicted of shooting certain dogs that were used by their owner for catching coyotes and had evidently come into his lots and pasture and frightened the hogs, chickens and cows, causing the hogs to break through the fence and the cattle to be greatly frightened, resulting in injury to the animals and a considerable pecuniary loss to the owner. The contention was made that the dogs were not of breed or kind that would chase stock under any conditions, and for that reason the defendant was not justified in shooting them, or the cattle, chickens and hogs in being frightened by them. The Judge states: "These experts on dog lore testified that such hounds as these would neither chase nor harm domestic animals, and that they would pay no attention to them. They also testified to a personal acquaintance with and observation of these hounds, and that they would not and could not be induced to chase or disturb cattle or hogs * * * The question that confronted defendant was not what the dogs really meant to do, but what they were doing or apparently intended to do. * * The law does not require the farmer who engages in raising live stock to first familiarize himself with the traits and habits of all the breeds of dogs that may infest the country. He may not know the difference between a tramp dog or common cur and a blooded English fox hound with a pedigree antedating the landing the Mayflower. He may not know, in fact, that the fox hound, when he gallops and cakewalks up and down the barn lot, to the great confusion and consternation of the cattle, hogs and fowls, is merely following the trail of a hungry coyote that had been pilfering the night before, bent on murder and theft; but, on the contrary, he may honestly assume that hound, himself a trespasser, is bent on mischief, and, if he does not retreat when warned, may at once become liable to forcible ejection. In such case, the farmer cannot risk the dangers to his live stock while he *investigates* the *dog's pedigree.* And, even if he were advised of that, how can he know at what moment the vicious traits of the dog's remote wolf and jackal ancestors may get the better of his breeding and social training and run riot in that same barnyard? * * * However liable a man may be in damages for injury to or destruction of trespassing dogs, it will not do to say that he can be brought to the bar of criminal courts every time he protects his property against the depredations and annoyances of dogs, whether they be patrician or plebeian dogs."

I was quite well acquainted with many of the attorneys and Judges above named, a number of them resided at Hailey for a time and practised law there. Judge Sutherland, the author of Sutherland on Damages, resided at Salt Lake and tried a number of mining cases before the District Court in Hailey. Chief Justice McBride had quite a large practice there. F. E. Ensign, Judge Roseburough, R. Z. Johnson, Judge Houston, Judge Beatty, Frank Ganahl, Gov. James H. Hawley, N. M. Ruick, S. B. Kingsbury, Texas Angel, Vic. Bierbower, A. F. Montandon, Gen. Geo. H. Roberts, Gen. Geo. M. Parsons, Bruner Brothers, Judge Price, Gen. Arthur Brown, and others were among the leading practitioners of the Bar in old Alturas County at Hailey. During the palmy days of old Alturas County, we had at Hailey about 40 lawyers and some of them the leading lawyers of the northwest.

A rather amusing incident occurred during the trial of a mining case from Rocky Bar. Judge Houston was attorney for plaintiff and Judge Sutherland for the defendants. It appears that Judge Sutherland's clients were shrewd mining manipulators and had no property or financial backing. They had an option on a certain mine and mill and were to pay one-half the proceeds to the owner of the mine. They had worked the mine for some months and taken out and had realized about $100,000.00, but had refused to pay the owner in accordance with their contract. Judge Sutherland, who was a very mild talker, in his argument to the Court suggested that Judge Houston's clients were trying to swindle his clients and take from them everything they had, and in his quiet way said: "They seek to take from my clients their ox and their ass and everything that they have." Judge Houston, in reply, said: "Judge Sutherland suggests to your Honor that my clients are seeking to rob his clients of everything they have, even their ox and ass, but you will see from the evidence in this case that his clients never had any ox or ass or anything with which to cover their ox and ass until they stole it from my client." This, of course, created laughter. Judge Brodrick, who very seldom smiled, broke into a hearty laugh.

Judge Houston was a Major in the Civil War and came to Idaho Territory from Michigan in 1869 as United States District Attorney for the Idaho District. He was fond of relating many of his experiences here during his practice. He said that he had a German client who owned a jackass that was involved in a law suit in which Judge Houston was the German's attorney. He won the German's case. One day the German came into his office and seemed very much pleased with winning his case and said to the Judge: "Major Houston, I'se goin' down the walley among my neighbors and tell dem all that you is the best jackass lawyer in dis derritory."

When Idaho was admitted as a State it consisted of three Judicial Districts, and since Statehood eight additional Districts have been created. The 3d, 5th, 7th, 8th and 11th Districts have two judges each. Many of the District Judges are crowded with business and are splendid judges and lawyers. I undertake to say that the bench

and bar of this State will compare very favorably with the bench and bar of any state in the Union.

Gentlemen, I thank you. (Applause.)

PRESIDENT MERRILL: Ladies and gentlemen, at this point we will be favored with vocal music by the Boise Male Quartette: "Flag Without a Stain."

(Vocal music by Boise Male Quartette.)

PRESIDENT MERRILL: Every attorney who cross-examines a witness would like to know whether or not that witness is telling the truth. I think we are very much favored today in having the opportunity of hearing Dr. J. W. Barton, who will address us upon the subject of the "Application of Psychological and Scientific Tests to Testimony." I introduce to you Dr. Barton, of the University of Idaho.

DR. J. W. BARTON: Members of the State Bar of Idaho: I am indeed complimented this morning in being called upon to address you. I take it as a compliment to my work, as well as a compliment to myself and those associated with me, to be given the privilege of representing to you some of the things that we think we understand with respect to this matter.

I am going to attempt something this morning that I have never attempted in my life, and that is the matter of presenting what I have to say by reading it. I have given a number of addresses in my life, and never before have I attempted to read one, and I don't know how I shall be able to get on with it, but probably only the results of that endeavor will show.

Before going on I should like to say that I make reference to some legal aspects here, not with the idea that you do not understand, that you do not know, but only for purposes of making myself clear. It will be by aim and my thought, running throughout what I will present to make clear to you what we mean in these days by psychology. I am inclined to think that probably very many attorneys, even judges and justices of courts, have mighty little idea of what is included in the term psychology these days. I shall present the matter in such a way, I think, as will indicate to you definitely and well that the mind is not some entity that is apart from the grosser aspects of personality, and that all that can be meant by mind is such instrumentalities and equipments of one's physical being as can be stimulated into activity by situations that present themselves, and that mind is only the bodily processes in action. With that introduction I turn now to my theme, the "Application of Psychological and Scientific Tests to Testimony."

Aside from the specific legal enactments, precedent and common sense have been the guides in the past in making adjudications. In law practice, as in other human relations, it is being felt that the truth could better be arrived at by a more scientific approach, and that justice can be done only when the truth is known. The time is rapidly

approaching when the first rule of evidence will obtain in all legal procedure. One of the best dictionaries of jurisprudence gives this rule in the following language: "The sole object and end of evidence is, to ascertain the truth of the several disputed facts or points in issue on the one side or on the other; and no evidence ought to be admitted to any other point." Again in the fourth rule from the same source we find the following: "The best evidence must be given of which the nature of the thing is capable."

Precedent is only common sense that has been reduced to court habit, and is found either in the common law or in statutory enactment; but common sense has not proven of the highest value in other human processes. Why should we expect it to in the work of the courts? We possibly shall never get away from precedent in this very important human endeavor, but we should come more and more to provide that precedent become increasingly scientifically based. We are rapidly approaching the time when even attorneys will care more about letting the truth be known than they are in the winning of cases.

The foregoing would all be pretty well agreed to by those engaged in the practice of law; but the question always arises as to when the truth has been told. The presenting of testimony is a precarious situation, one fraught with the greatest dangers of being wide of the truth, even in the hands of the most scrupulously honest attorney. Quoting again the Law Lexicon we have, "A witness should be able to say from his heart, I am not taught nor instructed, neither do I care about the success of either party, only that justice be administered." It would seem that in the theory of legal practice there is the assumption, consciously or unconsciously understood, that if a witness were brought to the point of giving expression to what is in his "heart" (his conscience) that complete justice would be done. The "free will" idea seems to have maintained its traditional vogue in law more securely than even with the church. This is probably due to the necessity of building a legal system based upon precedent. In the law there is little chance, as compared with the science, to break sharply with what has been, and to plunge out into the world of free investigation. Only in situations of revolution do we find any such accomplishments within court practices, the very nature of the case seems to make such procedure imperative.

Modern psychology teaches that humans, like other creatures, are the products of nativity and habit; and that they always behave in terms of their inherited and acquired natures, plus what the situations of stimulation are that are present at the time. There is no element about them that can, or does, work at cross purposes or contrary to one's nature and his environment. Yes, he is determined. On no other basis than this can any claim to science be maintained for the work of psychology. On no other postulate does science proceed. To attempt any other procedure in the control of a witness at

the bar is to resort to immediate self contradiction, since control always implies determining element to be manipulated. To take any other position is to resort to fictions at the expense of facts. This means, of course, that he (the witness) is an instrumentality yielding testimony, not wholly in terms of what is presented to him—what he is stimulated by; but also in terms of his peculiar nature at the time. If the witness did have a "clear conscience" or "will", in the old sense, (the sense of being free of determining factors) what would we do with it? Would it not be folly to even make any contemplations concerning it? Common sense has long attested the "free will" factor, but again it leads us nowhere in control. The scientific approach of objectification and verification has demonstrated more completely the first rule of evidence given above. Man has not always the truth in his heart, even though his heart be the most contrite. This is an explanation of why circumstancial evidence, when all the circumstances are considered, is better than the personal testimony of witnesses even though it be preponderating.

What are the determining elements in the valuation of testimony? Let us grant that the court and the attending counsel have in mind only the administration of justice; we still have many factors peculiar to the witness that determine how nearly the truth is attained. No court should attempt to evaluate testimony without taking full note of the age, the stability, the habits, and the acquaintance of the witness with the points at issue on the one side or on the other. Notice that these elements are all within the nature of the witness. His native and acquired natures are tied up in these elements. We are still to reckon with the environmental factors that are used to make the nature of the witness respond. The nature of the stimuli and the methods of applying them should be of a kind that will conform as nearly as possible to the scientific demands of objectification and verification of material response, and as free as possible of any bias in favor of either party.

Age is a factor that has long been conceded a place in testimony evaluation; but tradition has always defined age in chronological years lived by the one in question. Courts have, for ages, recognized that this definition is inadequate to include all cases; for the testimony of those of mental deficiency has not been given the same consideration that has been accorded the normals. The fact of the continuity of gradation in mental deficiency forces us to define age in terms of mental status, rather than in number of calendar years since birth. This gives us the idea of mental age. It is evident to all that many a so-called child of twelve years gives more dependable evidence than some that have reached their majority. Many adults have no more intelligence than children do, and some of very tender years. We now have well standardized tests for the determination of the mental age; and if age should be considered in the evaluation

of testimony then mental age should be the one taken, and this determined by objective tests of which there are many.

Another point of consideration in human response evaluation is that of mentality, intelligence, ability, or whatever else we want to name it. It is not unit. When we have determined the mental age of a witness, in any particular, we have not done so in general. Possibly there is no such "thing" as mental age in general. This latter is just another form of the abstraction fallacy. Who here has not many examples in mind of persons whose mentality, say in mathematics, is not higher than twenty and at the same time show a musical age of two years. People generally differ within themselves in this way. Should we place the same value on the testimony of a given witness in music that we do in mathematics? Testing for mental age must be made a specific matter involving not only native aptitude, but acquisition as well. In matters involving legal technique *you* men are better fitted to represent the law than you are to determine values in psychology. However difficult it would seem to get the correct evaluation of one's ability, native or acquired, we should not despair, because the evaluation must and will be made; and even though the absolute of truth can not be known by the scientific method of testing. It will be much more closely approached by this means than by the one of common sense. The use of a good form of the Binet test of intelligence will do much in the determination of the mental age of any witness. This is just another way of saying that in this we have an objective means of knowing whether we are dealing with idiots, imbeciles, morons, borderliners, normals, exceptionals, superiors, very superiors, or geniuses.

Chronological age is a real factor and should be taken into account but only in so far as it might shed light on the acquisitions and the physical maturity of the subject. And here again a good standard test of acquisition, of which there are hundreds, would render very much more dependable data than could ever be had by simply applying the common sense method of snap judgment in determining what one knows in a specific matter, on the basis of how many calendar years he has lived.

Feeble-mindedness is not the only form of mental deficiency with which the court must deal. We have also the disease of dementia. Again we find no sharp cleavage between these and the normals. Normality can mean no more than the status of those making up the middle group of a complete distribution. We are all somewhat crazy, but some more than others. If this were the whole story it would not be so disconcerting; but when it is remembered that "mind" is not unit, it is not difficult to appreciate that within the same person is found both sanity and insanity of varying degrees. The pessimist evidences only the symptoms of melancholia, and are manifestations of differences in degree on the same defect. Such is the relationship for the difference between the introverted person in

showing sharp conscience pangs and the self-confessed multi-murderer who has found peace with his God. It is an arbitrary matter just where the line should be drawn dividing irresponsibility from responsibility Psychiatric tests, involving the functioning of the reflexes as well as the fidelity with which an impulse will be transmitted from sensory ends to the adequate sets of muscles, should be used for determining the degree and nature of the irresponsibility shown. This is largely a matter of measuring the extent to which the responses of the one in question fall short of predictability. A specialist in nervous and mental diseases should apply the tests in cases involving the sanity of any case, and it should be insisted by the court that such tests be objectively used and evaluated. The testimony of au alienist on any other basis should not be introduced.

One's habits, or acquisitions, can be determined for any specific situation by means of already established and standardized acquisitional tests. Where no such tests are available, it is not difficult for one adequately trained to make them for the specific situation involved. Many industrial concerns are profitably making such tests for purposes of selection and placement of employees. What is needed is some better means of attaining what the court strives for in justice and truth; but we do not often distinguish sharply between what is objectively demonstrable as truth and what the witness represents as being so within his own subjectivity.

What are some of the matters to be checked in the determination of when a witness is representing the facts? There are two fundamental conditions that operate either singly or jointly to defeat the ends of justice from this standpoint. First, there is the condition of unintentional error; and second, there is the one of intended misrepresentation of the facts. (There is no admission of a "free will" in this, since all that is implied in the terms—intentional and unintentional—is the degree of awareness accompanying the processes.)

Unintentional errors might be due to deficiencies of perception, failures of memory, high or low suggestability or faults of attention. These functions should not be thought of as unit in any sense and neither should they be thought of as being faculties distinct from each other. Perception is impossible without attention, memory, suggestibility, etc. The human organism acts as a whole whenever it acts at all. For these reasons it is next to impossible to classify people as being poor or good in perception or any other function. Just how perception functions in any given person or in any given situation for a given person, depends upon his native placticity and impressionability and the acquisitions within a given field. However good one's intentions might be, he can never overcome his native and acquired natures. General intelligence tests and tests of memory, perception, suggestibility, attention and still more specific tests of specific matters of these various functions are obtainable. We have tests of attention scope, attention fluctuation, persistence, and attention direction. Results from such tests indicate tremendously for values in perception, memory, suggestion, and observation.

The error which we experience with any or all senses must be great since the omissions in reporting a scene presented ranged in one experiment from 20 to 50 per cent. In another situation involving both heard and seen factors the range was from 26 to 80 per cent. The presence of emotion always increases the error. Emotion and natural limitations are not the only factors making for error of report, for it is a fact that we do not perceive with our senses, but with the experiences of a life time. In other words, we see, hear, smell, etc., what we want to. This is not peculiar to any particular person or class of persons, but to us all. The Indian of the western United States can not track out the game better because he has better eyes than the white man, but because he has more tracking experience in stalking his prey. The same principle applies in the matter of expert testimony or testimony of any sort.

Not only the hereditary and acquired factors of one's nature should be determined and evaluated by the court in assigning values to witness responses; but the factors of readiness should also be evaluated. We respond most sanely and reliably in line with the readiness at the time. For this reason all courts should carefully guard the witness against the unscrupulous attorney who attempts, by spasmodic and discontinuous questioning, to induce activity in the witness that is conditioned on stimulus situations that under more normal circumstances would never operate. Who does not know that the sprinter on the mark can be released into running movements by any sudden sound even though he knows beforehand that he will suffer serious penalty if he goes without the firing of the gun? I am not sure but that more testimony is not vitiated in this way than by the "leading question". But the readiness factors can be determined and should be known by all examining a witness.

Such error as comes from the nature of the witness might be classed as those of illusion. There are errors of time, place, number, size, identity and probably hundreds of other forms. Take the case of the automobile accident reported by Munsterberg in which one witness reported the road as dry and dusty, and another one swore that it had rained and the road was muddy. "The one said the machine was running very slowly; the other, that he had never seen an automobile rushing more rapidly. The first swore that there were only two or three people on the village road; the other, that a large number of men, women and children were passing by." It is difficult to believe that both witnesses were highly respectable gentlemen, neither of which had the slightest interest in changing the facts as he remembered them. Numerous similar cases of conflicting testimony have come to your notice. What is the explanation? In many cases it can not be disposed of on the basis of deception, or of mental disease. Usually such cases are due to illusions of memory, im-

proper perception, or high suggestibility. The bases of all the factors are found in the native and acquired tendencies of the witness being examined. These can be determined in many instances beforehand in such a way as to make toward a better detection of probable error due to illusion for a given individual. Why should any given witness get the same consideration of value for his testimony that is assigned to others? In reality this is never done except in theory, but the disappointment comes in the fact that the standard used in assigning value differences is that of subjective opinion arrived at by common sense methods. Scientific procedure would prove much more in keeping with the ideals of the court.

Aside from disease and deception, error in testimony is due either to illusion, hallucination, or personality limitations for response. Illusons and hallucinations are accounted for on the ground of the native and acquired equipment—the readiness for response or the want of the individual—at the time. These factors are determinable in a great measure by scientifically controlled means so that the percentage of error in report due to these means can be pretty well known beforehand. Illusionary errors account for much of the inadequate testimony of the feebleminded and of those suffering from functional and pathological maladies of a mental kind. The mind is being thot of as the active or functional aspects of physical integrations representing the inherited and acquired tendencies defining personality.

It is not difficult to see from this that the truth is not always forthcoming from those of "contrite heart" and without conscious bias. One might with complete candor represent his all, and still fall far short of the truth, not only by omission but by an honest bias of which he is wholly unaware. This bias can best be determined by the method of science and not by the personal element of subjective judgment of the court or its jury. Honesty of statement is not synonomous with truthfulness and fact. We perceive things, not as they are in themselves, but as we are, and the promising aspect of the whole situation is that science is providing a way of knowing what we are in the many limitations peculiar to our natures and over which no individual has any self-control outside of this nature. Each one must be assigned his value beforehand, and while such evaluation can never be made absolute, even by the best of methods, it will far exceed the personal equation method so frequently used. This makes it very apparent why a court should go very slowly in making an adjudication on the basis of the testimony of a single witness, however honest and why a preponderancy is better. Many witnesses make it possible to extend biases to the point of including nearly all of the facts as well as many of the fictions.

The honest witness is as much to be scrutinized as a dishonest one, if it is found that his biases, or purposes, are strong and of a kind affecting the case. Those of strong purpose, even the most intelligent, are often less to be believed than the ones of lower mentality and less

of maturity. Children and feeble-minded usually tell the truth as they know it, because their purposes are not as insistent. They are more suggestible, meaning that they can be turned aside from their purposes more easily. The testimony of those of low mental age is usually not assigned as high value; but not because of dishonesty or bias, but rather because of suggestibility due to lack of the integrations defined as purposes. The mental age of any witness can be known by objective means, as shown above, and should be.

In these cases we are dealing with errors of testimony of which the witness is unaware. These errors are even more dangerous than those consciously resorted to because we all tend to be less on our guard with these; because we unconsciously subscribe to the view that "conscience" in a witness provides the truth *ipso facto*.... There are no scientific justifications for such faith.

But what of the witness who knows the truth and consciously sets about to misrepresent it? Is there no way to find him out? The oath of honesty of testimony and the constant threat of punishment for perjury do not accomplish all that one might hope for in arriving at the truth. It is altogether too well known how difficult it is to separate the wilful lie from the errors of perception, attention, memory, suggestion or mental disease. Perjury is difficult of proof, and peace of conscience in God seems not to be awakened, in many, by the taking of the oath of truthfulness. What does the psychologist have to offer in ferreting out what the witness feels to be a false representation?

Some studies and more theorizings, since the work of Lambroso, have indicated that the criminal is the product of nativity. We have all swallowed not only the finding of Duddale in his study of the Jukeses; but we have also shared in the theories derived from them. The most important of these principles was that crime does not only run in families; but as Goddard has shown, intelligence, upon which criminality depends, is inherited according to the Mendelian principle. The general conclusion has been that we have such monstrosities, by nativity, as the "criminal imbecile". If this could have been scientifically established all that would have been necessary would have been to assign to the biological eugenist the task of determining the ancestory of a given witness, and since there are germinal determiners for each trait of criminality in the parent stock we could have known directly not only who all the liars are, but in what specific processes they will lie. This would have provided a complete test of the validity of testimony as well as the guilt or innocence of the accused. I am most sure it would have rendered the present criminal court superfluous.

The best modern scientifically controlled experimentation on infants and children show that there are very few tendencies to respond that are native, and criminality is not among them. The criminal is a product of training and since one can be trained in any direction,

within the limits of his nature, it will be easily seen that lying on the witness stand is very remotely related to murder, sadism, arson or other crimes. I feel almost certain that anyone present knows that he is not wholly a falsifier in all situations, and that in most situations of life he tells the truth as far as he knows. If even lying is not unit, what is to be said about criminality? Some individuals yield more in the direction of crime than others do, and possibly because of greater suggestibility (lack of purpose) or of unfavorable environmental influences. J. B. Watson says, that if you will give him one hundred bits of protoplasm as normal babies, he will make anything out of them within the possibilities of their structure. This might mean that even what we call intelligence is not wholly a matter of nativity. It is rather plain from all this that testimony evaluation can not be safely based on heredity, even though criminality does run somewhat in families.

One day as I sat in my laboratory I overhead one of the advanced students in psychology examining a subject with a free association test. Every little while the subject would block, only to be given a new key word. On each occasion of being presented with a new key he would block, but always on reactions that seemed related. I asked what was producing the result of his not being able to go on after certain words, without the lapse of considerable time. This he seemed unable to explain. One of the words that produced such reactions was *ear*, another was *wheelbarrow*, and still another was *line*. I took the subject in hand and by a little abstraction (partial hypnosis) he was made to connect up in such a way as to remember that in his youth, while running with a wheelbarrow he came in contact with a clothesline in such a way as to cut a large gash in his ear. In this highly emotional situation there was a tendency to suppress, due to the fact that on the occasion of his running with the wheelbarrow he was making way with fruit that he had stolen from a peddler's wagon that was parked in his father's yard. Here we have an emotional situation that has been suppressed to the point of passing out of consciousness, yet influencing his behavior without awareness.

The situation of a witness exhibiting error in testimony due to deception, provides the conditions of emotional suppression and will manifest itself in the free association test by either delay, shift, repeating the key words or other protective responses, compensations as in coughing, complaints of fatigue, restlessness, drumming with fingers, fainting, silly giggling, evasive laugh, feigned disinterestedness, anger, curtness, shift of eye. These and many other explicit responses are resorted to by one who is confronted by a situation of naming the first word that comes to his mind when a key word is presented for which he has had no previous protective preparation. He is up against the proposition of showing what his past associations have been or else taking time for making compensatory responses such as I have indicated.

If such a person is tested subsequently with the same key words he will be found attempting to make substitutions for what he feels are the damaging response words. To illustrate a situation involving the use of this method: A homicide is evident and it has been established that it was produced by strangulation thru the instrumentality of a wire tightly twisted about the neck. One of two or any other number perpetrated the act, but each pleads an alibi. The free association test is resorted to by first standardizing the responses for each one to words in no way connected with the situation. Long lists of such words could be previously prepared and among these should be found as many of the critical words (words connected with the act or situation of the killing) as might be thought necessary and vital in establishing familiarity with the scene. As long as there remains more than ordinary emotion connected with the situation of the killing the responses of the guilty party will be as described. The ones not knowing anything about this scene will respond to the so-called critical words as he does to the ones not connected with the incriminating situation.

These explicit responses of which the suspect is wholly aware and over which he seems to have no control, are not the only ones that can be made use of in fixing identity. Since we have discovered that emotion is only machinery of the visceral and glandular equipment in certain intergrated relations, and since it expresses itself only in the functioning of these processes, the psychologist has set about to determine objectively the extent and control of such expression. Emotions due to suppression are the conditions necessary to uncontrolled exposure. One who knowingly falsifies does so under conditions of the most adroit deception (suppression) possible. Here the vicera and glands are highly involved. To lie is to resort to a compensatory response. A substitution such as this means that natural tendencies must be held in check, i. e., they are suppressed. This produces a strong situation of organic and kinaesthetic stimulation—a situation necessary for driving the impulses out of the central nervous system over the pre-ganglionic cells into the sympathetic portion of the autonomic. This is the structure involved in visceral and glandular functionings.

This bit of knowledge of emotional life makes it possible to determine the extent of these processes in many ways. Fear and anger processes have an inhibitive effect on the secretion of glands and those of digestion. Anger and fear are at the bottom of compensatory or defense responses. To adequately test the amount of secretion in the glands of digestion is to determine something of the extent of falsification. Such determinations have been made on many occasions since the work of Pav-low on salivery and other secretion.

Tests on other internal functions can also be made since in any case of fear or anger, or in any of their combinations, adrenin is secreted more profusely and is so absorbed into the blood as to

liberate the potential sugars of the liver. These chemicals have a decided effect on the reflexes of the unstriped musculature. This makes it possible to test objectively the pupilary reflex, the blood pressure, blood composition, pulse rate, and rate and depth of breathing. The instrumentation and technique necessary to carry out tests in these situations are too technical and involved to describe here.

There are still other means of detecting the deceptive representations of one giving testimony. Among these I shall mention that of the galvanic reflexes. Under changes in extent of emotion there seems to be pretty well established the fact of corresponding changes in the electrical resistences of the body. These changes are easily registered and indicated on the dial of the galvanometer.

All of these emotional responses that are evaluated on the visceral and glandular functions are all unconscious to the examinee, and he has no way of knowing what such responses are except at the hands of the experimentor. Tests for these as well as for the more explicit ones can be run simultaneously with the association tests to great advantage in time and in correlations between them.

None of these means, nor any combination of them, can be made absolutely conclusive in the evaluation of testimony; but there must be the impression with some that present methods now in use also do not completely satisfy, either. In the light of what I have presented here for unintentional error and for the intentional ones, also, the possibility of arriving at absolute truth in testimony is pretty remote. The best that we can hope for is the nearest approach possible by the use of the best means and methods that can be made practically usable; but let me suggest again that good intentions are no warrant of truth and justice, and that the more scientifically objective we can base our evaluations of testimony, the freer the counsel, the jury, and the judges will be of error in adjudications.

PRESIDENT MERRILL: Ladies and gentlemen, the program for this afternoon, as you will observe, is a very splendid one. The address of Judge Ailshie, which was to have been given at this morning's session, will be the first number on the program this afternoon. In addition to Judge Ailshie's address, as you will observe, we are to hear an address from Judge Parker, of the Supreme Court of Washington, and an address by Hon. A. H. Oversmith, of Moscow. In addition to that, we will have some music by Mr. Clarence Ward of the Boise Bar, and the report of the resolutions committee, and some discussion.

Is there any further business at this meeting's session? If not, we will adjourn until two o'clock this afternoon.

Adjourned until 2 p. m.

2:00 P. M. SATURDAY, AUGUST 13, 1927.

PRESIDENT MERRILL: The reception committee will kindly escort to the stand the speakers.

Ladies and gentlemen, we have the very great honor at this time of hearing an address on "Limitations in Uniformity of Laws," by the Hon. James F. Ailshie, formerly Chief Justice of the Idaho Supreme Court, and a member of the National Congress of Commissioners on Uniform State Laws. Judge Ailshie is fitted and qualified in every respect to discuss this very important and intricate subject, and has been for some time a member of that Commission, and has devoted considerable time to acquainting himself with its problems. Judge Ailshie. (Applause.)

JUDGE AILSHIE: Mr. Chairman:

PRESIDENT MERRILL: Judge Ailshie.

JUDGE AILSHIE: And members of the bar, and ladies, as well: In order that I may make sure that I will please at least one member of the audience, I am going to furnish the Secretary, for the benefit of the reporter,a copy of my remarks, and relieve him of the duty of reporting them, and he can, of course, leave out the applause.

Ladies and gentlemen, at the last meeting of this association at Pocatello a year ago, I was requested to discuss the organization of the National Conference on Uniform State Laws and the workings of that conference, the method by which they arrive at their recommendations. Your committee some weeks ago, perhaps months, for that matter, ago, requested me to discuss at this meeting the question of limitations to uniformity of state laws, and by that I took it that they meant to have me say something with reference to my views as to where the limit is reached at which uniformity may be obtained in the laws of the several states. I have accordingly reduced what I have to say on this subject to manuscript, and I shall adhere very strictly to my prepared address on that subject. I have endeavored to trace briefly the demand for uniformity of law among the states and some of the problems with which lawmakers, both nationally and in the states, have been confronted, and out of which demand this National Conference has grown and its work has been developed.

Ever since the adoption of the Federal Constiution there has been a recurring conflict between two contending principles and theories of government in this country. In adoption of the Constitution the states delegated to the Federal Government the power to legislate upon a variety of subjects enumerated in Section 8 of Article I of the Constitution. To these specially enumerated powers there must be added, as said by the Supreme Court in the Legal Tender cases, "all appropriate means which are conducive or adapted to the end

to be accomplished and which, in the judgment of Congress, will most advantageously affect it." This latter doctrine has been greatly extended and expanded during the intervening years.

On the other hand, all other powers not so delegated expressly or impliedly, are reserved to the several states.

Around this grant of power to the general government on the one hand, and this reservation to the states on the other hand have been continually waged forensic battles of as vital and far-reaching effect as ever confronted any government either in peace or war.

Alexander Hamilton, in addressing the New York Convention in support of the adoption of the Federal Constitution, speaking of this balance of powers between the two governments, said:

> "This balance between the National and State governments ought to be dwelt on with peculiar attention, as it is of utmost importance. It forms a double security to the people. If one encroaches on their rights, they will find a powerful protection in the other. Indeed, they will both be prevented from overpassing their constitutional limits, by a certain rivalship, which will ever subsist between them. I am persuaded, that a firm union is as necessary to perpetuate our liberties, as it is to make us respectable; and experience will probably prove, that the National government will be as natural a guardian of our freedom, as the State Legislatures themselves."

In the exercise by Congress of the powers granted it to legislate for the whole country there has been an ever-increasing tendency to extend that power by legislating upon subjects and conduct undreamed of by Hamilton and his compatriots as falling within the power of Congress, but generally believed to have been reserved to the legislatures of the several states. Sometimes the Supreme Court has agreed with the states in this respect and held such legislation void, but all too frequently, as believed by many, the almost identical legislation has later been cloaked in a different form while the substance remained the same, and re-enacted by Congress and passed the constitutional test in the court of last resort. This apparent straining of the Constitution and enlargement of the powers granted to the Federal Government has had back of it a psychological reason often overlooked and yet of such pervading potency that it has almost amounted to an accepted habit of thought, that notwithstanding the authority of the states, the powers of the government must expand and keep pace with the advance of science and invention, which is yearly changing our manner of transacting business and carrying on the commerce of the country. The ever-increasing diversity and rapidity of transportation, the facility and ease with which we exchange intelligences, the multiplicity of mechanical inventions through means of which production has been increased and wealth swollen—have all combined to magnify the demand for legislation on a variety of subjects that may be the same throughout the country without respect to state lines. Large interests, both individual and corporate, have come to doing business in many states at the same time and they are demanding uniformity of the laws governing and regulating their business wherever they may be and since it is more difficult to deal with a number of state legislatures than with a single body, they have naturally turned to Congress to see if they could not find some way in which national legislation might expand and solve their problems.

Mr. George B. Young of Vermont, now President of the Conference on Uniform State Laws, has given utterance to this feeling among the business interests (page 183, May, 1922, Am. Bar Journal) in this language:

> "Many business organizations do business in many states. *The perplexity, uncertainty, confusion and waste resulting from variant laws in these different state hinder freedom of trade and constitute a serious burden on business between the states. Unless the states themselves remedy this defect, the Federal Government will.*"

As soon as manufacturers and wholesalers found just how far they could reach into another state with their operations, without being subjected to the local laws of such state, they at once fashioned their business and operations to meet the situation and when thought necessary secured some act or amendment from Congress extending their protection just a little further. So it has been with transportation, telephone, telegraph—about everything we do now is done across state lines except to grow farm products and eat and sleep!

Mr. James M. Beck, former Solicitor General of the United States, in his lecture before the English Bar on the Constitution, speaking of this tendency of the Federal Government says:

> "* * *, the dual system of government has been profoundly modified by the great elemental forces of our mechanical age, so that the scales, which try to hold in nice equipoise the Federal Government on the one hand, and the States on the other, have been greatly disturbed. Originally the States were the powerful political entities, and the central government a mere agent for certain specific purposes; but, in the development of the Constitution, the nation has naturally become of overshadowing importance, while the States have relatively steadily diminished in power and prestige."

While in the language of Mr. Beck "the great elemental forces of our mechanical age" have been creating a demand among the masters of trade, commerce and industry for legislation effective alike all over the country and have tremendously influenced the drift to a strong centralization of government at Washington, nevertheless, the great body of the people back on the farms, in the forests, on the ranges and in the mills, mines and factories want home rule and local self-government.

Much has been said on the subject of states rights, but of course the extreme doctrine promulgated by South Carolina to which President Jackson paid his respects, back in 1832, has long since been ex-

ploded. Nevertheless, the two contending principles—the one for a strong, central government assuming and exercising all the powers possible under the Constitution, and the other insisting that the states ought to be allowed to exercise every power that is not absolutely essential to the Federal Government—have each at all times had their radical and extreme advocates. In the meanwhile, however, the Federal power has been extending in every direction while state authority has been diminishing.

The American Bar Association was the first civic organization of national influence composed of a considerable body of representative and influential citizens, to propose a kind of equalizing influence looking to a uniformity of laws among the states and at the same time have those laws local and subject to the will and execution of the states rather than of the general government. With this as one of its objects in view, the American Bar Association at the time of its organization in 1878 incorporated a clause in its constitution providing, among other things, that "its object shall be to * * * promote the administration of justice *and uniformity of legislation and judicial decision through the nation.*" In 1889, the Association appointed a committee designated "Committee on Uniform State Laws." That Committee made investigations and in 1891 reported to the Association in favor of the creation of a National Commission or Conference on Uniform State Laws. In the meanwhile, and in 1890, the State of New York passed an act authorizing the appointment of Commissioners to investigate the subject of the creation of a National Conference composed of representatives from the several states. The matter was subsequently taken up by the states, and a Conference of Commissioners, representing nine states met at Saratoga, New York, in 1892. The admission of representatives from the various states increased from year to year until in 1912 the Conference met with Commissioners present from every state in the Union.

Since then the Conference has met annually with a good attendance of Commissioners who, as a rule, have been able representatives of both bar and bench of the country. During the thirty-five years existence of this national organization, it has drafted, approved and submitted to the states fifty acts. Some of these have become obsolete and been superseded by other acts so that there are now pending forty-two acts recommended for adoption. Of these the Uniform Negotiable Instruments Act alone has been adopted by all the states. The states have varied in their acceptance of the acts recommended ranging all the way from South Carolina, which has adopted only one—the Uniform Negotiable Instruments Act—to Wisconsin, which has adopted twenty-six acts. In its approval of this work, Idaho stands above the average of the states with a record for adoption of sixteen uniform acts, five of which were adopted by the last legislature.

The purpose of the "National Conference of Commissioners on Uniform State Laws" as set forth in its constitution is "to promote uniformity in state laws on all subjects where uniformity is deemed *desirable and practicable.*" This purpose has been often emphasized and dwelt upon by members of the Conference in opposing efforts made by various bodies and interests to induce the Conference to take up subjects of legislation thought by the Commissioners to be outside the scope of work for which the Conference was organized. It has been thought and generally contended, that the Conference should restrict its labors to investigation, discussion and drafting of acts on subjects of commercial and social interest to the country at large wherein the law itself is fairly well settled and in which uniformity is lacking but is desirable and practicable. The President of the Conference joined the Commissioners from his home state last year in a report to the Governor in which they said:

> "Briefly put, it has been the main policy of the Conference to consider only such uniform laws as would directly aid the commercial interests of the country. In this sphere of its activities, it has been most successful. This is so, because, in its preparation of Acts, the Conference has dealt with legal matters, as to which the law is pretty well settled, but where uniformity in the law is lacking in the different states. Nevertheless, it has adopted and recommended several important Acts touching the so-called social relations."—(1926 Report Commissioners to Governor of Vermont.)

It is the history of all organizations, that as soon as they come to be useful and wield power and influence somebody wants to use them for the advancement of his own personal interests. The Conference on Uniform Laws is not free from such attack, though I do not believe it has thus far been misused or led aside from the main purpose of its work; nevertheless, I have not failed to observe the presence at these conferences of representatives of the most powerful interests in the country. Having in mind the field of its usefulness and the influence it has acquired, it is well to pause long enough to consider the limitations of its power and the bounds of its usefulness and some of the agencies that court its favorable consideration. It is not infrequent, that the representatives of some class of large interests form an association of their own and have their representatives draft and propose acts in their interest, not very well thought out or understood by lawyers who have not specialized in that particular branch of the law, and the Conference is asked to consider such proposed acts and approve them. This alone should not be considered sufficient grounds for rejecting a measure or refusing to consider it, but does suggest potent reasons for most carefully scrutinizing such proposed measure and taking time and adopting means for the fullest investigation and mature consideration before giving approval to any such proposals or their adoption by any state legislature.

Some of these organizations have submitted and recommended proposed acts independently of the National Conference and in a few instances such measures have been recommended by chief executives to their respective legislatures. This illustrates how easy it is, sometimes, for organizations to get ill-considered legislation adopted.

This phase of the matter was given editorial consideration in the March, 1927, issue of Law Notes, wherein it was said:

> "Obviously, no uniformity of legislation will result from the efforts of two organizations each urging a different 'uniform act.' In the Conference of Commissioners we have an organization for uniform legislation which has functioned for over thirty years, and has procured the enactment of much legislation. It leaves no field for an independent organization working to the same end. It should be generally recognized as the established agency through which all projected uniform legislation should pass, and organizations desiring uniform laws should confine their energies to securing their adoption by the Conference and, this adoption being secured, to seconding the efforts of the Commissioners to obtain the adoption by the various state legislatures. Incidentally, the Conference, which represents every state and submits its proposed measures to the American Bar Association for approval before recommending them for enactment, *is a well nigh indispensable check on the extremist tendencies of an organization devoting its energies to a single subject. The zeal of such an organization may be of great value in securing the enactment of a law, but a wider viewpoint should govern its formulation.*"

It is not the purpose or province of the Conference to propose new laws or reforms, but rather to promote uniformity of laws on subjects already considered by the public and legislated upon by the various states. The mere mention of some of the well-settled subjects regulating the commercial transactions and social relations of the people generally, at once suggests the desirability for their uniformity throughout the states, while some other subjects do not immediately suggest such necessity.

It seems reasonable at once to propose a uniformity of laws throughout the country governing the issuance and circulation of negotiable instruments and it appears equally reasonable to suggest a uniformity of motor vehicle traffic and the law of the road. The reasons for such uniformity are at once apparent. On the other hand, it is not so easy to see any urgent reason for uniformity of laws such as the regulation of public utilities operating in the several states or for the foreclosure of mortgages on real property. Nevertheless, both of these latter propositions are being urged with great vehemence before the Conference. The manner of execution and procedure for foreclosure of a real estate mortgage in Maine or California is of no particular concern to the citizens of Idaho or Florida, though we may admit that it might be of some interest to a few law firms who represent loan and investment companies in the large financial centers like New York, Boston, Philadelphia and Chicago. A somewhat similar observation might be made with reference to a uniform utilities act and the perpetual franchise provision sought to be incorporated therein. It is thought by some that a note of warning to the Conference itself may well be sounded upon the dangers of impairing its usefulness whenever it attempts to enter the field of reform legislation or the domain of public policy which the people of a state fashion for themselves. There are many subjects of legislation that are, to a large extent, local and upon which different states desire different laws. This necessity, or perhaps, to speak more precisely, this demand, is the outgrowth of a variety of causes peculiar to a locality or state such as climate, production and industry, habits and customs of the people, their political affiliations and religious attachments; from all of which has developed a so-called public policy of the state. Good morals and the public welfare are subjects on which there is much contrariety of opinion both among individuals and communities and even among courts and between courts and legislatures. We will do well not to urge upon diverse state sovereignties our proposed uniform laws dealing with these subjects.

I am moved to make these observations on account of the rapidity at which the Conference is recommending acts in recent years (seven in 1926) and the new fields of legislation to which it is being invited. Power and influence carry with them corresponding responsibilities. We must measure up to these responsibilities. We must not lose sight of the fact that under our form of government the enactment of laws cannot safely precede public opinion and the demand of the people for such laws. Discussion and earnest consideration should come first—legislation will follow. You cannot make uniform that which has not yet been formed. It may be doubted if we make progress where we are merely changing long and well-established customs and procedure that accomplish only the same ends already attained.

In our urge to do things, we must not forget the character and temper of our cosmopolitan citizenship. Let us make haste slowly. We have here the mixing of blood and crossing of purposes of every school of thought, every shade of politics and every mooted theory of government yet conceived by the discontented and restless representatives of every branch and cult of the Caucasian race gathered from the four quarters of the earth all combined in our common American citizenry. We must test and prove these theories in this vast American melting pot. It may well be doubted if a single sovereignty could ever have successfully handled such a heterogeneous population or served as sole lawmaker for such a people. The States, on the other hand, could meet these problems as local issues, they could take the risk and do some experimenting; while one state was testing out one plan, another might be trying out a very different one—or better still—they might debate them in their campaigns and

in their legislative halls and frequently end them there. The passage of the years laden with their history of state and national issues, partisan campaigns, legislation and judicial constructions furnishes conclusive evidence of the wisdom and far-seeing statesmanship of those fathers of the Constitution who stood firm and persistent for reserving to the states their complete sovereignty and autonomy as members of the Federal Union. As we now look in retrospect, it seems that it would have been utterly impossible, with this population, for our government to have survived its internal issues and conflicts and successfully met its external perils without these several state governments to equalize public opinion and solve their local problems. The demand for uniformity of laws among the states must therefore find its answer and limitations whenever it runs counter to local necessities, state policy or the social and political aspirations of the people of a state.

(Applause.)

PRESIDENT MERRILL: Throughout this convention we have been favored with the presence of a gentleman from the Supreme Court of the State of Washington. We are now to hear the Hon. Emmett N. Parker, Justice of the Supreme Court of the State of Washington, discuss the subject: "The American Law Institute." Judge Parker.

JUDGE PARKER: Mr. President.

PRESIDENT MERRILL: Judge Parker.

JUDGE PARKER: And members of the Idaho judiciary and bar: I have been so entertained and enlightened here, and so overjoyed at my journey here over these great mountains to this beautiful valley and city that I had forgotten until just a moment ago, or about an hour ago, that I was here on some sort of a special mission. I bring to you, as a preliminary, the greetings and good will of your sister state of Washington. It is a little like going to an adjoining state or adjoining country to visit relatives, because you know we have a common ancestry, not in blood, but in civil government. It is a striking fact that here on the North Pacific coast the common law of England found absolutely virgin soil. Has it ever occurred to you that here the first touch of civilized government came from a common law people, for this territory, including Oregon and Washington, never knew any other civilization, speaking from a legal standpoint. It was not a part, you know, of the Louisiana Purchase. Indeed the common law took root in virgin soil here more even than in a considerable portion of the original thirteen states, because they were not originally settled by English-speaking people, though they ultimately came under the dominion of descendants of the Anglo Saxon race.

The American Law Institute, therefore, deals with a subject that is close to the hearts of the lawyers of Northwestern America and

Western Canada, particularly so because of its ancestry. This much merely as a preliminary.

I followed Judge Ailshie's example, and have given the President a copy of my remarks that I shall make to you, probably because the President asked me to do so, and, second, because after sitting on the trial and appellate bench for nearly twenty-five years I seem to have lost that confidence that is necessary to accompany successful public speaking, and I fear that if I did not reduce my words to somewhat formal shape I would get them somewhat tangled up, and possibly I will be better able to state to you more exactly what the American Law Institute is, and what it is trying to do.

Noticing in the report of the proceedings of the American Bar Association for the year 1926 that you have in Idaho nearly one hundred members of that association, each of whom, I assume has had sent to him from month to month the journal of that association wherein there has been published from time to time much of the doings of the American Law Institute, I fear that my message will bring to many of you little of new interest. However, a brief review of the beginnings of the American Law Institute, its spirit and purpose, its progress up to this time, and its hopes for the future of our jurisprudence, I hope, will not be wholly devoid of interest, even to those of you who have access to that journal.

At the 1914 meeting of the Association of American Law Schools held at Chicago, some papers were read and discussion had evidencing a conviction on the part of those present that the volume, complexity and uncertainity of the unwritten or common law in the United States had become such that there should be set on foot a movement looking to the establishment of some permanent organization having for its object the clarification of our unwritten or common law by way of restatement in a simplified, direct and orderly form. The World War checked the progress of this movement, though it received some further consideration in 1915 and 1916; but it was not until 1920 that the matter was again seriously considered by the Association of American Law Schools, with the hope of material progress, when a committee of that association was appointed looking to the establishment of a law institute. The membership of that committee was added to from time to time until it had thirty-nine members, a considerable number of whom were outside that association. Honorable Elihu Root became its chairman, and Dr. William Draper Lewis, Dean of the Law School of the University of Pennsylvania, became its secretary. I will not pause here to name its many learned members. It is sufficient to say that they were all of the highest rank among the jurists, practitioners and law educators of the United States. The committee was to prepare a re-

port with a view of submitting it to a large representative assembly of judges, practitioners and law educators of the country, to be held at such time and place as the committee might designate, to the end that the sentiment of such an assembly be ascertained touching the proposed undertaking, and, if favorably expressed, some united formal action be taken looking to the formulation of a permanent organization to undertake at least the beginnings of the manifestly large tasks of making a restatement of the unwritten or common law in the United States.

The committee brought to its aid considerable research work touching the volume, complexity and uncertainty of our law as at present expressed in decisions and texts, and the causes thereof. The committee also seriously studied the practical aspect of the problem; particularly as to the form in which the proposed restatement should be made; the efficient division of subject matter; the question of what subjects should be first undertaken, having in mind that many years would be required to so cover anywhere near the whole field of our unwritten law; and also noticing possible ways and means, both mental and material; necessary to any considerable progress towards the desired end.

There resulted from these labors of the committee its report in pamphlet form of over one hundred pages of ordinary law book size, wherein there was ably set forth the necessity for the restatement, discussion of ways and means for making such a restatement and a proposal that there be organized an American Law Institute to undertake the work. This report was sent out to the chief justices of every court of last resort in the United States, including the senior judge of each United States Circuit Court of Appeal, and several hundred other judges, practitioners and law educators, accompanied by invitations to attend a meeting to be held in Washington, D. C., on February 23, 1923, to consider the committee's report and its proposals. There responded to those invitations by attendance at the meeting place three justices of the Supreme Court of the United States, five senior judges of the United Circuit Courts of Appeal, twenty-seven chief justices of the State Supreme Courts, or a member of such court representing its chief justice, thirty-three law educators, representing nearly as many law schools of the country, and a large number of other judges and practitioners from practically every state in the Union, in all approximately 360.

The meeting was called to order at the appointed time by Mr. Root, the chairman of the committee, who was made chairman of the meeting. He briefly outlined the views and recommendations of the committee as expressed more in detail in its report already in the hands of all present. This was followed, during the morning session, by a very general and spirited discussion evidencing practically a unnanimous opinion of those present in harmony with the views and recomendatons of the committee. Accordingly, there was then appointed a committee of the assembly to cause to be incorporated under the laws of the District of Columbia, an organization to be known as the American Law Institute, and make statement of its objects in its articles or certificate of incorporation as follows:

"The particular business and objects of the society are educational, and are to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work."

During the noon recess a formal certificate of incorporation, which had already been tentatively prepared, was executed by the appointed committee, and placed of record in the proper office of the District of Columbia; thus bringing into existence as a legal entity the American Law Institute.

After the noon recess those present at the morning session reconvened as charter members of the incorporated institute. By-laws were formally proposed and adopted declaring all present to be charter members; also making certain public and semi-public officials members during their incumbency of office, such as the chief justices of the State and Federal Courts of last resort, the senior judges of the Circuit Courts of Appeal, presidents of State Bar Associations, deans of law schools, and some few others. Increase in the general membership was also provided for by election of new members up to a total limited general membership of 500, which has since been increased to 750. The certificate of incorporation having provided for a council, as the governing body of the Institute, to consist of twenty-one members, an election of members of the council was accordingly held. Those so chosen were well distributed throughout the Union, the Pacific states being awarded two members of the council, one from California and one from Washington. At a later annual membership meeting of the Institute the membership of the council was increased to thirty-three, its present number.

After the adjournment of the general membership meeting the council met and organized by the election of Mr. Root as honorary president. Had he felt able to undertake the active duties of the office of president, he would undoubtedly have been elected to that office. It was manifestly only in deference to his personal wishes in that regard that he was not so elected. But, because of his valued services looking to setting the movement on foot, it was unanimously agreed that he should be named as the honorary president of the Institute, and he was accordingly so elected. Thereupon Honorable George W. Wickersham, formerly Attorney General of the United States, was elected the active president of the Institute. Judge Benjamin N. Cardozo, present chief judge of the New York Court of Appeals, was elected vice-president, and Dr. William Draper Lewis, Dean of the Law School of the University of Pennsylvania, was

elected secretary. These gentlemen have remained in their respective offices up to the present time.

At the general membership meeting it was asked how this great undertaking was to be financed. At that time those most active in setting the movement on foot did not not seem to feel free to give any definte information as to what their hopes in that behalf were rested upon. It seemed apparent, however, that they had some assurances that the undertaking would be sufficiently financed when it should be made clearly apparent, by the expressed sentiments of such an assembly and the spirit there evidenced, that the representative judges, practitioners and law educators of the country were really in earnest in backing and fostering the undertaking. Some time after that meeting, where enthusiastic endorsement of the report and proposal of the committee was plainly evidenced, the Carnegie Foundation endowed the Institute to the extent of $110.000 a year for a period of ten years. So, the Institute seems to be fairly well financed for the carrying on of its work for at least that length of time, during which it will, no doubt, be demonstrated as to what extent its aspirations will be realized.

Aside from ex-officio membershp in the Institute, an effort is being made to distribute the general membership throughout the states of the Union as near as may be according to their population. The limit of general membership, at present fixed at 750, has not yet been reached, and there seems no prospect of it being reached for at least a considerable time. Whether or not the necessity for such a limitation upon membership will, from a practical standpoint, be desirable to be maintained, is not yet demonstrated, though it seems to be the general view that a larger membership would result in making the Institute unwieldly in its practical operation. There are no financial incidents to membership in the Institute; that is, there are no initiation fees or dues. Members, other than ex-officio members, are, however, expected to show interest in the work of the Institute by attending the general annual membership meetings, or in some other manner evidence their interest, and contribute in some measure to the work. For any marked failure of a member to so manifest his interest, his name may be stricken from the roll of membership, such failure being taken as evidence of lack of desire to continue his membership. While this rule does not apply to ex-officio members, such members are strongly urged to attend, and most of them do attend, the general membership meetings which are held in Washington near the first of May each year. Several council meetings are held each year, the two principal ones being in December of each year in New York City. At the council meeting the ordinary administrative and business affairs of the Institute are given attention, which, of course, are not very intricate. The larger work of the council meetings is the consideration of the tentative restatement drafts prepared by the reporters and their advisers.

The director of the Institute, which office has been held by Dr. William Draper Lewis since the beginning of the work in 1923, has general charge and supervision over all the research and restatement work of the Institute. The work with reference to each separate general subject is carried on by and under the immediate supervision of a reporter on that subject, who has assistants in his research work and associate advisers in making his tentative restatement of the law upon the subject assigned to him. The reporter, when he has made a tentative restatement of some division of his general subject, for instance, some division of the law of torts, holds a conference with his advisers when his tentative draft, so far as he has gone, is painstakingly examined and discussed section by section, and revised if found necessary, to the end that it be presented to the council as a tentative restatement of such division of his general subject. Later, such restatement is presented to and by the council painstakingly examined and considered section by section, and revised if found necessary, to the end that it be presented to a general membership meeting of the Institute, still as a tentative restatement, where it is again examined and considered section by section. As yet, the general membership meetings have not finally approved any restatement of any portion of any general subject, and probably will not do so except upon the completion of a restatement upon some general subject. However, a number of tentative restatements have been examined and considered at such meetings and much new light thrown upon them by discussions there had. All tentative drafts so far are still subject to further revision by the respective reporters, the council and the general membership meetings. I have had the privilege of attending one of the conferences, that of Professor Bohlen, the reporter on torts, with his advisers. Being a member of the council, I took this opportunity to do so, because it came at a time in my work when I was able to go east, more for the purpose of seeing a conference in actual work, and noting the method and spirit of the work, than with a view of lending any substantial aid as an adviser. I may here remark that any member of the council is privileged to attend any such conference. A few of them, especially interested in some particular subject, have attended the conferences having the subject under consideration. Some others have attended conferences evidently prompted somewhat as I was prompted. I was much impressed with the apparent earnest and painstaking character of the efforts of the reporter, his assistants and advisers, in the preparation of the portion of the restatement there under consideration; and am led to believe that it was but typical of the spirit manifested by other reporters, their assistants and advisers. The consideration by the council of the portions of the tentative restatements presented to it is of the same earnest and painstaking character,though possibly not so critical, because of the fact that the council has to consider all tentative restatements and pass them on to the general membership meet-

ing for still further consideration. The director, the reporters and their assistants and some of their special advisers are all compensated for their services. The members of the council are not compensated for their services, though they are reimbursed in the amount of their expenses incurred in attending meetings and conferencs.

Professor Francis H. Bohlen, of the Law School of the University of Pennsylvania, is the reporter on the subject of torts. He has prepared a partial tentative restatement of the law on that subject to the extent of 164 sections, which has been considered by the council and the general membership meetings. Professor Samuel Williston, of the Harvard Law School, is the reporter on the subject of contracts. He has prepared a partial tentative restatement of the law on that subject to the extent of 174 sections which has been considered by the council and the general membership meetings. Professor Floyd Mechem, of the Law School of the University of Chicago, is the reporter on the subject of agency. He has prepared a partial tentative restatement of the law on that subject to the extent of 239 sections, which has been considered by the council and the general membership meetings. Professor Joseph H. Beal, of the Harvard Law School, is the reporter on the subject of conflict of laws. He has prepared a partial tentative restatement of the law on that subject to the extent of 330 sections, which has been considered by the council and the general membership meetings. All of these have prepared a considerable amount of further tentative restatement of the law on their respective subjects which has not yet reached the council. The director, Dr. Lewis, is the reporter on, and has commenced the preparation of a tentative restatement of the law of, business associations. This general subject will include corporations for profit and associations of a kindred nature and possibly partnerships, though the full extent of the field to be covered under this general heading is not yet determined. None of this work has yet reached the council. Professor Harry A. Bigelow, of the Law School of the University of Chicago, is the reporter on the subject of property, real and personal, and has prepared a preliminary report on that subject, looking to the commencement of the preparation of a restatement of the law on that general subject. This report is, in substance, an outline of what is conceived to be the logical divisions of this general subject and the efficient manner of its treatment. No tentative restatement on that subject has yet reached the council. Professor Austin W. Scott, of the Harvard Law School, is the reporter on the law of trusts. He has commenced a tentative restatement of the law on that subject; he and Professor Bigelow consulting with each other as they proceed, to the end that they avoid duplication of work so far as possible. None of the work of Professor Scott has yet reached the council. When a tentative draft is prepared, it is printed in pamphlet form, with comment following each section constituting the proposed restatement. Copies of these are then distributed to members of the council, if to be considered by the council, and distributed to the general members, if to be considered at a general membership meeting, in ample time for study prior to such consideration.

A special fund has been given to, and accepted by, the Institute to finance the preparation of what may be conceived to be a model code of criminal procedure. There was some considerable objection by members of the Institute of the acceptance of this fund and the undertaking of such work by the Institute, in as much as it might be considered as a departure from its real purpose as evidenced by the expressed sentiment at the original meeting, and as understood by the Carnegie Foundation in its endowment of the Institute. However, since the general funds of the Institute would not be drawn upon to bring about the preparation of such a proposed code, it was finally decided to accept this special gift and undertake the preparation of what might be conceived to be a model code of criminal procedure though the doing of such work looks to the making of statutory law. Dean William E. Michael, of the Law School of the University of Pennsylvania, is the reporter on this subject, who, with Professor Edwin R. Keedy of that school, is preparing a tentative draft of such a code. None of their work has as yet reached the council for consideration, though much research work has been done by them and their assistants, particularly in the way of bringing together in comparative form the statutory criminal procedure provisions of the several states of the Union, and in preparing a tentative draft for submission to the council of 57 sections up to and including the subject of bail. It may be said in this connection that, while the Institute may ultimately adopt what it conceives to be a model code of criminal procedure, it is not at all likely that the Institute will go any further looking to the enactment of such a code by our legislatures. Efforts in that direction I conceive to be work wholly apart from that of the Institute.

Some consideration has been given to the subject of the general classification of the law; this, with a view of avoiding, as far as possible, that duplication and overlapping of treatment which is so prevalent in our legal literature. Dean Roscoe H. Pound, of the Harvard Law School read at the 1924 meeting a very learned and enlightening paper on this subject. His conclusions seemed not very hopeful of the making of an efficient classification other than a very general one, which should descend but little into details. His observations seemed to suggest, in substance, that a very comprehensive, detailed classification was hardly possible in so far as making for efficiency of the work of the Institute is concerned, and probably not even desirable to that end. However, some attention is being given to the order of our progress. The subjects undertaken to be covered so far are of prime importance in our jurisprudence at this time and are of such outstanding character that at all events will be readily

recognized as separate subjects in any scheme of general classification which may be adopted by the Institute, if any general classification ever is adopted. Other subjects will be taken up from time to time and the work of restating the law thereon assigned to reporters of the best legal talent that liberal compensation can command. It is hoped that ultimately the whole field af unwritten law may thus be covered, but even when, and probably before, this shall have been fully accomplished, it is probable that new conditions rising in our civilization, as in the past, will call for revision of restatement already made, and the adaptation of fundamental principles to new conditions as has been rendered necessary from time to time during the whole course of the growth of the common law.

Although four years have passed since the commencement of the work of the Institute, it is apparent that some considerable time, possibly several years, will yet pass before the publication of any restatement will be put out as the finally approved work of the Institute. Answering some friendly criticism directed to the seeming slow progress being made, President Wickersham in his annual address to the general membership meeting in May last, comparing the manifest required labor and time of our present undertaking with the labor of years consumed in the preparation of the Justinian Code and the Code Napoleon under social and commercial conditions much simpler and less involved than confront us, very pertinently observed:

"Our work requires consideration of the decisions of the courts in forty-eight separate states, and it must find its sanction in the voluntary acceptance of the work by bench and bar as an accurate statement of the existing common law. Necessarily, to secure this accuracy, the soundest learning and the utmost care and thorough research are required. If only one hundred pages are produced, they must be demonstratably accurate. The value of the work cannot be measured by bulk. But, even so, we may reflect with satisfaction upon the reasonable progress of the undertaking."

It is not contemplated that common law methods of growth and development will be departed from. No code in the European sense is contemplated. The purpose is not to change the law, but by research to ascertain what is the law, and, where conflicting views of state jurisdictions obtain with reference to a particular subject, to ascertain which is the soundest view touching such subject, viewed in the light of fundamental principles and our present social, industrial and commercial conditions. This, it is conceived, has been the real spirit of the common law throughout the centuries of its growth. All such adaptation of fundamental principles to new conditions, the Institute will undoubtedly sanction only in a constructive and conservative spirit. If its present attitude be maintained, it will be constantly conscious of the fact that its mission is not the making of law but the discovery of existing law as applicable to modern conditions, and restating it in as simple understandable form as may be done in

human language. This is not a reform institution any more than an institution for research in the natural sciences is a reform institution. It has no propaganda looking to the curing of political or social ills through the lawmaking power. It neither advocates nor opposes legislation looking to such ends. There is, no doubt, a field for useful public service along these lines, and many people of good intention seem called to labor therein, but the American Law Institute has set its hand to the doing of other work. It seeks by painstaking research to rediscover that which we already have, to ressurrect in a sense and bring to new discernible life and to put in simplifed understandable form that which is becoming obscure.

Roughly paraphrasing the saying of Him who brought His message of good-will to the world some two thousand years ago, the American Law Institute can in all good faith say to the world: "Think not I am come to destroy or even change the law, but to fulfill the law."

This undertaking has been prompted by the present complex condition of our law, not unlike the condition existing in the Roman law preceding its harmonizing in that great work commonly known as the Justinan Code, and in France preceding the enactment of the Code Napoleon. Those restatements, if they may be so called, being made in statutory form, probably worked greater changes in the Roman and French law than will the present undertaking work in our law; for they, being a creation by sovereign legislative fiat, were the making a law, though in a large measure only the remaking of law. In an illuminating address by Governor Hadley of Missouri, delivered at the first meeting of the Institute in 1923, referring to the Justinian Code and the Code Napoleon, he said:

> "There are many interesting analogies to be drawn between these two great historic achievements, between the restatement, simplification and clarification of that great system of jurisprudence and the work that confronts us here in America today. Their work, of course, was vastly simpler even in an age that had not yet accomplished the mechanical achievement of the printing press. Even with all our advantages of the printing press and other mechanical devices, we have a vastly greater problem than was accomplished under Justinian or by the people of France. And yet, as Mr. Root has said, if we do not strive to do something we will be lost in 'the wilderness of single instances,' in the jungle of conflicting and confusing decisions. We may not accomplish all, but if we do not strive we will not accomplish anything."

As stupendous as the task looms, may we not hope that the learning and ingenuity of the lawyers of the United States and the goodwill of those who are furnishing the material resources for this undertaking will be sufficient to affect, in at least some substantial measure, the consummation of the aspirations of the founders of the American Law Institute. This is not an undertaking of mere visionary character resting on nothing more than blind faith and desire,

but it is an undertaking conceived in the light of experiences and of realities, with a consciousness of the large dimensions and difficulties of the task, and still accompanied by a faith and hope which can at least dimly see the great reward. If the vision of the founders becomes an accomplished reality, it seems probable that the restatement of the unwritten law in the United States, of the character and quality hoped for, the most ambitious undertaking in the whole history of the common law, will be ranked in the minds of posterity with the Justinian Code and the Code Napoleon, as the third outstanding milestone in the evolution of the jurisprudence of Europe and America. We are admonished by one of the proverbs of the Old Testament that "where there is no vision the people perish." To the minds of our conventional orthodox religious friends, this, no doubt, has particular reference to the possible perishing of sustaining spiritual qualities. But is it not equally applicable to those sustaining qualities which make for our future social and material welfare? Is not the vision of the founders of the American Law Institute, rested upon a well grounded hope, prophetic of the continuing life and renewed vitality of our jurisprudence, that it may serve well the needs of a new and even better day?

(Applause.)

PRESIDENT MERRILL: We are to be favored with two solos by Clarence T. Ward, a member of the Boise Bar.

(Solos by Mr. Ward.)

PRESIDENT MERRILL: The next address will be, "Building a Judicial System for Idaho," by the Hon. A. H. Oversmith, of Moscow, Idaho. Mr. Oversmith. (Applause.)

MR. OVERSMITH: Ladies and gentlemen, and I might also add, members of the bar, if any further statement is necessary in order to address you: I want to say at the outset that anything that I may say is written, and, preliminary to what I have to say, I want to tell you now that anything that I may say this afternoon isn't going to be new. I don't know of anything new that I can bring to you. Things have been said so much better by some one else that I don't expect to say anything which would interest you as much perhaps as what somebody has written.

I was very much interested in the very able address which we just heard from Judge Parker. Summing it all up, it means simply this. The Institute he speaks of, as it seems to me, is merely trying to formulate into law the law as it is interpreted by the best judicial decisions. That was attempted seven thousand years ago by what is known as the Hammurabi code, which was mentioned in the preliminary announcement of this meeting. The Hammurabi code is nothing more or less than a statement of the law in accordance with the judicial decisions which had been handed down up to that time.

In the preliminary announcement of this meeting the Board of Commissioners of the Idaho State Bar and the Bar of Boise seems to have had a misapprehension of the subject which has been assigned to me. In the folder which was sent out, the question is asked, "Is there anything the matter with Idaho's Judicial Sysem?" also, "Should we create a Judicial Council and should our Courts be reorganized?"

Answering these questions in the order in which they appeared in the announcement, there is nothing the matter with the Judicial System of Idaho, for the reason that we have none. The writer has been reading ancient history and portions of the Sumerian and Hammurabi Code rather than modern fiction and does not know anything about a judicial council. Inquiry made of several members of the Bar was fruitless on "What is a Judicial Council?" such as has been established according to the announcement. According to the wealth, population and the amount of litigation which reaches our State Courts, Idaho has sufficient judicial machinery to take care of its judicial business and there is no apparent necessity for reorganizing our Courts.

To say that we have no judicial system in Idaho is no intimation that our Courts are not performing or have not performed properly such functions as have been delegated to them by our constitution and laws. My subject does not imply any necessity for criticism, but on the contrary the word "building" implies a constructive rather than a critical discussion. If we can conceive of a foundation as being somewhat separate and apart from a building, you will get a better conception at the outset of my purpose and intent in this discussion. Idaho is practically a new State, at least, it is a new State compared to the period of statehood of our sister states east of the Rocky Mountains. We have barely began to develop our wealth and resources. In many instances our problems are not the problems which confront other Courts. As we develop and utilize the natural resources and wealth of our State, many legal questions will arise, the settlement of which will depend upon our judiciary. The building therefore of a judicial edifice for our state is a matter of future development.

What has been done in the past has been merely in preparation for the future as we have barely laid the foundation for a State Judicial System. The superstructure will be the work of the present and future generations. Even the foundations which have already been laid may, at least in part, have to be repaired and possibly some portions of it reconstructed in order to support the superstructure which of necessity must follow development.

The power and influence of our Courts, both National and State, are comprehended by only a few out of our millions of inhabitants. It has always been the boast of American people that power rested

in the people. Whatever power rests in the people, as a matter of fact, is limited to the extent of judicial interpretation of both the Constitution and the laws of our country and our State. We proudly boast of our republican form of government and we have just reason for our pride. Beck in his admirable work on the Constitution says:

> "In the American conception of government there is no absolute sovereignity."

The statement of the author is only true because of the limitations which the Courts themselves have placed upon their own inherent powers. The decisions of the Supreme Court of the United States on the limitations of its own powers laid the foundations for our National Judicial System, and our various State Courts have found in these decisions the material necessary for the beginning of the foundations of a State Judicial System.

The National Constitution in three short sections made provisions for our Federal Courts. The power granted to our Federal Courts and especially to the Supreme Court of the United States is absolute and imperialistic in form. No bill of rights is reserved.

> "The most effective restraint which freemen ever imposed upon themselves is this extraordinary power of the Supreme Court. The Constitution made the Supreme Court the final conscience of the nation with respect to the powers of government, and such it has continued to be with unbroken success to this day."

says Beck.

No such power as is exercised, and can be legally exercised, by the Supreme Court of the United States is found in any other government. The provisions in the Constitution for a tribunal from which there was and could be no appeal except through constitutional amendment were not made haphazardly or without profound thought and discussion in the convention. No precedent existed for granting such extraordinary powers. Chief Justice Coke in one of his decisions intimated the inherent power of the Court to nullify any legislation which infringed upon the basic rights of mankind. Prior to our National Constitutional Convention, French judges had often refused to register the decree of the king, but they were imprisoned and removed from office for failure to submit their judgment and conscience to the will of the head of the State. In spite of what had been said to the contrary, the debates in the convention are ample proof that it was originally intended to vest in the Supreme Court the final power and authority to protect any citizen as against any law which infringed upon his basic rights as set forth in the Constitution. The vesting of absolute and what might have become imperialistic power in any tribunal was fraught with at least some potential danger, and it might be interesting could we ascertain the ideas of each of the men who were responsible for the creation of the Supreme Court. Why was this self-restraint imposed upon us,

and why have we submitted to this same restraint for nearly a century and a half? The answer is quite simple. The history of every civilization and of every country prior to the adoption of our constitution reveals the fact that the inherent rights of man were best protected under those systems of government which created and fostered an independent judiciary. We have continued to maintain our Federal Courts with all the powers delegated by the Constitution for the reason that the absolute and imperialistic power, which has been spoken of has only been exercised through necessity when and only in such cases where there has been a plain violation of a citizen's rights under the Constitution.

Our early judges found themselves confronted with problems, the solution of which, meant the success or failure of our constitutional form of government. On the question of property rights, the decisions of the colonial courts and the decisions of the English courts under the common law furnish ample precedents for the guidance of the Court. On those questions involving governmental functions and the prohibitions on the power of Congress as defined and set forth in the Constitution, it was necessary for the Court, through its own reasoning and by following the sound judgment and conscience of its members, to lay down certain fundamental principles as a guidance for not only the correct determination of the rights of the legislative and executive branches of the government but also to map out and clearly define its own powers and its own limitations. It is safe to say that in the field of legal jurisprudence dealing with constitutional law and departmental government, our country was and remains the pioneer nation. American text books on constitutional law and the decisions of the American Courts on this subject are now cited, and to a great extent followed, in every country where constitutional government exists. Judge Cooley gained an international reputation in that great pioneer work of his called, "Constitutional Limitations."

If the Supreme Court of the United States had done nothing else in its first fifty years of existence than to hand down those decisions which limited and circumscribed its own power, the nation now and in the future would owe the memory of these men its most profound gratitude. It is easy to conceive of a body of men exercising to the fullest extent any delegated power. In fact the widest application is most often sought whenever a known power is prescribed. But to find a tribunal or a body of men which, through the reasoning of its members and its own written decisions has limited its scope and power, history records no parallel to the Supreme Court of the United States.

Congress has passed and the President of the United States has signed thousands of laws since this country became a nation and out of all of this mass of legislation, the Supreme Court has only declared something like fifty laws unconstitutional. Literally speaking, the Supreme Court has never declared a law unconstitutional. The ques-

tion of the constitutionality of a law can only be raised and will only be determined by the Supreme Court upon a complaint of a person who claims his constitutional rights have been invaded by an enactment of Congress, or of any legislature or other governing body. The decision of the Court merely makes what we deem a constitutional law inoperable as far as the law applies to the facts in litigation.

No State Supreme Court, as far as I have been able to learn, has refused to follow the Supreme Court of the United States on those rules of interpretation governing a person's constitutional rights, and in these decisions our own State Court can safely lay down the same rules and the same reasoning as the Supreme Court of the United States whenever the constitutional rights of a citizen are involved in any litigation.

While litigation arising out of constitutional rights is small in comparison to the mass of litigation reaching the Courts, yet those rights are so important so as to deem it inadvisable to depart from the precedents already established. Our own Supreme Court, with one or two exceptions, seems to have followed these precedents and upon these foundations a Judicial System, as far as constitutional government is concerned, can be safely built.

Leaving aside for the present any further discussions of the foundations of a Judicial System as far as constitutional rights are concerned, we come to the more fruitful source of litigation, namely: litigation arising over property rights, and personal liberty, or in other words, the duty of the Court to interpret and enforce the civil and criminal laws of our State.

In discussing the question of Courts, it should be kept in mind that strictly speaking a Court is made up not only of the judiciary but also of all members of the Bar and other officers incident to a judicial tribunal. But in this discussion, the term Court will be limited to a large extent to those elective officers whose duties it is to finally interpret and lay down the law as expressed through the enactments of the legislature.

What is a Court? The most common definition which is found in the decisions is as follows:

> "A Court is a place where justice is judicially administered."

On this subject of what is a court, I want to present the first topic for the discussion which should follow. In my opinion the definition is not comprehensive enough and does not limit the power of the Court as it should be limited. A better and more significent definition of a Court and one which is more compatible with at least my own idea of a Court would be as follows:

> "A Court is a place where justice is judicially administered in the manner prescribed by law."

Using the first definition as commonly given by the Courts themselves, there is, to my mind, an indication or desire upon the part of the Court to usurp the legislative functions of government and

to lay down its own rules or regulations in order to promote such justice as satisfies the conscience of the judge upon whom rests the determination of any right. Courts should have no inherent power to determine whether or not any legislation promotes or retards justice. Assuming the constitutionality of a law, it is the duty of the Court to interpret the law as it is written irrespective of whether or not justice or injustice will result from its enforcement. To adopt any other rule of construction is to abrogate any necessity for a legislative body as the Court under its own definition could administer justice according to the conscience of the members of the tribunal without any legislative enactment.

To illustrate: 1. Refer to Statute of Limitation on promissory notes.

2. Refer to the right of the Court to parole a convicted prisoner under the age of 25 years of previous good character.

3. Refer to the right of a laboring man as against a merchant, for instance, to recover attorney's fees in suit for wages.

As a further illustration on this point, the Supreme Court of the United States has laid down the rule that the Court will not inquire into the wisdom or folly of any particular enactment of Congress, nor will the Court inquire into the motives which lead up to the passing of any law. Even though a right which might be considered valuable may be destroyed by legislation and that such was the intention of the lawmaking body, yet the Court should not interfere unless the motive appears in the act iself. Immediately following the Civil War, Congress desired to establish a national currency through national banks. Prior to the establishment of the national banking law, state banks had undoubted right to issue currency, but with the idea in view of compelling the state banks to cease issuing currency, Congress placed an excise tax on all currency issued by any bank except national banks. The Supreme Court of the United States did not question the right of the state banks to issue currency, nor did it question the right of Congress to levy an excise tax, and while the law in fact destroyed the valuable right of the state banks to issue currency, yet the Supreme Court declared itself powerless to interfere in view of the fact that Congress, in passing the law in question, acted within its delegated powers and there was nothing in the act itself indicating that the motive of Congress in levying an excise tax was to destroy a right which the State banks had previously exercised.

The wisdom of enacting any particular legislation depends upon the judgment and conscience of the members of the legislature and the executive who approves of the law, and it is my contention that under no circumstances should a Court in any manner circumvent the intent of the legislature by any forced construction which might, under certain facts, promote justice. The responsibility of the law promoting injustice rather than justice must rest upon the legisla-

ture and the governor, and a Court should refuse to entertain jurisdiction for the purpose of promoting justice at the expense of the law. To decide a case in the furtherance of justice rather than in the manner prescribed by law will result in much confusion and such decisions establish precedents for both the bench and the bar which will encourage litigation and appeals to the Courts for justice in spite of the law. By reason of the limitations placed upon the courts during the development of the common law, a most interesting departure from its hard and fast rules gradually developed a Court of Conscience or Equity. But even in the Courts of Equity certain fundamental maxims were established, one of which being that "equity follows the law." Every effort should be made by the Court to promote justice but *never* at the expense of the law.

Another subject which might form a source of fruitful discussion is the question whether or not our Supreme Court should follow a majority or a minority rule. On many legal questions which are submitted to our Supreme Court, there is a divided opinion among the various State Courts and in many instances we find divided opinions between the Federal Courts and State Courts. The question of which rule to follow must of necessity be first presented to the District Court. Assuming that our own Supreme Court has not passed upon the point in issue, the trial Court must adopt either one or the other line of reasoning of other Courts. If the Courts are equally divided or even if there is a majority line of decisions, the final determination of the matter as far as the trial Court is concerned must rest upon the conscience and good judgment of the trial judge.

There can be no rule laid down for the guidance of the lower Court in making its decision, but assuming that the lower Court has adopted the reasoning, logic and the sense of justice laid down by certain decisions, what rule then should the Supreme Court follow on appeal? There seem to be no adjudicated cases upon this question as far as my investigation has progressed. In all appellate courts such questions are looked upon as new questions to be decided according to the reasoning and sense of justice of its members. It would appear to me that if our Supreme Court would adopt a rule or decide that where there is a divided opinion among the various courts on a controverted question and the lower court followed one line of decisions the Supreme Court should adopt the decision of the lower court as the law of the case and follow such line of supporting decisions.

By adhering to such a rule in deciding cases on appeal there would be fewer appeals taken. Under our present procedure and under the procedure of every other State, the final determination of the rule to be followed by the courts of the State rests entirely with the Supreme Court and no matter which way the lower court may decide the case, an appeal is bound to be taken as long as the Supreme Court adheres to its right of reversing the lower court, whenever the conscience and judgment of the members of the Supreme Court happens to differ from that of the trial court. If the trial court should decide a controverted point against the greater weight of the authorities, and contrary to the judicial trend of decisions, the Supreme Court even under the rule as suggested could still exercise its function of reversing the case and announcing the majority rule. But where the courts are equally divided or where the line of reasoning adopted by the trial court is not wrong beyond a reasonable doubt, the decision of the trial court should stand. Such a rule would cause the members of the bar to carefully brief such a cause in the trial court. At the same time the trial court would make a more careful investigation in order to determine not only the greater weight of authority but the better and more logical reasoning on the controverted issue. Much of the sentiment prevalent among both the trial judges and the members of the bar to the effect that the Supreme Court will have to finally settle the question, might be obviated if the rule contended for was adopted.

In an article in a recent issue of one of the leading law journals, the author contended that a court had an inherent right to legislate by judicial decision upon questions where the legislature had not acted. It is true the author of the article limited this right to extraordinary occasions, but it is my contention that no court has any inherent power or any power to legislate by judicial decision on any question whatsoever. If no legislation exists it should be the duty of the Court to direct the attention of the next legislature or lawmaking body to the subject matter whenever the Court is of the opinion that legislation is necessary in order to protect property rights or personal liberty. It is rather difficult, however, to conceive of a situation where neither the common law nor any statutory law would not be applicable in some form or other.

The fourth proposition which is submitted for discussion is the question of our Supreme Court following its own decisions and citing its own decisions in support of any rule of law. While I do not mean to state as a fact from a thorough investigation, yet a more or less casual reading of judicial decisions of our State and of other States, leads me to believe that our Supreme Court relies less upon its own decisions and its own announced rules of law than any other State Supreme Court. It is very seldom that one reads a decision of such Courts as Michigan, Iowa, Illinois, Indiana, California, Washington, New York and many other States where decisions from other Supreme Courts are cited in support of a rule which has already been announced in other adjudicated cases of the State. It is only in exceptional cases where one finds cases from other States cited in any decision where the Supreme Court of such State has previously passed upon a question of law. Imagine my surprise a few years ago on reading a decision of the Supreme Court of Idaho in a case in which I was attorney for the respondent and had cited two Idaho cases alone in support of a rule which I contended was de-

cisive of one of the questions which was at issue in the case, to find in the decision not only the two Idaho cases cited in support of the rule but also many other cases from outside Courts. It is true the decision was written by a district judge who was called in by the Supreme Court, but it has always been my contention that the citation of authorities in addition to the authority of our own Supreme Court was useless and entailed upon the judge writing the decision the unnecessary labor of searching for and reading other authorities. These authorities added nothing to what our own Supreme Court had said on the subject. On this same line of discussion the Supreme Court might well contend that if the Court has previously decided a case upon any issue arising in the case which is being appealed, it would be incumbent upon appellant to cite the previous Idaho decision and point out in the written argument wherein such previous decision should not be decisive of the point at issue in the case appealed. Obviously the same rule could not be applied to any respondent in an appeal unless counsel for respondent was attempting to rely upon any exception which might exist of any previous rule laid down by the Court.

Closely allied with the subject just under discussion is the question of construction of those laws or statutes which we have borrowed from other States. The decisions of the Courts of the State from which our law is copied, and which were rendered before we adopted the law, should be followed by our own courts even though against the weight of authority. Our Supreme Court has, in certain cases, followed the weight of authority, or as expressed in some decisions, our Court has followed the better line of reasoning, rather than the rule of statutory construction which all Courts, including our own, have repeatedly announced. It is the exceptions made by the Supreme Court which have caused confusion and doubts in the minds of the members of the bar and the trial judges. If no deviation was made from the rule contended for by the higher courts there would be fewer appeals.

Summing up all that has been said thus far, the aim of the Courts, through decisions, should be to stabilize the law in every way possible. This can only be done by following those judicial precedents which time and experience have shown to be based upon sound reasoning and which on the whole have proven to aid justice, even though in a few instances to follow such precedents may entail hardship on a litigant. Whenever possible the higher courts should endeavor to set new precedents for the future, but not in deviation of those already established. In recent years there has arisen a feeling which has found expression in certain magazine articles that while great advances have been made in all other sciences ,the science of law has made no progress in the past two centuries. Whether this criticism is a just one or not, the responsibility of any lack of progress must to a very large extent rest on the legislative branch of our government rather than on the judiciary. The function of a Court is to interpret and not make laws. Courts may stabilize the law and the legal procedure by following established precedents and by new rules of statutory construction and procedure which may serve as precedents to future generations and thus aid progress, but whatever real changes may become necessary in the furtherance of justice and progress must come from sources other than the judiciary.

Much has been said in the press and on the public platform of the failure to enforce our criminal laws, and to some extent at least, the Courts have been criticised on account of the failure to mete out proper punishment of the more serious crimes which have been committed. This is a subject which should be discussed by itself but it is my contention that the Courts are not properly subject to the criticisms which have been made. With a rural population such as exists in Idaho, we are not confronted to the same extent with what may be termed the criminal element as are the more thickly populated states. In the recent session of the legislature, there was an attempt made to change the system of selecting jurors to try criminal cases. The measure was defeated in the senate, and to my mind, its defeat was justified. In a recent case in my own county, two men were excused for cause where by a close examination of each of them, it was found that they could not conscientiously follow an instruction of the Court with respect to the weight which should be given the testimony of an accomplice. Under the present system of selecting jurors to try criminal cases, no one has assigned any good reason why a fair and impartial jury cannot be procured. The Supreme Court has also come in for criticism which is not merited under the facts. If there is any just criticism due on account of the manner in which the criminal laws of Idaho are enforced upon our citizenship should rest the responsibility for such criticism.

There is no doubt in my mind but what the office of Prosecutor, or County Attorney, should be filled by the younger generation of lawyers, even if the salary incident to the office was sufficiently large to be attractive to the older members of the bar. If those who violate the law are to be convicted and punished for their offences the tax payers must stand their fair share of what must be the necessary cost and expense of properly conducting a criminal case from the standpoint of the State. Legislation was passed by the recent legislature authorizing the County Commissioners of any County to retain by the year or otherwise such additional counsel as might be found necessary to assist the County Attorney in prosecuting and trying the more important civil and criminal cases. As far as I know, not one County has taken advantage of the law. It is a matter of common knowledge that many members of the bar receive in defense of one criminal case a greater fee than is paid by the people for legal services for prosecuting the criminal cases arising in the County in one entire year. What is now paid the County Attorney barely com-

pensates him for the civil work done for the County. It is quite safe to say that if the people were willing to pay a reasonable value for legal services in the prosecution of criminal cases and such willingness was expressed through their various Boards of County Commissioners, there would be no room for criticism, at least not in Idaho.

There is one proposition which I am about to mention and which probably will cause no dissenting voice from the members of the bar nor from the members of the judiciary. It is one, however, upon which too much emphasis cannot be laid. I refer now to our very much underpaid judiciary. In my own district, we have a judge who is now serving his twenty-ninth consecutive year on the district bench. When he first took his oath of office he received a salary of $3000.00 a year, which, at that time, according to the purchasing power of money, was equivalent to at least $7500.00 at the present writing. Members of the Supreme Court receive the meager salary of $5000.00 a year, when as a matter of fact, if our present judges were paid at all in comparison to the emoluments of that office at the time Idaho became a State, the salary would not be less than $12,000.00 per year. We cannot expect to build up a strong judiciary without just compensation for services rendered. Neither the trial Court nor the Court of Review is the proper place for any lawyer to round out his career as it is sometimes expressed. But the office of judge, either the District or Supreme Court, should be made sufficiently remunerative so as to attract the young men of ambition who would prefer the judiciary rather than the work of an active practitioner. We have five members on our Supreme Court only one of whom has served beyond one elective term. I doubt if there is a similar situation in any other State Court. What I have said is not at all in criticism of the personnel of our present Supreme Court, and probably not one member of a present court would disagree with me upon the proposition that the value of a judge's services on the bench increases ordinarily in proportion to the length of his service.

The members of the judiciary yield a tremendous power and influence over the every day life of the citizens of the State. We must look to the Courts for the preservation of life and liberty. No comparison should be made between the emoluments incident to the other state offices and the members of the judiciary. We do not draw from the professions in order to fill the executive and ministerial offices incident to state government. Custom and political exigencies seem to demand rotation of office except the judicial offices. The mistakes of the executive or the ministerial officers of government can be corrected in a space of two years, while any mistake of the judiciary is irreparable at least to the parties interested, and by the establishment of judicial precedents such mistakes may become a serious matter to a large number of citizens.

In discussing the question of salaries, it is also well to keep in mind the long period of preparation which is absolutely necessary in order

to fit a person for the judiciary. Under present conditions, a judge must have at least six years of college training which is only the least expensive part of the necessary training. After his admission to the bar, he must go through a period of at least ten years of study and close application to work with few clients and with fewer pieces of shekels with which to hold body and soul together. To expect the bench to attract and keep in service young men or any men of ability without any prospect of advancement upon a salary which means only a bare existence is folly. While the salary may sometimes look attractive to the young man who is just entering upon his career as a lawyer, he soon learns that there is a larger and wider field for his services than the bench and where the remuneration is at least prospectively large enough to serve as a counter-attraction, hence we find too many men of ability leaving the bench for other fields of endeavor.

If we are to have courts which will carry weight in other jurisdictions, we must have a continuity of service and we must attract young members of the bar towards a judicial career. This cannot be done if no hope of reward is held out except a bare existence. It must also be remembered in any discussion of judicial salaries that it takes years to build up confidence and a clientele in any community and unless the bench is made sufficiently attractive, those members of the bar who are enjoying a comfortable competence out of their practice have every reason to believe that additional years of experience will build up greater confidence and a greater clientele, while the lawyer on the bench sees his previous clients scattered and no future before him except a salary which is less than the wages received by many skilled mechanics. The members of the bar in the State of Idaho possess sufficient political power and influence, if united in a common cause, to bring about at least a substantial raise in salary for each member of the State Judiciary. We should unite upon a program of this kind which cannot help but be beneficial to the electorate at large and the results will fully justify any effort which we may put forth to bring about a more satisfactory situation. Incidentally the members of the bar cannot help but be benefited if we can attract and retain men with proper qualifications upon the bench.

Necessarily in an address of this kind, only a few subjects can be touched upon. Discussions coming out of meetings of the state bar cannot help but be beneficial to both the bench and bar. The passage of the law creating the State Bar Association and providing sufficient funds from its members to allow it to function properly is a step in advance and should be approved by us. Associated together in a common cause, namely the upbuilding of a Judicial System for Idaho, cannot help but bring about a wholesome feeling of responsibility and confidence between not only the members of the bar but also between the Judiciary and the bar.

There is one field of endeavor and a field of work which is neglected in a most extraordinary manner by the profession. In both houses of the present legislature and out of a membership exceeding 100 there were only four lawyers who devote their entire time and attention to the practice of law. The attention of one of the four was almost entirely taken up with remedial acts due to supposed defects in our highway district laws. Another one of the four took his responsibilities rather lightly for reasons which are not necessary to relate either in criticism or otherwise, and had it not been for the unselfish, gratuitous assistance rendered by certain members of the Boise bar, the legislature would have been swamped with legal problems impossible of solution in a sixty-day session. There has always been more or less of a feeling that legislatures are dominated too much by its lawyer members and that the presence of lawyers in the legislature is wholly unnecessary, but after the layman reaches the legislature, he is only too glad to accept of the services of the legal member in most every field of legislation.

As members of the bar, we serve somewhat in the capacity of a guardian over the property rights of our clients to say nothing of the protection often rendered to their lives and liberty. It is only when we are unable to agree among ourselves that we report our differences to the Court for final adjudication and settlement. It is therefore the duty of members of the bar to sacrifice of their time and talents in order that correct rules governing property rights and correct principles of law find their way into our statutes. There should be at least sufficient active practicing attorneys at law in each branch of the legislature to fill the judiciary committees.

(Applause.)

PRESIDENT MERRILL: Ladies and gentlemen, we will now have the report of the Committee on Resolutions, by Mr. John W. Graham, of Twin Falls, chairman of the committee.

MR. GRAHAM: Mr. Chairman.

PRESIDENT MERRILL: Mr. Graham.

MR. GRAHAM: Ladies and gentlemen, the report is short.

We, your Committee on Resolutions, do heartily commend the untiring work and earnest efforts of our Bar Association Commissioners in conducting the affairs of the Association during the past year.

We recommend that the Idaho Bar approve and adopt the canons of ethics of the American Bar Association and that we adopt the procedure provided in such canons in all disciplinary proceedings.

We believe that the American Bar Association is performing a real service in our country and we suggest to our members the advisability of joining this parent organization.

We recommend the recodification of our statutes and the elimination there from of obsolete matter. We, therefore, suggest that a committee be named to determine what laws are in fact obsolete.

That District Judges in fixing minimum sentences should give greater consideration to the facts involved and with that end in view we recommend that the Board of Pardons formulate rules and suggestions for the use of Prosecuting Attorneys and District Judges in administering our indeterminate sentence law in order to bring about uniformity of punishment in the interest of justice.

Inasmuch as the delays in the hearing and trial of cases and proceedings in the Supreme Court have long been recognized by the laity and the members of the bar as a very great evil in the administration of justice and the disposal of business and should be remedied at the earliest possible date, we recommend that the members of the Supreme Court, they being entrusted in the final analysis with the administration and execution of the Judicial Branch of our government, call into conference the District Judges, the members of the Bar Commission and other members of the legal profession, with a hope that some concrete action may be taken along legislative lines for the hastening of the administration of justice.

We feel that the members of the Supreme Court are the best informed as to the cause of delays in our judicial system and are better equipped to recommend an appropriate remedy. It seems absurd that we, the members of the legal profession, cannot put our judicial house in proper shape. It is a certainty that if the legal profession does not take action in the near future to remedy these ills, the laity will take the subject into their own hands and possibly give us something that we do not want.

We suggest that some of the matters that might be considered by the Supreme Court as a remedy are as follows:

A. Some restrictions on right of appeal to the Supreme Court.

B. The creation of an intermediate Court.

C. Appointment of a commission or commissions until the Court gets caught up with its work.

D. Cut out the Court on wheels and have Supreme Court sit at the Capitol only.

E. Dispense with oral arguments unless required by the Court.

F. The adoption of memorandum decisions where possible.

G. The conservation of time and labor by the elimination of lengthy dissenting opinions.

To the members of the Boise Bar and to the citizens of Boise we extend our thanks in appreciation of their fine hospitality.

JOHN GRAHAM,
G. L. TYLER,
ABE GOFF,
Committee on Resolutions.

RESOLUTION

In view of the fact that the Supreme Court of the United States on May 31, 1927, in the case of Rhea vs. Smith held that under the Missouri Statute making judgments of state courts of first instance liens from time of rendition and those of district courts of the United States liens only at the time of filing in the office of the county clerk, there was no such conformity as to prevent operation of the provisions of the Federal Act of August 1, 1888, and therefore a judgment of the District Court of the United States became at once a lien on all property within its territorial jurisdiction, and

WHEREAS, the Idaho Statute is very similar to that of the State of Missouri, and

WHEREAS, many of the abstract companies in the State of Idaho do not include in their certificates attached to abstracts the matter of federal judgments,

BE IT RESOLVED, That there be referred to the legislative or some other committee to be appointed by the Commission the matter of investigating the case above mentioned and its applicability to the State of Idaho, and make such recommendations as may seem proper to the end that appropriate legislation be recommended for the next session of the legislature if such legislation seems necessary and also that there be uniformity in the certificates of abstract companies with references to Federal judgments.

MR. GRAHAM: Mr. Chairman, I move that the report be adopted.

MR. TYLER: I second the motion.

PRESIDENT MERRILL: The report of the committee has been presented, and it has been moved and seconded that the same be adopted.

MR. OVERSMITH: Mr. Chairman.

PRESIDENT MERRILL: Mr. Oversmith.

MR. OVERSMITH: I agree with the entire report, except the recommendation contained therein of establishing an intermediate court. I really believe that until we are able to pay the judiciary of this state sufficient compensation to keep men upon the bench and attract men to it, that we had better not go on record as favoring the establishment of any other courts. I therefore move you, as a substitute motion, that the report be adopted, that that portion of the report be stricken out, and that the report be adopted as amended.

PRESIDENT MERRILL: You have heard the substitute motion. What is your pleasure?

MR. GRAHAM: Mr. Chairman.

PRESIDENT MERRILL: Mr. Graham.

MR. GRAHAM: I think possibly our friend, Mr. Oversmith, has taken too seriously the recommendations contained in our report. The matters suggested were simply suggested for consideration by the

court. We are not recommending that all of the remedies suggested should be embodied in the law, but simply that such matters as are involved in the report should be considered by the Supreme Court and the members of the Bar Commission.

MR. OVERSMITH: I want to say, Mr. Chairman, that I don't think I have taken it too seriously. This report will be printed, and it will go out over the state to the members of the bar, as favoring the establishment of another court. It won't be read with the same intent that was in the minds of the members of the committee when this report was adopted. The laity of the state will, I believe, read into that the favoring of another court. I think we ought to concentrate our efforts towards building up the courts we already have, rather than suggesting any such thing.

PRESIDENT MERRILL: I have heard no second.

MR. ————————: I will second the motion.

PRESIDENT MERRILL: The substitute motion has been seconded. Are there any further remarks?

MR. ————————: Mr. President, I would like to hear the resolution read.

PRESIDNET MERRILL: Mr. Graham, will you read that again, then?

(Mr. Graham read again the recommendations.)

MR. GRAHAM: The language of the resolution is that we suggest that those matters be considered only.

MR. ————————: Mr. Chairman, as I understand Mr. Oversmith, it is subdivision "B" that he objects to. Is that correct, Mr. Oversmith?

MR. OVERSMITH: That is absolutely correct. My motion is directed to the elimination of those words, "The establishment of an intermediate court."

JUDGE H. H. TAYLOR: Mr. Chairman, I assume you are discussing the elimination of that one feature?

PRESIDENT MERRILL: It is a substitute motion that that be eliminated.

JUDGE TAYLOR: It occurs to me that most of your attendance today is from Boise. There are two little things that occur to me, one, the advocacy of calling in the District Judges and prosecuting attorneys. That is a suggestion only, one of the things for us to consider—and when I say "us" I mean individually, not representing the court at all. However, that suggests the desirability of an appropriation to pay the expenses of calling in the district judges. There is no way to pay their expenses. It will be impossible for us to make use of that without evading the law, without creating an expense that isn't an expense recognized by law, for the district judges to come in here. I am heartily in favor of such a meeting. The court has gained a great deal of benefit in the last two years from association with the district judges, from their coming in to sit as com-

missioners, from their sitting with us and being here and visiting. It would be a wonderful thing to have the district judges meet once a year, but there is no provision for their expenses.

The second thing I have in mind is that you are mostly southwest jurisdiction lawyers, from this immediate vicinity, going on record as recommending to the legislature that they do away with holding a term of court at Pocatello and a term of court at Moscow and a term of court at Lewiston, where, previous to this year, we have held two terms each year, this year only one each, and you are going to vote, as a State Bar, with just about one out of fifty of the bar from Pocatello, Lewiston or Coeur d'Alene here to voice any sentiment against it, to take the court off of wheels. But if you will analyze that question you will find that we hear at Pocatello thirty cases each time we go there. Assuming that that requires one attorney on each side, that is sixty attorneys. It is safe to say that there are twenty or thirty attorneys who appear at Pocatello, fifteen or twenty at Coeur d'Alene, and the same at Lewiston. We don't want to advocate placing upon the litigant the expense of standing at least three days of his lawyer's time on a railroad trip to Boise, when you can take the court to Couer d'Alene or Lewiston for an outside expense of $550 and hear all thirty cases, when you can do the same thing for a week at Pocatello. I doubt if you want to go on record, in the absence of the people from the places where we do go on wheels, and pass a State Bar resolution that that provision should be abolished.

PRESIDENT MERRILL: Any further remarks?

JUDGE JOHN C. RICE: Mr. Charman:

PRESIDENT MERRILL: Judge Rice.

JUDGE RICE: I would like to suggest that if there is any one thing where there is an inherent right in the members of the Supreme Court, it is the right to file a dissenting opinion.

Just one word more on this whole report there. I wonder if we are not inclined to magnify somewhat the so-called evils of the congested condition of the Supreme Court calendar. It is an evil, but I am afraid that in dwelling on it so much we are magnifying it to some extent even in our own minds, further than we ought to. But what I wanted to say in that connection is not in any criticism of what was suggested here. I want to raise the question as to whether we are really directing our attention to the solution of the problems before us. I am rather inclined to think that we have enough judicial service in the State of Idaho to handle the business of the state expeditiously and well. I am wondering whether the real solution would not be found in providing for a stronger executive direction of the judicial timber which we have, rather than along the lines of the suggestions in that report. I am not so sure in my own mind but what an improvement could be made in the matter of directing the activities of the different judges and the appellate judges, with added powers to use the district judges in appellate work to a greater extent than we have now, under the guidance and direction of a well equipped judiciary officer. I suggest that as worthy of consideration, at least, in connection with the problems that we have before us.

PRESIDENT MERRILL: Any further remarks:

MR. FRANK MARTIN: Mr. Chairman.

PRESIDENT MERRILL: General Martin.

MR. MARTIN: It is pretty well known, at least to most of us here, that during the past year, at least, the Supreme Court has been making heroic efforts to remedy the various evils which are mentioned in the report, in completing the work that has accumulated for a number of years, and especially here at Boise. They have been handicapped, along lines suggested by Judge Rice, by the fact that there is no adequate system of correlating the work of the district judges with the Supreme Court. If we had some method of legislation, or perhaps Constitutional amendment, by which the head of the Supreme Court, or the Chief Justice, could direct the work of the district judges, by which, when a number of district judges were called here to sit with the Supreme Court, they really, in fact, or as a matter of fact, would be members of the Supreme Court, and their decisions were equal to that of a judge of the Supreme Court, we have more than judges enough in the state to do the work; there isn't any question about that. Our people in some of the judicial districts have taken delight in having plenty of local judges, and there are plenty of judges in this state to do the judicial work in the state, if there were some way by which the head of the judicial system could direct their work and have them work in the place where the work was needed and take them away where it isn't needed. If. when a district judge is called in to sit in the Supreme Court, he really became a member of the Supreme Court while sitting there, much of this difficulty we have could be remedied.

Now I am not especially opposed to the matters of recommendation to the Supreme Court, but the fact is that they have all been considered by the Supreme Court, and considered and considered. There is nothing new there suggested that will be of any benefit to the Supreme Court. They have been working hard during the last year to try and remedy these very things, and they have had every one of them in mind. There is no particular benefit in spreading them on our records.

JUDGE TAYLOR: Mr. Chairman.

PRESIDENT MERRILL: Judge Taylor.

JUDGE TAYLOR: I just want to ask, as a matter of information, if I might paint a picture of the Supreme Court calendar that is not quite so blue. At the beginning of this year we had 328 cases pending. The first of August we had a tabulation made by the clerk, and during that time we had disposed of 193 cases. Last year, in the entire year it was 185. You give us twenty-five cases a month and we will write them. We are going to write more than twenty-

five each month from now until Christmas. We will dispose of more than 100 more cases. Our aim is not less than 300 cases a year. That will be perhaps fifty-two more than have ever been written by the Supreme Court in its history in one year, if I am correct, and I don't think that five judges write any faster than three. There have been 132 appeals filed in that time. Taking the month of August, you have 100 appeals. With the cases pending, I think I can assure you—because we are going to confine our time for the next four months to the wrting of decisions—you won't have sixty-seven cases in the Boise Division that are over a year old. In Pocatello we have fallen a little behind. But by the first of March, if we don't name an earlier term at Pocatello, we will have wiped out every case in the Boise Division that is over a year old, and that is pretty near a millenium in Idaho, as far as you can hope for the present. In the North there are just thirty-two cases pending at the present time, which wouldn't justify a term of court in the North as early as in Pocatello. Pocatello had ninety at the beginning of the year. We have written thirty, and one or two old cases were brought over here on stipulation, and a few disposed of, and Pocatello now has 100. But if its proportion of appeals is carried out, while we were writing thirty, it has filed forty, and that will demand an early term at Pocatello. We sometimes lie awake nights, and sometimes we sit up, thinking of when we can catch up with this calendar, but we will be caught up, as far as the Boise term is concerned, by next March first, so that there won't be a case pending then that is over a year old. And I want to tell you what that will do to some of you Boise lawyers: It will make you file your transcripts. Where appeal has been taken the transcripts haven't been filed in some cases for two or three or four or five or six months. It will make you file your briefs. We set cases in June and July and have applications for an extension of time to file briefs in cases that have been pending in the Supreme Court for more than a year and a half. The transcripts wouldn't come up, and you ask for extension of time. That is largely corrected now since the reporters are getting paid for the transcript. They find they have more time than they used to think they did, and the transcripts are coming up. This court is doing everything it can to bring the business up to date.

Pocatello will be the sufferer next spring, but no doubt some method will be taken to give Pocatello its full quota of hearings after March first, if not before.

If we can write 300 cases this year, we can write 300 cases next year. There wont be a change in this court next year. The Legislature won't take up a lot of our time, coming in on the floor, asking us this, that and the other thing, and we won't be spending any of our time with the legislative committee trying to get our salaries increased, and we will save several weeks on that. The picture isn't so blue as you think.

MR. OVERSMITH: Your idea is to eliminate that from the resolution?

JUDGE TAYLOR: There is an open season on judges, and whatever you choose to do with us is all right. There was criticism in Boise recently over a decision that shouldn't have caused so much of a furore, when you consider that that probably isn't the only mistake we have made. I am not going to sign any opinion ever. If I may tell just a short one: When I was first appointed I was living over at the hotel and stayed there a couple of weeks, and a bellboy went through the lobby and said, "A call for Mr. Taylor," and he did the same thing the day before. And it seems there were two Taylors there, and a friend said, "Educate that boy; get him to call you Judge Taylor." And I said, "What Taylor are you looking for," and the bell boy said, "Just a minute and I will see," and he came back and said, "Hermie Taylor." So say what you please—how and when and where; it is an open season.

MR. TYLER: Mr. Chairman: As a member of the committee and also a member of the Pocatello Bar, I wish to take a moment's time. The committee announced to the chairman that any propositions that any of the members of the bar had we would be glad to accept and consider and present to this association. It appears that this discussion has centered around one part of the resolution here wherein your committee makes several suggestions. I hear no criticism as to the suggestion that it would be a good thing to have the Supreme Court bench and the District Courts meet, etc., so that now, at this time, in order to expedite matters, I move you, as an amendment to the substitute motion, that this report be adopted, with the elimination of the part wherein it starts, "We suggest some of the matters that might be considered by the Supreme Court as a remedy are as follows," and then the following sub-paragraphs A to G. I move that as an amendment to the substitute motion.

MR. OVERSMITH: I would accept that, with the consent of my second.

MR. ————————: I consent.

PRESIDENT MERRILL: Gentlemen, have you anything further on the substitute motion?

MR. T. K. HACKMAN: It wouldn't be in order, would it, to amend that? I intended to offer a resolution. Under the present law we pay the reporter for the transcript, and under that rule some of us have had the transcripts paid for months and can't get them, unless we come to the court here to get a writ of mandate. The suggestion I intended to put before the committee—and I would like to put it as an amendment there now—is to request the Supreme Court, if they can, to adopt the rule that after the attorney makes a deposit with the Clerk of the Court, that the Clerk can pay the reporter when he files the transcript, and that that be a complince with the law.

JUDGE TAYLOR: You might make that as a recommendation direct to us, Mr. Hackman.

MR. HACKMAN: All right.

JUDGE RICE: I rise just for a little information here. The suggestion of this last speaker raises a question in my mind as to where we should go with certain ideas we may have. I have prepared a suggestion which I want to get up to the proper representative of this association, but I assume that the legislative committee would take that.

PRESIDENT MERRILL: The Bar Commission would refer to its Legislative Committee any matters that the bar might be interested in in that respect.

PRESIDENT MERRILL: Are there any further remarks on the substitute motion that has now been adopted, that is to say, for the adoption of the report, with the elimination of the paragraph, subdivisions A to G?

MR. GRAHAM: I wish to acquiesce in the suggestion of the member of the committee, by reason of the fact that we have succeeded in doing one thing, and that is, getting the subject discussed. I am surprised at the suggestion made by the gentleman in regard to the work that is being done by the Supreme Court. Why don't you advertise your work?

JUDGE TAYLOR: I am not a candidate for office for the next five years.

MR. GRAHAM: You will be, some day, possibly. We had a meet- of our bar, some thirty-five members, last Tuesday evening, and every single member of the bar criticised the members of the Supreme Court because they were not working.

MR. ————————: Not every member.

MR. GRAHAM: They had the wrong facts, which they were discussing. Several of them made the statement that the five judges were not turning out as much work as three—absolutely false. They didn't know what the facts were.

JUDGE TAYLOR: That was true last year and the year before, Mr. Graham.

MR. GRAHAM: We had a hard explanation to make to the laity when we went and asked for an increase in the membership of the courts, and now they say five men can't do more than three. There is something wrong. If five men can't do more than three, let's go back to three.

PRESIDENT MERRILL: The question on the motion has been called for. It is a substituted motion, which in its present form I understand will carry with it the adoption of the report, if the motion is carried. All in favor of the substituted motion say "Aye."

The report is adopted.

Is there any further discussion on any other matters or unfinished business?

MR. OVERSMITH: Mr. Chairman, let me make one suggestion, in reply to the gentleman over here who reserves the right to write a dissenting opinion. A dissenting opinion can be written with fully as much force by simply citing a case which the judge thinks is decisive upon the question. He could writ a dissenting opinion, and simply say, "I dissent from the opinion of the majority, and base my dissent upon the logic and reasoning of" that case.

PRESIDENT MERRILL: Any further discussion?

Any unfinished business?

I am about to declare the meeting adjourned, if there be nothing further.

We are adjourned.

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IDAHO STATE BAR COMMISSION

By_____,Secretary