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ATTORNEY'S LICENSE FEES—$5.00, payable annually prior to July 1, to the State Treasurer, Boise, Idaho.

MEETING OF THE BAR—The Western and Eastern Divisions will hold Division meetings in 1934 at times and places to be fixed, respectively, by Commissioners Graham and Owen.

Annual meeting of the Idaho State Bar will be held in the Northern Division in 1934, at a time to be announced later.

An election of a commissioner for the Eastern Division will be held in 1934.


# IDAHO LAW JOURNAL

VOL. III NOVEMBER, 1933 No. 4


## SOME MATTERS VITAL TO TAXPAYERS AND THE LEGAL PROFESSION*


JAMES E. BABB


Mr. President and members of the Idaho State Bar:

### I.

While considerable relief may be secured through consolidation of counties under an amendment of the constitution authorizing the consolidation on votes of the counties to be consolidated it is submitted that such a remedy leaves the local county seat towns and the local office holders too much, endangering the defeat of the taxpayers' interest in those elections for consolidation—it is submitted that the only process by which the taxpaying interest can be adequately represented on such an issue would be a proposed amendment of the constitution submitted to a vote of the entire state in which provision would be made for eliminating by the one state wide majority vote (instead of two-thirds majority) all unnecessary counties and county seats and substituting therefor the new counties and county seats by the one state wide vote upon the entire problem, such a plan should be mapped out only after an elaborate survey made over the entire state under known public auspices, such, perhaps, as the State Chamber of Commerce contacting with similar local organizations, and in maturing such a plan there would be accumulated reliable statistics as to what the change would save in taxation on each $1000.00 of assessed value, as well as the most reliable estimates possible through thorough canvassing with those most experienced in local political management in all the present counties in the state as to the votes that could be commanded for the various consolidations suggested, since the plan must be continuously worked and wrought upon until it can be assured (as near as possible to devise) of a success both at the polls and in the economies later to be effected.

The duties of officials and employees of the Highway Districts might be put upon the officials and employees of the counties and where there are important county seat towns or cities, the county and city corporation could be also consolidated and the one set of officers serve both. The great popularity of county consolidation was shown impressively by the big vote given by the entire state on the said constitutional amendment adopted in 1932.

### II.

Under present conditions the litigation coming before the courts of general jurisdiction is subdivided into such small units as to make it excessively burdensome to operate an institution of the size of court of general jurisdiction for

*Address delivered before the annual meeting of the Northern Division, Idaho State Bar, Moscow, Idaho, June 10, 1933.

the purpose of handling such business as is afforded in so many if not almost all of the counties as at present constituted, making it almost impossible to operate the judicial machine because of its multiplicity of conflicts with different portions of itself instead of having courts held only where there could be accumulated a large enough calendar of cases that would justify the bringing together of the judges and the stenographers and the lawyers and jurors, grand juries and trial juries and witnesses necessary in order to transact the judicial business which is not different from manufacturing or other lines of business and industry which require a sufficiently large operating unit of the product to be handled to justify bringing together the quantity of equipment necessary to carry it on and the larger the unit of product or commodity to be handled the more cheaply and efficiently it can be carried on where there is an opportunity to use the greatest number of operatives to the limit of their several functioning capacities.

III.

Idaho might well turn back to the jurisdiction of the district courts the contested litigation for which two additional independent boards have been created and maintained, viz: the Public Utilities Commission and the Industrial Accident Commission, retaining in the office of the state engineer possibly the accounting, engineering and other professional and scientific aid for the handling of the public utilities business and for making adjustment of the informal cases, and distributing the formal cases for trial to the several district judges in the state providing therefor a venue system which would send each case for hearing and trial before a judge of some other district than the district where the rates or service affected by the case are concerned, so that no judge deciding one of the cases would be affected by adverse votes on account of his decision pertaining to rates or service when he should be up for re-election—that having been one of the main causes for creation of the Public Utilities Commission because of the injustice of requiring the Utility Company to submit to a trial before a judge who is elected by the votes of the people whose utility rates or utility service would be fixed by the decision of the judge—Justice Field of the United States Supreme Court having held in one of his greatest dissenting opinions that a decision of a judge under those circumstances in such a case should be held illegal—the dissenting opinion apparently correct though not concurred in by other members of the court, seemed to make necessary the creation of Utility Commissions to provide a disinterested body for the hearing of such cases—a result wholly unnecessary because of the power to assign such cases to district judges of other districts than those affected by the decision. Similar provision in a general way can be made to do away with Industrial Accident Commission. The District Judges are elected by the people instead of being appointed by the Governor—since during the current Senatorial inquiry into the business of J. P. Morgan & Company it has been widely proclaimed that every public official found to have been upon the friendly investment opportunity list of J. P. Morgan & Company should be disqualified for holding public office even up to and including the Secretary of the Treasury and Governor Pinchot of Pennsylvania, having demanded that the judges of the Supreme Court of Pennsylvania found to be upon such lists should tender their resignations—what is going to be the status of the candidates for Governor of any state where contributions have been made by the same citizens or interest to the campaign fund of each, which in its nature



is inherently as much if not more a bid for favor than the J. P. Morgan & Company tender of a favorable opportunity to make a favorable investment which has been so vigorously championed as a ground for removal of an officer thus favored?

IV.

The public is greatly menaced in another vital matter affecting the Judicial Department of the State of Idaho, and of every state in the union, viz: by the threatening unnecessary duplication of law publications. The publications of Corpus Juris and the American Digest System should be consolidated into one publication which should contain each and every efficient quality of both of these marvelously efficient publications, a course which would require the elimination of the Digest System by merging it into Corpus Juris which already contains the English and English Dominion decisions none of which are included in the great American Digest System—Corpus Juris also containing alphabetically arranged judicial definitions of Words and Phrases, which is not contained in the American Digest System but is operated unnecessarily in a separate series of publications of Words and Phrases alone, but without the English and Dominion cases in Corpus Juris, and on the contrary the American Digest System has some valuable features not contained in, but which should be merged into, Corpus Juris, such as tables of where all cases are cited therein and their alphabetical Descriptive Word Index to authorities, and their monthly digest system cumulated semi-annually, etc., which should be supplanted by a monthly supplement of Corpus Juris cumulated semi-annually, annually, etc., carrying the supplementary matter monthly, etc., of the entire range of information published in the permanent edition keeping it up to date, rather than, only the annual supplement of Corpus Juris which is now issued.

The reference in those Corpus Juris supplements to subsequent decisions under note numbers would take the place of all of Shepard's Citations of subsequently citing cases and be furnished to the attorneys monthly instead of quarterly only as Shephard now furnishes them—Shepard's Citations alone complete now costing more than the upkeep of an entire law library a generation or two ago; furthermore, the *text* of Corpus Juris, *itself*, furnishes the subsequently citing cases, and from every jurisdiction, without necessity of turning to the separate Shepard Citators from each of the 48 states, lower Federal and U. S. Supreme Court Reports and seven separate regional West Publishing Company Reporters. Why maintain these large numbers of duplicating systems when all of the elements of each can be furnished in one? Corpus Juris cites English cases construing the very words of Idaho enactments as well as the enactments of Congress and every state in the nation which have not been construed by any American cases—not long since there were found an English Chancery case, and an Ontario Canadian case construing language of a comparatively recent Idaho statute which had not been construed in any decision of any state or United States Court, and the English decisions are constantly construing contracts, wills, and other provisions and documents expressed in the English language in which all our laws and documents are expressed making those precedents of equal value in the courts in this country as if they were decisions of our own courts—making it unsafe for the Bar in the United States to be drafting instruments and legislation in the English language without access to the construction of the English

language by the English courts as well as our own since the questions involved are the same.

While the consolidation of the American Digest System and Corpus Juris seems formidable in size we must remember that in addition to innumerable text books the public is still further menaced by three more able encyclopedic treatments, of the whole field of the law in addition to those just mentioned, viz: the work of the Uniform Law Commission very far advanced, the work entered upon by the American Law Institute under the financial patronage of the Carnegie Institution, for a complete republication of every branch and department of law literature and keeping it up to date, and Johns Hopkins University with ample funds provided are starting another similar all comprehensive recompilation and publication covering the entire field of fundamental jurisprudence.

The American Bar Association might well (should) maintain in some form, an auxiliary to pass upon the public convenience and necessity of any proposed law publication, prescribing rules and regulations for the thoroughness and completeness of the work requiring classifications of all cases according to Statutes and Constitutions with abbreviated statements of the Statutes and Constitutions as done in Wigmore's Evidence, such abbreviated analysis of Statutes and Constitutions exemplified in Stimson's excellent American Statute Law, and this suggestion as to Statutes and Constitutions should be adopted in the next Edition of Corpus Juris, and of the kind of paper, printing and binding, and of the sale price of any proposed publication and plan for keeping it up to date by periodical leaflets.

V.

A very great saving of court expense to the county and in the length and expense to the parties, of trials would be made by adoption in form suitable to our condition and system of an act from Laws of the State of Washington of 1903, page 50, approved March 6, 1903, Volume 3 of Pierce's Code of Washington of 1929, Section 8488, whereby in case of failure to demand a jury trial and make a deposit with the Clerk of Court of a designated sum toward expense thereof a jury is considered waived—the party making such a deposit having the right to recover it with other costs in case of winning costs in the case. This has served to reduce jury trials to a very small minimum—statistics showing that the cases can be tried before the court ordinarily in a small fraction of the time required to try the same case before a jury and that the many errors hazarding the reversal of almost any case tried before a jury are on a trial before the court almost wholly eliminated thus in addition to the time of attorneys and witnesses and of the court and court officials saved in a trial before the judge alone—there is a very large saving to litigants from the hazards of error in a jury trial and expense of appeals and new trials.

VI.

If my recollection is correct the Idaho Annotated Code of 1932 Official Edition is the only revision or codification of Idaho laws that has been made without publishing in it, properly codified, the laws adopted at the session of the Legislature at which the codification was approved, a result which makes the Code incomplete in the very beginning and two years behind when it should start complete and up to date and makes necessary a recodification just two



years sooner than otherwise would be necessary, since it becomes very burdensome to continue without a recodification longer than 8 or 10 years. There should be a supplemental publication immediately after the adjournment of each subsequent session bringing the code down including the laws of each such session together with annotations of subsequent decisions. The Bar is urged to see to it that from this time on Idaho gets such a supplemental volume after the close of each session, until the next succeeding codification, the more necessary now because the last Code being two years behind when it started.

# PROFESSIONAL DUTIES*

BERT A. REED

For the past fifteen years or more we have been living in a period which may well be classed the commercial age. We have witnessed the combining or merger of great corporations. The formation of great holding companies and corporations has tended to give said companies and corporations strong control over the finances of the country and over the different commodities in general use by the people.

For instance, let us consider the corporation which is known to all of us, the Washington Water Power Company. This company has secured a monopoly on the power in this part of the country known as the Inland Empire. The Washington Water Power Company, I am informed, is controlled by the American Power and Light Company and the American Power and Light Company is controlled by the Electric Bond and Share Company.

Recent developments in the senatorial investigations reveal the fact that the house of Morgan has a large interest in the Electric Bond and Share Company. Now, the house of Morgan, as we all know, is a banking and investing corporation and the question may easily arise, does the house of Morgau, through its financial powers and its preferred list of customers control these corporations and all of their subsidiaries? If it does this in effect, it is one big powerful trust and while it may not offend the Sherman Anti-trust law in letter, it is my humble opinion that it does in spirit.

This is only one example of the many corporations and holding companies which have to do with the commodities which you and I purchase every day for consumption. To analyze this situation, let us go back a few years and examine into the conditions which may have brought about this situation. From the period of the outbreak of the great war, this country furnished a great amount of supplies to the belligerents. When we entered the war the demand for supplies, means of transportation and other necessary war accoutrements was even greater. At the same time there was a shortage of labor due to the fact that so many men were taken out of their regular course of employment by enlistments and the draft. Under these conditions speed was all important. Money was no object.

Unprecedented wages were paid to all labor and, as the earnings of labor increased, there came the demand for the things which the great mass of labor had been unable to purchase; for instance, motor cars, radios, electric appliances and many other things. Money was plentiful; eredit easily had; practically all corporations were paying large dividends and the greed for profits and power at this time was so great that I am afraid the golden rule of the conduct in business affairs was entirely forgotten. It was at this period that a great many of the investment and holding companies were created, some of them without assets except high-powered salesmen. High finance became the rule of the day and worthless securities were floated and sold to the innocent public. Any and all means, apparently, were used for the purpose of building fortunes. A great many of the methods used by the individuals and corporations during this period are now being revealed to the public by criminal prosecutions and senatorial investigations.

*Paper read before the annual meeting of the Northern Division, Idaho State Bar, Moscow, Idaho, June 10, 1933.





Apparently I have digressed from my subject, but I have mentioned these things only for the purpose of bringing to your minds the relation attorneys and counselors may have had to these operations, and undoubtedly the temptations that were submitted to the lawyers were very great. It is well known that it is a general rule that corporations, good or bad, secure the best legal talent available and so the retainers paid to the lawyers in those days were undoubtedly liberal and they were confronted with the problem of doing the business for the corporation as they wished it done or were faced with the losing of their retainers. Undoubtedly they were compelled to find the loop holes in the laws and advise their clients how to keep within the law to accomplish their purpose.

One of the greatest abuses, apparently, has been the evasion or attempted evasion of the income tax laws. Whether or not the ethical code was violated can only be determined in the mind of the individual himself because a great part of that business was of such a nature that it never reached the courts.

Even prior to what has been deemed the commercial age, the abuses of the profession were such that it became necessary for a code of rules to be formulated and adopted for the conduct of the attorneys in practice in their profession and in their relations with the public and the courts. Alabama, I believe, was the first state in the Union to adopt such a code, a part of which has been followed by the American Bar Association in the formulation and adoption of a code known as the "Canons of Professional Ethics".

A great many years ago, in the city of New York, owing to ambulance chasing and other methods used in the practice of law, it was found necessary, after an exhaustive investigation, to adopt a code of ethics which was later enacted into laws. "Canons of Professional Ethics", as formulated by the American Bar Association, was formed more for the purpose of having the ethics uniform over the country and for the improvement of the personnel of the Bar and Bench. That is well illustrated by the preamble to the Code of Ethics, which is as follows:

## PREAMBLE

"In America, where the stability of Courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing Justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration. The future of the Republic, to a great extent, depends upon our maintenance of Justice pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men.

"No code or set of rules can be found which will particularize all the duties of the lawyer in the varying phases of litigation or in all the relations of professional life. The following canons of Ethics are adopted by the American Bar Association as a general guide, yet the enumeration of particular duties should not be construed as a denial of the existence of others equally imperative, though not specifically mentioned."

As conditions have rapidly changed in the past few years, the American Bar Association has found it necessary to supplement and modify, in a great many instances, the code which it has formulated after many years of investigation

and deliberation, and that investigation has revealed that the lack of attention and abuse of the "Canons of Ethics" will be found more in the larger and more thickly populated communities than in our territory here. There are a few of the "Canons" which I consider to be more important, upon which I would like to comment and for the Bar to participate in a discussion of the same.

First, the duty of the lawyer to the Courts.

It is the humble opinion of the reader that the Courts of today do not hold the high place in the minds of the people that they should, nor do they receive the proper respect. A great many people think that the courts are crooked and unfair and that the ordinary individual cannot secure justice. I have read newspaper articles which tend to cast reflection on the Courts. They have criticized any rules of the Court that may have been formulated for the purpose of giving dignity to its proceedings. They have ridiculed the wearing of gowns by the judiciary and the respect shown the Court upon assuming the bench by the attorneys and the audience rising, and other publications which have tended to establish in the minds of the people that it is a mockery. To remedy this situation, the duty is imposed upon the attorneys to defend the Courts and to show the proper respect due the courts, even though they may not like the Judge of said Court.

In my personal experiences, I find that many foreign born, when they speak to you or address you on the street, touch their hat. That thing, in itself, shows to you that in countries other than our own, the Courts are respected by all of their citizens. I believe that if our lawyers or professional men are more careful in their actions and conversations in trials, that the respect which is due the Courts will and can be formulated in the minds of the people.

Very often, after a case is lost, counsel will make remarks to their clients shifting the blame for their defeat to the Court rather than to the fact that the opposite counsel may have had a better case.

This Canon further imposes upon the counsel the duty of trying his case in a way in which the facts shall be presented with all candor and fairness so that the full facts in questions may be presented to the Court or the jury, as the case may be. Counsel should also be very punctual in his appointments, particularly with the Court. I have had the experience of having a case set for a particular hour; the jury would be in the box; opposing counsel ready for trial with his witnesses; and have to wait five to ten minutes for the other counsel to appear. While this short period of time does not appear of any great consequence, yet it is very aggravating to the Court and to all concerned. Those five or ten minutes seem to be eternity. Of course, the Court has the power to inflict punishment by contempt proceedings but it does not like to adopt that method and undoubtedly would not adopt it unless conditions became so obnoxious that it becomes necessary to enforce promptness.

Other Canons will be mentioned merely to invite argument, not because they are Canons openly violated, but because of attempts sometimes made covertly to induce the favorable action of the Court. No attempt to exert personal influence on the Court should ever be made. This Canon is a difficult one to present for the reason that very seldom, if at any time, is there an out and out attempt made to bribe a Court. Perhaps in the olden days it was common; but at this day and age I am of the opinion that there is no attorney that would care to take the chance of offering a direct bribe to the Court. If, at this time, Courts are influenced, I would rather say it is done more in the manner



of extending favors, such as has been revealed by the senatorial investigation of the house of Morgan.

Now, I do not want to be understood as saying that the favored list of the house of Morgan was had for the purpose of bribery, but I do believe that those to whom Morgan extended these favors, if they were called upon for a favor by the house of Morgan, would certainly be embarrassed by a certain sense of obligation, and it would be difficult for them to refuse requests that might be made.

There are other ways in which personal influence may be had with the Court, but this is a difficult matter to present and I would much prefer that the Bar discuss it themselves. However, there is one side of the matter that I wish to present, and that is this: undoubtedly at this time, the people having been gypped in so many different ways, are suspicious of the Courts and often times will condemn a judge when it should not be done. Take for example a judge on the Bench that had been and still is very friendly with one or more of the attorneys and who have enjoyed each others society. If those attorneys would appear in Court, the public undoubtedly would feel that these individual attorneys had such personal influence with the Court that it would be useless for any other attoruey to appear against them; or, if their influence would not go that far, they at least become suspicious of the friendship and integrity of the Court.

Now, is it necessary that a Court should deny himself social contact with his friends, in effect, practically ostracize himself, in order to retain the regard of the public? I do not believe so, but I do believe that the profession itself can greatly alleviate this condition by stamping out utterances that may be made along the line against the integrity of the court, and by educating the public to believe that, because a Court may be on social terms with any of the attorneys, it does not signify that the attorney would have any greater influence with the Court in the trial of a law-suit than one who perhaps was not intimate with the Court.

Passing from this subject, I wish to mention the following:

Ill feeling and personalities between advocates; treatment of witnesses and litigants; newspaper discussion upon litigation and the attitude toward the jury.

In a great many instances litigants are represented by counsel between whom ill feeling exists and that feeling is shown by personalities being indulged in during the course of the trial. This method does not enhance the respect of the Courts and, in a great many instances, does aggravate the Court and the jury and often militates against the client of the attorneys. No such remarks should be made between attorneys, but all remarks should be addressed to the Court.

As to the treatment of witnesses and litigants, the advocate should conduct his case in a gentlemanly manner toward the witnesses and litigants. In this way I am sure more facts will be brought out and a much better impression will be made with the Court and the jury than if he pursues a bull-dozing manner and tries to ridicule them or make out that they are testifying falsely or asking questions containing innuendoes or trying purposely to confuse a witness, and thus get the witness to contradict himself. During the trial of the case it might be well for advocates to bear in mind that one of the characteristics of the American people is to sympathize with the under-dog and any attorney that adopts the tactics above mentioned certainly is not doing his best

for his client's interest, neither is he instilling in the minds of the public any greater respect for the Courts.

The jurors, as they are selected under our laws, are not altogether in Court from choice, but are subpoenaed to serve as jurors during the term. Under our practice, great liberality has been extended to counsel in the interrogation as to their fitness to sit as jurors in a case. That liberality has, in a great many instances, been abused. Inquiries have been addressed to the individual jurors, possibly as to his family and his personal habits, which are, to say the least, impertinent; and questions of that sort, undoubtedly arouse in the minds of the individual an attitude of dislike and, if that individual happens to be permitted to sit as a juror, the chances are that the attorney who propounded these questions will have a much harder battle to receive a verdict at his hands than he would have had if the questions had not been propounded. I sometimes feel that it is the duty of the Court to prohibit these questions from being asked the prospective juror and on several occasions I have interfered. The juror is more or less helpless during such an examination unless protection is given him by the Court.

I pass on to the next matter—newspaper discussion upon litigation.

This canon is not violated to a great extent by the Bar, but occasionally you do see in the newspapers what purports to be the fact of one side of the case. This practice is certainly to be condemned. It can only be done for the purpose of attempting to influence the Court or the jury which may hear said litigation. No doubt the person feels that, by publishing the purported facts of the case, he can enlist the sympathies of the public and in that way, through politics or possibly friends of the Court, seek to influence the Court or the jury in its determination of the litigation involved.

There are a great many other Canons that may be discussed and would take a great deal of time, but a summary of the Canons of Ethics or synopsis thereof is well presented by the "Oath of Admission" which has been promulgated by the American Bar Association and which Oath is as follows:

## OATH OF ADMISSION

"The general principles which should ever control the lawyer in the practice of his profession are clearly set forth in the following Oath of Admission to the Bar, formulated upon that in use in the State of Washington, and which conforms in its main outlines to the "Duties" of lawyers as defined by statutory enactments in that and many other States of the Union—duties which they are sworn on admission to obey and for the wilful violation of which disbarment is provided:

I DO SOLEMNLY SWEAR:

I will support the Constitution of the United States and the Constitution of the State of .....;

I will maintain the respect due the Courts of Justice and judicial officers; I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land;

I will employ, for the purpose of maintaining the cause confided to me, such means only as are consistent with truth and honor, and will never seek to mislead the Judge or jury by any artifice or false statement of facts or law;



I will maintain the confidence and preserve inviolate the secrets of my client, and will accept no compensation in connection with his business except from him or with his knowledge and approval;

I will abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice. SO HELP ME GOD."

There is another subject which may properly be discussed in this meeting, but it is one that I am loath to present, but before beginning that subject, I wish at this time and place to publicly state that, during my brief tenure on the Bench, I have observed no serious violation of any of the Canons of Ethics nor have any such been brought to my attention and I feel that the Bar of the Eighth Judicial District is to be congratulated upon its membership.

The subject of judicial ethics is one which I am reluctant to discuss and what I may have to say will be brief for the reason that "we cannot see ourselves as others see us."

In adopting the Canons of Judicial Ethics, the American Bar Association have quoted some of the Ancient Precedents which applied to the Judiciary, several of which are as follows:

> "And I charged your judges at that time, saying, hear the causes between your brethren, and judge righteously between every man and his brother, and the stranger that is with him."
>
> "Ye shall not respect persons in judgment; but ye shall hear the small as well as the great; ye shall not be afraid of the face of man; for the judgment is God's; and the cause that is too hard for you bring it unto me, and I will hear it."—Deuteronomy, 1, 16-17.
>
> "Judges ought to remember that their office is jus dicere, not jus dare; to interpret law, and not to make law or give law", — —
>
> "Patience and gravity of hearing is an essential part of justice; and an over-speaking judge is no well tuned cymbal. It is no grace to a judge first to find that which he might have heard in due time from the Bar, or to show quickness of conceit in cutting off evidence or counsel too short; or to prevent information by questions though pertinent," — —

These, I believe, are just as applicable today as they were years ago.

A summary of the Judicial Canons is as follows:

In every particular his conduct should be above reproach. He should be conscientious, studious, thorough, courteous, patient, punctual, just, impartial, fearless of public clamor, regardless of public praise, and indifferent to private political or partisan influence; he should administer justice according to law, and deal with his appointments as a public trust; he should not allow other affairs or his private interests to interfere with the prompt and proper performance of his judicial duties, nor should he administer the office for the purpose of advancing his personal ambitions or increasing his popularity.

The American Bar Association has prescribed this Code of Ethics as an example for the members of the Profession and the Judiciary and if earnest endeavor is made to live up to it, the profession will be on a high plane and will receive the confidence and respect of the people.

The members of the Judiciary, I believe, try to live up to the Ethics preseribed and, as to whether or not they are doing so, the members of the Bar and the people must judge.

# THE LAWYER AND THE NEW LEGAL ERA*

WILLIAM E. MASTERSON**

I have been asked by Judge Ailshie, the distinguished Commissioner of the Northern Division of the State Bar, to speak to you on the subject of "The Lawyer and the New Legal Era." This subject presupposes that we are approaching or have arrived at something new in our profession. I must admit at the outset that one's efforts properly to predict the future or to appraise the present relation of the lawyer to the order of things in which we of today find ourselves, especially in the light of the kaleidoscopic changes that are rapidly taking plaee, may lead to views which may seem strange, if not illusory, to anyone except himself. In fact, I am somewhat perplexed, if not confused, when I attempt to define and evaluate from a detached standpoint my own views in this connection. Views antithetical to mine I shall expect, therefore, and I shall be content if my poor observations here simply incite to inquiry. Perhaps, we are agreed upon one thing, however,—we are entering a new world into which we are being drawn by the logic of events and the force of eircumstances—an entirely new economic, political, and social era. Our thinking along all lines is shifting to a new base, and our mental horizon is perceptably broadening. Men are learning to see things and persons and relations large, from a less personal point of view, and frozen dogma and formalism are giving way to the substance of thought. Conceptions of human endeavor and human accomplishment shorn of selfish or purely personal considerations are stirring in men's minds. In fact, the whole social and economic structure that we have builded with the toil of centuries is toppling before the pressure of a new idealism. The divergence of opinion may arise when we set out to discover whither these changes are destined to lead us and unborn generations and how we may best adjust ourselves to them. As this new order of things appears, the question at once presents itself to us (and no less to the teacher of law than the practitioner), Will this new idealism be received into our profession and so remold our legal system and its administration as to meet the needs and further the ends of the new order? A legal system cannot remain static before dynamic progress in other departments of life. It cannot continue to run in its old grooves and govern human relationships, institutions, and industry that are moving in new directions. Obviously, therefore, we must witness and are witnessing a revolution in that system, and we are being inevitably forced to repair the old machinery and to set up new machinery by which it is administered. We have already witnessed a change in our method of approach to the law in our efforts to determine what law is or should be and what its place is as a factor in controlling our behavior. A single approach to the solution of problems that arise in the practice of law has virtually fallen into the discard. While various schools of thought—the historical, philosophical, and analytical, for example—have contributed much in the development and definition of our legal system, and they have much to commend them, yet each of these

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**Professor of Law and Dean of the College of Law, University of Idaho; author of JURISPRUDENCE IN MARGINAL SEAS WITH SPECIAL REFERENCE TO SMUGGLING (1929) and articles in legal periodicals; member of the Texas and Idaho Bars.

schools must yield its claim to the exclusiveness of its method of understanding what the law is, whence it came, what it ought to be, and how it functions in our affairs.

At least we can no longer rest secure in a comfortable assurance that legal problems are solved solely by the application of immutable abstract rules of law. We have realized for some time that we can not feel content, at least in certain fields of the law, with marshalling what we think of as the bare facts of a case and then searching through the books for smug principles that will categorically and mechanically point to a predictable determination of the rights of the parties concerned. This would be a "jurisprudence of conceptions," and a too great emphasis in the past upon this method of solving all problems that arise in law offices and before the courts has unfortunately lead to "the setting up of fixed, arbitrary, external standards and an over-development of the mechanical."[1] Law in principle as now humanly conceived is not always law in action. Mr. Justice Holmes observes through his frequently quoted dictum that, "general propositions do not decide concrete cases," and that the decision will depend upon "a judgment or intuition more subtle than any articulate major premise."[2] Mr. Justice Cardozo says, "Concepts are useful, indeed indispensable, if kept within their place."[3] Dean Smith of the Columbia Law School recently aptly notes, "Legal concepts born of a passing order are losing their utility, and devices for law making and law administration designed to function in a simpler society are breaking down under the complexities of modern life. That this is so is evidenced by the popular demand for remedial legislation, the increasing non-observance or disregard of law, and the growing tendency to invoke non-legal agencies in the regulating of business and in the adjustment of disputes."[4] Attempts by courts to solve all problems by resort to old abstract principles or concepts alone result in a frozen system of law isolated from the changing facts of life. As Dean Pound points out, this approach leads by one way only, in which "new situations are to be met always by deduction from old principles." "In the pursuit of principles there is a tendency to forget that law is a practical matter. The desire for formal perfection seizes upon jurists. Justice in concrete cases ceases to be their aim. Instead, they aim at thorough development of the logical content of established principles through rigid deduction, seeking thereby a certainty which shall permit judicial decision to be predicted in detail with absolute assurance."[5] The attempt to evaluate the interests or claims of parties in this fashion has led to "a mechanical administration of justice," which is rapidly breaking down. To quote Dean Pound again, its "tendency is to lead lawmakers, legislative and judicial, to overlook the need of squaring the rules upon the statute book, or in the reports or doctrinal treatises, as the case may be, with the demands of reason and the exigencies of human conduct in the one case, and with the demands of social progress in the other case."[6] Our legal system, if it is to remain a scientific system and function in practical fashion, cannot lose contact with actuality—with life as it is lived; it must insure justice and adjust interests according to the standards and demands of the time in which it is administered. We are coming to think of law as a means of attaining social ends, as only one of the forces that insure the enjoyment and protection of public and private interests. We start with the social and economic needs of the day and we supply those needs with a legal system. Necessarily must this system change with a changing social and economic order. This fact must be recognized, and lawyers and lawmakers, must follow the rise and direction of the new social, political, and economic trends, in order to be able to square our laws and their administration with them.

[1] Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 Harv. L. Rev. 591, 613 (1911).
[2] Lockner v. N. Y., 198 U. S. 45, 49 L. ed. 937, 949 (1905).
[3] THE PARADOXES OF LEGAL SCIENCE (1928), 62.
[4] REPORT OF THE DEAN OF THE COLUMBIA LAW SCHOOL (1929), 4.
[5] Pound, op. cit., 596.
[6] *Ibid.*



Social, economic, and other elements are being considered more than ever before (at least, in certain fields of the law) in working out the rights of litigants. The appearance of such elements as controlling in actual decisions of courts is especially evident in several recent decisions of the Supreme Court of the United States passing upon the constitutionality of certain types of state legislation in the light of the Fourteenth Amendment. The philosophies of the judges, their social and economic views, and their interpretations of public opinion and social trends, rather than a rigid body of existing rules, has largely controlled in some of these decisions. An illustration of this fact is found in the recent decision of *New State Ice Co. v. Liebman*.[7] The Court in this case was called upon to pass upon the constitutionality of an Oklahoma statute which forbids the State Corporation Commission to issue a license to "any person, firm or corporation for the manufacture, sale and distribution of ice, . . . except upon a hearing had by the said Commission" and upon proof of "showing the necessity for the manufacture, sale or distribution of ice, or either of them, at the point, community or place desired"; if the facts proved at the hearing disclose that the facilities for this business at such point or community already licensed "are sufficient to meet the public needs therein," the application may be refused. The statute declares also the manufacture, sale, and distribution of ice to be a "public business." The plaintiff, a person lawfully licensed to engage in this business, brought a suit to enjoin the defendant from engaging therein wthout first having obtained a license from the Commission. The Supreme Court affirmed the judgment of the Court of Appeals, which, in turn, had affirmed the judgment of the District Court dismissing the bill for want of equity, on the ground that the manufacture and sale of ice is a private business and is not so charged with a public use as to justify the regulation attempted by the Oklahoma statute. Mr. Justice Sutherland, speaking for the majority, said:

> "Plainly, a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business, such as that under review, cannot be upheld consistent with the 14th Amendment. Under that amendment, nothing is more clearly settled than that it is beyond the power of a state, 'under the guise of protecting the public, arbitrarily [to] interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.'"

Mr. Justice Brandeis, with whom Mr. Justice Stone concurred, wrote a strong dissenting opinion. He pointed out that while "A certificate of public convenience and necessity," such as is required by the Oklahoma statute, was unknown to the common law, yet

> "It is a creature of the machine age, in which plants have displaced tools and businesses are substituted for trades. The purpose of requir-

[7] 285 U. S. 262, 76 L. ed. 747 (1932).

ing it is to promote the public interest by preventing waste. Particularly in those businesses in which interest and depreciation charges on plant constitute a large element in the cost of production, experience has taught that the financial burdens incident to unnecessary duplication of facilities are likely to bring high rates and poor service. There, cost is usually dependent, among other things, upon volume; and division of possible patronage among competing concerns may so raise the unit cost of operation as to make it impossible to provide adequate service at reasonable rates. The introduction in the United States of the certificate of public convenience and necessity marked the growing conviction that under certain circumstances free competition might be harmful to the community and that, when it was so, absolute freedom to enter the business of one's choice should be denied.

. . . .

"Of course, a legislature cannot by mere legislative fiat convert a business into a public utility. Producers Transp. Co. v. Railroad Commission, 251 U. S. 228, 230, 64 L. ed. 239, 241, P. U. R. 1920C, 574, 40 S. Ct. 131. But the conception of a public utility is not static. The welfare of the community may require that the business of supplying ice be made a public utility, as well as the business of supplying water or any other necessary commodity or service. If the business is, or can be made, a public utility, it must be possible to make the issue of a certificate a prerequisite to engaging in it."

He notes that the development of the manufactured ice industry in Oklahoma in recent years has been attended by "deep-seated alterations in the economic structure" and by "radical changes in habits of popular thought and living," and that ice has come to be regarded as a "household necessity indispensable to the preservation of food" and to the "economical household management and the maintenance of health," and that, therefore, "We cannot say that the legislature of Oklahoma acted arbitrarily in declaring that ice is an article of primary necessity, in industry and agriculture as well as in the household, partaking of the fundamental character of electricity, gas, water, transportation and communication." He notes that "unbridled competition" is thought by some to be responsible for the "emergency more serious than war" now confronting the country, and that in view of this emergency, it is of doubtful wisdom to permit men to add to the facilities of an industry already suffering from over capacity. He concludes:

"I cannot believe that the framers of the 14th Amendment, or the States which ratified it, intended to deprive us of the power to correct the evils of technological unemployment and excess productive capacity which have attended progress in the useful arts."

Thus, whether a state may grant or withhold a license to sell ice may not be answered categorically by abstract legal principles, but by the conception of what is affected with a "public interest" and, as Mr. Justice Brandeis observes, this conception is not "static," but varies with the shifting social and economic needs and trends of the time and place. It is true that what constitutes a "public utility" is a question of fact, but in view of the widely differing views of the judges of the factors or elements which enter into a determination of this fact, it is, indeed, a hazardous venture to undertake to predict in this type of case, what the decision may be. If it be said that the law has not



changed (namely, that if a business is affected with a "public interest," it may always be regulated), it must, nevertheless, be admitted that the factors which determine whether there is such an interest constantly vary and may lead to opposite results in similar cases by the same court, with the legal concept governing the decision, however, remaining always fixed. Mr. Justice Holmes, dissenting in *Tyson & Bro.—United Theatre Ticket Officers v. Banton*,[7a] has this to say in regard to public opinion as justifying legislative restriction on business:

"The truth seems to me to be that, subject to compensation when compensation is due, the legislature may forbid or restrict any business when it has a sufficient force of public opinion behind it. Lotteries were thought useful adjuncts of the state a century or so ago; now they are believed to be immoral and they have been stopped. Wine has been thought good for men from the time of the Apostles until recent years. But when public opinion changed it did not need the 18th Amendment, notwithstanding the 14th, to enable a state to say that the business should end . . . . What has happened to lotteries and wine might happen to theaters in some moral storm of the future, not because theaters were devoted to a public use, but because people had come to think that way."

Again, what constitutes a "reasonable" or "arbitrary" classification for purposes of taxation involvs definities of what are "reasonable" and "arbitrary," and there is no rule of thumb by which they can be defined. It is like the question of negligence: there is no negligence in the absolute, in vacuum, it is always related to external circumstances. In determining whether a particular classification is "reasonable" and "arbitrary," judges necessarily draw from the deep wells of their own experiences, prejudices, predilections, and economic and social views. If it be argued that the legal concept remains fixed (namely, that if the classification is "reasonable" or "arbitrary," it is not a violation of the due process clause), it is, of course, a fact that different judges entertain different views as to what is "reasonable" or "arbitrary" and that different results may be expected in similar cases, as a new economics and new human wants appear and press for recognition and protection.[8]

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[7a]273 U. S. 418, 71 L. ed. 718 (1927).

[8]For learned discussions of this subject, see two articles by Professor Pendleton Howard of the College of Law, University of Idaho, *The Supreme Court and State Action Challenged Under the Fourteenth Amendment, 1930-1931*, 80 Pa. L. Rev. 483 (1932), and *ibid.*, vol. 81, p. 505 (1933). In the case of Baldwin v. Missouri, 281 U. S. 586, 74 L. ed. 1056 (1929), Mr. Justice Holmes, in his dissenting opinion says: "I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the 14th Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this court as for any reason undesirable. I cannot believe that the Amendment was intended to give us carte blanche to embody our economic or moral beliefs in its prohibitions. Yet I can think of no narrower reason that seems to me to justify the present and the earlier decisions to which I have referred. Of course the words 'due process of law' if taken in their literal meaning have no application to this case; and while it is too late to deny that they have been given a much more extended and artificial signification, still we ought to remember the great caution shown by the Constitution in limiting the power of the States, and should be slow to construe the clause in the 14th Amendment as committing to the Court, with no guide but the Court's own discretion, the validity of whatever laws the States may pass."

The lawyer now-a-days must endeavor to follow the swift evolution through which public opinion and other factors that enter into decisions are passing in order to be able to hazard an opinion to his client in all such cases as these.

Professor Williston clearly points out how the "gospel of freedom," which was "preached by both metaphysical and political philosophers" and economic writers during the latter half of the eighteenth century, and which was founded on "an immutable basis of moral right and natural law" that characterized that period, reflected a pronounced influence on the law of contracts, especially the law relating to the requisites for the formation and effective discharge of contracts, and to the freedom with which parties were allowed to contract, and how this law passed through changes with the reception of a new philosophy and a new economics.[9] As a result of this doctrine, the courts held to the theory of the necessity of a "meeting of minds" or mutual assent, rather than mutual expression or "appearance of assent" for the formation of a contract, and in order to reach results which they felt should be reached they imputed, in many cases, to the parties to the contract an "intention" that conformed to the results reached, as where on this fiction a mortgagor was relieved of the terms of his bargain in spite of his own agreement or mental assent. In recent years, however, with the change in philosophical and economic views, there is a reversion to the early law that the "appearance of assent," even when there is no actual assent, is sufficient for the formation of a contract.[10]

Again, the eighteenth and nineteenth century doctrine of freedom in individual action was reflected in decisions allowing freedom of the individual to contract without legislative or judicial interference. This view of the courts is excellently expressed by the Master of the Rolls in the case of *Printing and Numerical Registering Co. v. Sampson*[11]:

> "It must not be forgotten that you are not to extend arbitrarily these rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires, it is, that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore, you have this public policy to consider—that you must not lightly interfere with this freedom of contract. Now there is no doubt that public policy may say that a contract to commit a crime, or a contract to give a reward to another for committing a crime, is necessarily void. The decisions have gone further, and contracts to commit an immoral offence, or to give money or reward to another for committing an immoral offence, or to induce another to do something against the general rules of morality, though

[9] *Freedom of Contract*, 6 Cornell Law Quarterly 365 (1921). See, also, Pound, *Liberty of Contract*, 18 Yale L. Jnl. 454 (1909).

[10] However, as Professor Williston points out, the judges found it difficult to escape "the authority of previous decisions, and previous grounds of decision", and many cases even today give expression to the doctrine of mutual assent. "Moreover", he adds, "the fact that judges on whom the decisions of the Common Law and the construction of Statutes rest, are usually men past middle life, and therefore combine the natural conservatism of age with a knowledge of and faith in opinions current when they received their education, makes change slower in the law than in sciences the theory and practice of which are less strongly anchored to the past." Williston, op. cit., 369.

[11] 44 L. J., Ch. 705 (875). See Williston, op. cit., 373, for other citations.



> far more indefinite than the previous class, have always been held to be void. I should be sorry to extend it much further."

In 1887, Mr. Justice Andrews of the New Your Court of Appeals, said,

> "It is clear that public policy and the interests of society favor the utmost freedom of contract, within the law, and require that business transactions should not be trammeled by unnecessary restrictions."[12]

As late as 1905 the Supreme Court of the United States held in the case of *Lochner v. New York*[13] that an attempted statutory limitation of employment in bakeries to sixty hours a week and ten hours a day was an arbitrary interference with the freedom to contract guaranteed by the Fourteenth Amendment, and could not be sustained as a valid exercise of the police power to protect the public health, safety, morals, or general welfare. It should be noted, however, that strong dissenting opinions were written. Many such laws were consistently held invalid for years,[14] in fact, until the decision in the case of *Muller v. Oregon*,[15] decided in 1908, which held that rights guaranteed by the Fourteenth Amendment are not infringed by the limitation by an Oregon law of the hours of labor of women employed in laundries to ten hours daily.[16] Since this decision many laws limiting the freedom of contract have been held valid, such as those limiting hours of labor for women and children, the power of working women to contract for less than a minimum wage, those prohibiting employment by railroads and other concerns for more than a fixed number of hours, and those fixing the terms of contracts of insurance and carriage in interstate commerce.[17]

The Supreme Court of Illinois even went so far as to hold in 1931 in the case of *State Street Furniture Co. v. Armour Co.*[18] that an agreement between employer and employee that the latter could not make an assignment of his wages without the consent of the former was invalid, and that an assignee may sue the former on such an assignment. The court without the aid of a statute, thus, denied the right of freedom of contract in an ordinary commercial transaction. It did not base its decision on grounds of public policy, but on the ground that the contract in question denied the right of freedom of contract; but ironically enough, it denied this very freedom itself by denying freedom to enter into a contract not to assign wages.

It is, thus, evident that as a result of a new philosophy and a new economics, freedom of contract has been drastically limited during the last quarter of a century, and it seems safe to predict that we may witness still further limitation on this freedom in certain directions as the public weal or the individual welfare demands it—as new social and economic needs present themselves—and, to quote Professor Williston again, the extent to which this limitation should be permitted is "a question of degree to which not even an attempt at

[12] Diamond Match Co. v. Roeber, 106 N. Y. 473, 13 N. E. 419, 422. See, also, Nordenfelt v. The Maxim Nordenfelt Guns and Ammunition Co. [1894] A. C. 535, 553.

[13] 198 U. S. 45, 49 L. ed. 937.

[14] For numerous citations, see Williston, op. cit., 376.

[15] 208 U. S. 412, 52 L. ed. 551.

[16] It is interesting to note that Mr. Justice Brandeis, who is now one of the most liberal Judges of the Supreme Court, appeared as counsel for the defendant in error, arguing for the validity of the statute.

[17] For numerous citations to cases upholding the right of the States to limit freedom of contract, see Williston, op. cit., 377, 378.

[18] 345 Ill. 160, 177 N. E. 702.

an answer can be made without reference to time, place, and circumstance; and there is nothing in our Constitutions which should prevent reasonable experiment to aid in the decision . . . . Undoubtedly the burden rests on one who proposes a limitation to prove that it is needed or desirable, but no more can be said."[19]

There is a growing tendency in other cases to abandon "strict logic" in the interest of just results,[20] and in the administration of the criminal law, punishment is being adjust to the nature of the criminal rather than by a "crystalized . . . mechanical and mathematical retribution."[21]

These examples are only illustrative. Many more might be given, especially in the field of constitutional law, which show that we are entering an era in which the actual needs of society as interpreted by the courts will decide cases. No longer is a logical, well-arranged, perfected, and complete legal system standing alone, adequate for the proper adjustment of human affairs. The new conditions under which we are living today and the stress and strain of the circumstances of the period through which we are passing are, thus, making many inroads upon a "mechanical jurisprudence" that would solve all cases solely through fixed legal rules and logic. We are beginning to think less of legal "rights," and more of adjustments and social needs. As the scenes of our existence—national and international—shift into new light, we will, doubtless, come upon new enterprises and industries that will be found to be affected with a public interest, not hitherto dreamed of as belonging in this category, and upon new business situations that cannot be adjusted by "strict logic." Many new social, economic, and religious forces will fiercely compete with what we have come to think of as an established legal order. The results that follow will depend upon the exercise of sound judicial and legislative discretion with respect to practical methods, and not so much upon our past tendency to categorize and dogmatize.

It might be helpful to mention briefly in this connection some of the social, political, and economic factors that will, no doubt, determine the directions which the revisions of our legal system may take. It is believed that some of these factors are: 1. The new character of crime organization. 2. Defective administration of the law and uncertainty of results in litigation. 3. Government control of private enterprise. 4. The position of large corporations. 5. Unprecedented activities in the fields of invention and discovery. 6. The new internationalism. 7. Miscellaneous factors.

1. *The new character of crime organization.* Criminals have become so numerous and so highly organized and their activities so nation-wide in character that we can no longer content ourselves with the punishment of a few criminals. Mass education as a preventative of crime and the reconstruction of the consciousness of the criminal are coming to be seen as necessary aids in our efforts to rid the nation of the scourge with which it is now visited. No criminal is beyond repair, but so long as there is a criminal consciousness, that consciousness will manifest itself in violence and in crime. Crime-breeding centers must be wiped out, and the idle must be given employment. Betterment in prison conditions and more humane and considerate treatment of

[19]Williston, op. cit., 379.

[20]See, for example, RESTATEMENT OF THE LAW OF CONTRACTS by the American Law Institute, § 45, and the explanatory note at pp. 231-233 of the OFFICIAL DRAFT, No. 1.

[21]Pound, THE SCOPE AND PURPOSE OF SOCIOLOGICAL JURISPRUDENCE, 25 Harv. L. Rev. 144 (1911).



criminals are necessary. We must concern ourselves with a "theory of punishment as something to be adjusted not to the nature of the crime but to the nature of the criminal."[22] There may well be employed temporary shifts in our search for truth in the awful and delicate task of administering the criminal law, but one is intuitively convinced that there is yet to be applied a strictly scientific and humanitarian method of dealing with the criminal—a method aimed solely at his correction. It is gratifying to know that the element of revenge, which found its origin in antiquity, is rapidly giving place to the idea of healing the criminal as the sole motive. No doubt, the time is not far distant when our civilization will sanction no other motive. Reform in the substantive and adjective criminal law and closer co-operation between state and federal authorities are needed in order to insure swifter justice and to make for greater certainty in the apprehension of the criminal.[23]

2. *Defective administration of the law and uncertainty of results in litigation.* Our substantive law is, on the whole, satisfactory, but the righteous quarrel is with the spirit with which it is administered. The practice of law is in many instances anti-social. Dilatory tactics on the part of lawyers, resulting in harassing delays—in brief, efforts to defeat justice—made possible by needlessly technical rules of evidence and pleading, are the source of complaint on all sides. Possible loopholes and technicalities invite dishonesty in the practice of law, and have fostered the growth of lawlessness and frequently lead to the obstruction of justice. Insufficient pre-legal and legal training are required before admission to the bar in many instances.[24] This condition is diverting the streams of litigation into the channels of commercial arbitration. Bar associations, through discipline of unscrupulous practitioners, judicial councils, the American Law Institute, and law schools, through systematic research, are doing much to lead us out of this chaos; but if action in the future is not considerably swifter than in the past, we should not be surprised to witness in the not distant future a complete collapse of the jury system in certain types of cases, the abandonment of radical revision of many of our technical rules of evidence and pleading, or, as an alternative, an even more rapid multiplication of boards of conciliation or administrative tribunals, and the resultant loss by the lawyer of a large part of his practice. Even now laymen may appear before justice and municipal courts, the Board of Tax Appeals, and many commissions, such as the Interstate Commerce Commission and industrial accident commissions,[25] and tax cases are passing into the hands of accountants. Mr. Robert H. Jackson of the Jamestown, New York, Bar recently warned:

> "Abuses in the personal injury practice have reached such magnitude that highly influential and responsible sources within the profession propose to remove the whole matter from the courts, to make automobile liability insurance compulsory, and to condition all insurance to

[22]*Ibid.*

[23]That new forms of criminal organizations may be effectively wiped out by needed changes in the law is strikingly illustrated by the extermination in England and the United States of illicit rum running from sea by the evolution of the "hovering laws," see MASTERSON, JURISDICTION IN MARGINAL SEAS WITH SPECIAL REFERENCE TO SMUGGLING (1929), 1-164, 175-254, 326-375.

[24]For a learned discussion of this question by Dean Morse of the Oregon Law School, see 11 Or. L. Rev. 39, 46 (1931). He points out the dangers of allowing this training in law offices and non-standard law schools as substitutes for training in standard or accredited schools.

[25]See Eagle Indemnity Co. v. Industrial Accident Commission of Calif., 85 Cal. Dec. 95, 18 Pac. (2d) 341 (1933), for example.

> provide for settlements by award of an administrative tribunal such as the workmen's compensation boards. This would largely dispense with the lawyer, and while it would seriously impair the sources of income of great numbers of attorneys, it seems likely to come about in some form if present abuses and uncertainties can not otherwise be overcome. The wide range of possible legal results from each simple accident exerts a most corrupting influence upon the legal profession. Its temptation must be met by greater resistance from the lawyers, or society will act to remove the temptation."[26]

3. *Government control of private enterprise.* National and state governments are more and more concerning themselves with the dangers that are arising from the diversion of the nation's wealth from public use and employment into private hands for selfish ends, with the wasting of our national resources, and with the alarming and ever-mounting unemployment. A new legislative program and a new case law that will adjust the laws to the new facts of our existence, no doubt, lie ahead of us. A new chart is the promise of the new national administration. The direction in which it will lead us is an interesting speculation. Already the Supreme Court of the United States has held constitutional a California statute declaring that an "unreasonable waste of natural gas" is "opposed to the public interest and is hereby prohibited and declared to be unlawful" and that it may, therefore, be enjoined,[27] and that a municipal ordinance classifying "driverless automobiles for hire" as public vehicles, and requiring persons engaged in the business of leasing such automobiles to deposit with the city treasurer insurance policies or bonds in specified sums for the protection of persons injured or whose property may be damaged as the result of a lessee's negligent operation of the vehicle, is not repugnant to the due process and equal protection clauses of the Fourteenth Amendment.[28] The Supreme Court at Washington is constantly being called upon to exereise its broad powers of censorship over state action controlling private enterprise, sueh as legislation regulating the hours of labor, wages to be paid certain classes of workers, rentals to be charged by landlords, the maintenance of flour mills and elevators, the establishment of standard weights for bread, taxing chain stores, prescribing building zones, requiring the sterilization of human beings, and so on.[29]

Is it reasonable to expect government control of commodity prices, directly or indirectly, of supply, demand, and distribution, of the debtor-creditor relationsbip, and of employment? Has the government entered the field of charity relief to stay, or will its sole aim be to prevent the reoccurrence of the conditions which have made the transference of this relief to it an unfortunate necessity?

4. *The position of large corporations.* The huge corporations spreading their activities aeross the continent and eommanding undreamed of power and eontrol over private property may be said to oecupy a quasi-public position. Professors Berle and Means of Columbia recently observed in a remarkable

[26]15 Cornell Law Quarterly, 194-195 (1930).

[27]Bandini Petroleum Co. v. Superior Court of Calif., 284 U. S. 8, 76 L. ed. 136 (1931).

[28]Hodge Drive-It-Yourself Co. v. City of Cinn., 284 U. S. 335, 76 L. ed. 323 (1931).

[29]For eitations to many such decisions, see Howard, *The Supreme Court and State Action Challenged Under the Fourteenth Amendment, 1931-1932,* 81 Pa. L. Rev. 505 (1933), and Williston, op. cit., 377-378.



book[30] that the corporation of today is more than a device for the conduct of private business, but that it has become an economic and social institution. Through this institution, economic power is being concentrated in the hands of a few corporate managers, with the result that there is a divergence of ownership and eontrol. "The eoncentration of economic power separate from ownership has, in fact, created economic empires, and has delivered these empires into the hands of a new form of absolutism, relegating 'owners' to the position of those who supply the means whereby the new princes may exercise their power."[31] Under this new regime, the old conception of property has changed. Will this new position of the corporation mean that the corporation must serve not only the owners or the control, but our entire society? Since the corporation has taken on a public aspect, it has been suggested that "society as a whole may insist upon fair wage scale, security to employees, reasonable service to the public, and stabilization of bussiness."[32] Professors Berle and Means venture this prediction: "It is conceivable,—indeed it seems almost essential if the corporate system is to survive,—that the 'control' of the great corporations should develop into a purely neutral technocracy, balancing a variety of claims by various groups in the eommunity and assigning to each a portion of the income stream on the basis of public policy rather than private cupidity."[33] What may we expect from the "New Deal" as a result of this development?

5. *Unprecedented activities in the fields of invention and discovery.* Invention and discovery are rapidly making over our mode of living in almost every department of life. New methods of transportation and communication will require new forms of control and new means of exercising this control. Administrative tribunals will increase—are increasing—in number, and the extent of their jurisdiction broadened. The machine age is compelling a radical readjustment of the relations between capital and labor. Furthermore, as these new inventions and discoveries multiply, and as the large centers become more crowded,[34] we may witness new laws designed to bring new living conditions under more complete control, and new court decisions, if not legislation, that will work changes in our tort law, sueh as a still further extension of the doctrines of liability without fault[35] in order to distribute the losses that arise as a result of a new and more complex civilization.

6. *The new internationalism.* In the field of international relations and international law, the rigid nationalism, the ruthless rivalry and extension of national power of a former century are collopsing before the pressing demands for peace and international co-operation. The international order or society as known to the last generation no longer exists. The eighteenth century eoncepts of sovereignty have faded out. Aliens are receiving fairer treatment, seeret treaties are largely prohibited, weaker peoples are being supported and

[30]THE MODERN CORPORATION AND PRIVATE PROPERTY (1933) c. 1.

[31]*Ibid.,* 124.

[32]Hopkins in a review of Professors' Berle and Means book in 3 Idaho L. Jnl. 269 (1933).

[33]Berle and Means, op. eit., 356.

[34]More than one-half of our population now lives within daily access to cities of one hundred thousand or more; and the tendency to gather in metropolitan areas is increasing.

[35]Rylands v. Fletcher, Law Reports, 3 House of Lords, 330 (1868).

protected through the Mandates System, labor conditions throughout the world are being ameliorated through the activities of the International Labor Organization, cartels covering certain commodities in several countries are governing supply and demand, treaties are multiplying by the thousands, international economic and disarmament conferences are in session, and nations are carrying their differences to international commissions, the Permanent Court of Arbitration, or to the Permanent Court of International Justice. Alongside what is frequently spoken of as customary international law, there is growing up a large body of international legislation (regulation by treaty) and case law. In brief, we are passing out of an age of racial pride and prejudice, of selfish isolation and self-sufficiency into one of economic interdependence and friendly co-operation. This new ideology in our international relations reflects itself in a new nationalism.

7. *Miscellaneous factors.* We should not be surprised if the rising tide of divorce and the collapse of the orthodox variety of religion before a new religious idealism will result in changes in our family law. Wholesale failures of banks and insurance companies, the scandals now being uncovered in banking practice, and the crash of the exchanges of 1929 point inevitably to reforms in banking and insurance laws and laws regulating the issuance of corporate securities and penalizing fraudulent inflation of values. The distressing conditions of the debtor class will bring some form of emergency relief, and recent disclosures of evasions of tax laws will require reforms in those laws.

For this summary of the foregoing factors, I have drawn heavily from the Report of President Hoover's Research Committee on Social Trends. This report is, indeed, illuminating as indicating possible directions which the revision of our legal system may well take.[36] Some of these factors will result in new legislation (some of which is now under consideration), while some of them may require new case law such as we are already witnessing or changes in existing case law to meet the new conditions under which we are living. The work of bringing the law and its satisfactory administration into line with the conditions of the new social and economic era which we are entering is, in large part, the work of our profession. We are alert to this responsibility, and we cheerfully assume it.

I have passed over ordinary professional activities, such as the work of the Johns Hopkins Institute for the Study of Law, the American Law Institute, and that of our local and national bar organizations and associations and of the judicial councils, which I assume we all follow somewhat. I have confined myself largely to a discussion of our need of studying our law and procedure in the light of rapidly changing political, social, and economic needs; for from this study only may we learn how the law is functioning in our midst —whether it is satisfying those needs—and what innovations are incluctable. We must test our laws by their workableness in this new order and set ourselves the task of seeing that they become "means towards social ends" of the day. The lawyer owes this duty to his client; the teacher of law to future generations of lawyers; while both owe it to society in general. In the performance of this task, we are already learning to lose self in service, and to recognize that in all honest human endeavor and behavior there is an inescapable certainty of unity governed by a universal principal. We may not be able to predict just where our labors will lead us from day to day; a great deal of experimentation may be necessary; but we can toil with whatever of courage and wisdom and vision we have, and patiently await the certainty of a satisfactory outcome.

[36]Dean Bates aptly says of the Report referred to: "To lawyers and legal scholars, the picture presented by this study of our social life offers both opportunity and challenge. The absolutely essential task of bringing about better correlation between government, industry, business, and agriculture should be in large part the work of the lawyer and legal scholar." 31 Mich. L. Rev. 654 (1933).

# THE REMONETIZATION OF SILVER*

CHARLES W. BEALE

From a time long antedating the Christian era silver has been used as money.

More than eighteen hundred years before Christ, Abraham purchased from Ephron the burying place for his dead wife Sarah for which he paid four hundred shekels of silver, "current money with the merchant."

Prior to putting in operation the government ordained and established by the Federal Constitution the silver dollar was a standard unit of value in the United States. From 1792 to 1873, a period of eighty-one years, there existed in this country the double metallic standard, during much of that time at the ratio of sixteen parts of fine silver to one part of fine gold. Today more than one-half of the inhabitants of the globe use silver as money.

Supported by that monetary record, extending from antiquity to the present time, the advocates of bimetallism are justified in urging Congress to remonetize silver at a fixed ratio with gold without waiting similar action by any foreign country or government.

Recent legislation for the expansion of credit, which is not available to the unemployed, to bankrupt farmers and failing merchants, who have no collateral upon which to secure loans, should be supplemented by legislation authorizing the conversion of nature's silver deposits into a circulating medium to be used in payment for services, farm produce and factory products, thereby changing the status of many in this country from abject recipients of charity and from discouraged, rejected applicants for credit into independent, prosperous citizens.

Credit is not money. Credit creates debts. The American people need more silver dollars and not more debts.

Naturally, National and Federal Reserve bankers are opposed to the remonetization of silver as they will not be in a position to control its coinage and circulation. They have so long dictated the amount of currency to be issued, to whom it shall be loaned and the rate of interest to be paid for its use, they will not be willing to have their monetary control weakened by silver legislation.

Experimental legislation based upon the creation of more debts has not furnished general relief or decreased the ranks of the unemployed. The time is opportune for action by the Government of the United States.

The primary cause of the business depression and unemployment in the United States is an insufficient supply of money. The undeniable facts disprove the claim, regardless from what source it comes or by whom made, that the existing supply of monetary gold is sufficient for the requirements and necessities of the people of the world. If that supply were sufficient, why have England, and European and Oriental countries, and our own government suspended payments in gold? Why have South American Republics defaulted the interest on their gold bonds? Why have more than ninety per cent of the people on earth abandoned the gold standard? And why curtailed operations, decreased railroad traffic and earnings, passed dividends, bankrupt farmers and millions of unemployed in the United States?

*Address delivered before the annual meeting of the Northern Division, Idaho State Bar, Moscow, Idaho, June 10, 1933.





The gold dollar of today that is worth three dollars that were borrowed three years ago is not a fair or honest dollar and is not sufficient to restore prosperity in this country or throughout the world.

A discussion of remonetization of silver calls for an answer to the question: What is money?

Money is the creature of law. That substance which by virtue of an act of Congress exists as money today, tomorrow by an act of Congress may be demonetized.

The term "legal tender" has a double meaning and a twofold application: it is a quality given by law to a material thing that changes it into a medium of exchange for the payment of specified debts. It is a legalized substance that a debtor can require his creditor to accept in payment of a debt that is due and owing.

The quality, legal tender, can by Congress be given to all lawful money, but Congress has not made all lawful money legal tender. Gold coins of the United States are legal tender in all payments at their nominal value when not below the standard weight and limit of tolerance provided by law, and, when reduced in weight below such standard and tolerance, are legal tender at valuation in proportion to their actual weight. Standard Silver Dollars are legal tender at their nominal value for all debts and dues public and private, except where otherwise expressly stipulated in the contract. United States Notes are legal tender in payment of all debts, public and private, except duties on imports and interest on the public debt.

Federal Reserve Notes are obligations of the United States and shall be receivable by the National and Member Banks and Federal Reserve Banks, and for all taxes, customs and other public dues; but they are not legal tender.

National Bank Notes while not legal tender shall be received at par in all parts of the United States in payment of taxes, excises, public lands, and all other dues to the United States, except duties on imports; and also for all salaries and other debts and payments owing by the United States to individuals, corporations and associations within the United States, except interest on the public debt.

Gold Certificates of the United States are legal tender in payment of all debts and dues, public and private. While Silver Certificates shall be received for customs, taxes, and all public dues, they are not legal tender.

Thus it will be seen that while all of the above different kinds of money are lawful money they are not all legal tender. However, all those varieties of money circulate and are received at their nominal value.

While the Act of Congress dated March 14, 1900, makes 25.8 grains of gold 0.900 fine the standard unit of value, there are in the United States eleven different kinds of lawful money; part legal tender and part not legal tender. They are:

Gold Coins.
Gold Certificates.
Standard Silver Dollars.
Silver Certificates.
Subsidiary Silver Coins.
Minor Coins: (Five Cent Pieces and One Cent Pieces.)
United States Notes.
Treasury Notes of 1890.
Federal Reserve Notes.

Federal Reserve Bank Notes.

National Bank Notes.

By Act of Congress it is made the duty of the Secretary of the United States Treasury to maintain all forms of money issued or coined by the United States at a parity of value with the gold dollar.

Thus it appears, by law a gold and a silver standard unit of value can be maintained at a parity.

(Since the delivery of this address and on June 5, 1933, it was Resolved by the Senate and House of Representatives of the United States of America in Congress assembled:

> "All coins and curreneies of the United States (including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations) heretofore or hereafter coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues, except that gold coins, when below the standard weight and limit of tolerance provided by law for the single piece, shall be legal tender only at valuation in proportion to their actual weight.")

Governments cannot function, business cannot be transacted and mankind cannot exist in a civilized state without money. Business is based on money. The volume of money fixes the prices of commodities and the wages of workers. Decreasing the volume of money decreases the prices of commodities and the wages of workers.

Increased prices and wages result in increased production and employment. Decreased prices and wages result in decreased production and unemployment.

The employed consume the produce of the farm and the products of the factory and create prosperity.. Unemployment causes business depression, poverty and suffering.

Decreased priees force the debtor to pay his debt in dollars of increased purchasing power over the dollars borrowed—to the gain of the ereditor and the loss of the debtor. For example: A farmer, having contracted a debt payable on a gold basis when his wheat sold for one dollar a bushel, must expend three times as much effort and market three times as much produce to obtain the dollars with which to pay his debt when his wheat sells for only one-third of a dollar a bushel.

When England was the creditor nation of the world her efforts to demonetize silver were prompted by the desire to limit the standard unit of value to gold and thereby give the dollars paid to her by her debtors an increased purchasing value over the dollars she had loaned to them.

Notwithstanding the United States is now the creditor uation and the citizens of the United States are the holders of a vast amount of foreign bonds payable in gold, the same argument for the maintenance of the single gold standard does not apply. England's debtors were able to pay. Now the monetary gold in the world is not sufficient even to pay those gold bonds and to discharge the debts of foreign countries owed to our country.

Under the normal conditions that prevailed when England was the creditor nation, the increased purehasing power of the gold dollar enriched the English creditors. But at present conditions are so abnormal, depression and unemployment are so general and the paying power of the debtor has been so lessened, that bankers and those holding contracts payable in gold are simply destroying



their ability to collect from their debtors by continuing to press for the maintenance of the single gold standard. Their debtors have not the gold with which to pay.

Would it not be to the advantage of the Government and individual creditors if the per capita circulation of money were increased by the remonetization of silver which would enable the debtors to discharge their debts both to the Government and to the citizens of this nation?

It is not prophecy to assert that the facts justify the belief if some monetary relief is not afforded the people their resentment will find expression in a growing disposition toward general repudiation. Can the creditors afford, by their selfish desire to get dollars from their debtors that will purchase more than the dollars they loaned them, to encourage such repudiation?

Conditions were never more favorable for remonetization since 1873 than they are now and the demand for it has never been as great since silver was demonetized as it is at the present time.

Notwithstanding approximately $4,311,000,000 of the monetary gold in the world are in the United States, they are not furnishing employment to the unemployed or relieving the business depression, and if all of the silver bullion in existence were coined into silver dollars at the ratio to gold of sixteen to one there would not be more money, both silver and gold, than needed to meet the necessary demands for money, and such coinage would not inflate priees of produce, products and commodities higher than required to restore prosperity, nor would it increase the purchasing power of the dollar to be paid by the debtor over the purchasing power of the dollar when borrowed.

Certain economists and financiers have contended that a fixed ratio of bimetallism is impracticable, that a change in the ratio of production of silver and gold would result in a change in their commercial values and the cheaper metal would displace the dearer one.

Such contention is based upon imagination and speculation and is not supported by the history of bimetallism in the United States from 1792 to 1873. On the contrary the commercial values of silver and gold during that period did not differ appreciably from their values as money fixed by law.

Relief such as the remonetization of silver would afford the American people calls for immediate and independent action by the Congress of the United States. Such remonetization would bring speedy relief to American farmers by restoring markets for and increasing the prices of their produce, thereby furnishing them with the necessary money to prevent forced sales and confiscation of their property and to increase their purehasing power.

Marked changes in events and the agitation for cancellation of the war debts have strengthened the doubt in the minds of many as to the benefits that may result from the international economic conference to convene in London five days hence. If the purposes of debtor nations are to avoid their money obligations to the United States and to increase their exportations into this country at the eost of American labor and industry it were better that our government be not represented at such conference and that Congress delay not longer in the restoration of silver as money that will enable our people to expand their export trade.

For commercial purposes Mexieo, South American Republics and Oriental countries being on a silver basis and England by reason of her depreciated pound sterling trading with them or prepared to trade with them largely to the exclusion of the United States, has not the time arrived for Congress to re-

monetize silver and thereby enable the citizens of this nation to improve their commercial relations with silver-using people?

The ratio of sixteen parts of silver to one part of fine gold is fair and justified by the production of silver and gold for centuries past at the ratio of not to exceed fourteen and one-half to one.

The advantages in the use of silver and gold as money are found in their intrinsic value, their scarcity, their indestructibility, and their resistance to rust and decomposition. Such advantages have been recognized for centuries.

Confronted with a scarcity of monetary gold, and the annual production of gold decreasing, it is inconceivable upon what facts or theory the friends of gold and the enemies of silver contend for the maintenance of the single gold standard. The voice of the unemployed and that of those engaged in failing and unprofitable enterprises cry out against such contention.

Universal depression and unemployment in the United States no longer present a mere economic problem, they involve our social and political lives and relations.

Silver was the standard unit of value in America before gold. Prior to the organization of our Government and as early as 1786 the Continental Congress adopted as a monetary unit the dollar containing 375.64 grains of pure silver. Thereafter and until 1873 the silver dollar continued to be a standard unit of value in our country without limitation as to amount coined. At the present time in the United States standard silver dollars to the extent of more than half a billion dollars are legal tender at their nominal value in payment of all public and private debts, when not otherwise stipulated, and cannot be redeemed.

Bimetallism, like Banquo's ghost, "will not down." National and world conditions are forcing it to the front. If its friends do not despair, but continue the conflict inspired by the hope that is in them, silver will again become the money of the people, and speedily following its rehabilitation as money there should be universal prosperity and happiness.

The existing accumulations and the annual production of silver are not sufficient to cheapen its exchange value as money.

A great benefit to the people in the use of silver as money will result from the large number of workers who will be engaged in the mining, milling, transporting, smelting and refining of silver in the course of its progress from the mine to the mint. Such employees do not include the additional large number of those who will be gainfully occupied in furnishing them with supplies and equipment.

Furthermore, silver money coined from silver bullion would immediately pass into circulation and would not have to be accounted for as loans. It would belong to the employees and others who had received it in exchange for their services and commodities and would again and again be passed on to others in exchange for their services and commodities.

Instead of being hoarded in government and bank vaults, it would furnish the means for the purchase of produce and commodities, reduce the ranks of the unemployed and restore general prosperity.

Nor would the silver hoardings of the Indians and Chinese flood the mints of the world. Such accumulations constitute property of the natives of India and China acquired under custom and practice that have prevailed among the people of those countries for centuries. They did not dispose of their silver holdings during the war when silver sold as high as $1.08½ an ounce, nor after the war when it sold as high as $1.37½ an ounce and as low as 25¾ cents an ounce.



The habits of the people of the Orient continuing through generations would not be changed by the remonetization of silver by the governments of the Western people.

The chief causes for the reduction of the price of silver are:

(a) The debasing by the English, French, Belgians and Germans of their silver coins and the sale of the silver bullion resulting therefrom.

(b) The sale by the Indian Government of silver to maintain the gold standard forced upon it by England.

There has never been a surplus of silver for monetary or any other use, and the claim that its restoration as money would result in the disturbance of business and the destruction of our monetary system is wholly without justification and is propaganda of the selfish, small minority who profit and hope to profit by the continuance of the single gold standard.

Within the last three years there has been an over-supply of silver on the markets of the world by the sale of silver bullion, resulting from the debasement of coins, and the sale by the Government of India of its silver bullion.

The price even of a commodity cannot be maintained when such commodity is diverted from its normal channels of distribution and uses and is pumped on the market.

Notwithstanding, by act of Congress, the gold dollar consisting of 25.8 grains of gold 0.900 fine, has been made the standard unit of value, and that annual production of gold is about 20,000,000 ounces, about one half of which is coined into money and the other half is consumed in the arts, in the event that gold should be demonetized and diverted from its use as money, it is not to be doubted that its selling price would be cut at least in half and would be fixed by its demand for use in the arts.

More than one half of the people of the world use silver as their medium of exchange. The price of silver has been cut in half and the purchasing power of such silver-using people thereby reduced fifty per cent. Results: American exports to those people decreased, American production suspended, American unemployment increased, produce of American farms unmarketed, American factories and mines closed, and shipments and earnings of American railroads diminished. Thereby the operations of the American farm, factory, forest, mine and railroad have been so seriously affected as to result in idleness, suffering and distress.

In answer to the contention that the depressed condition of our commerce is due to other causes, such as civil war in China, political unrest in India and boycotts of foreign goods, rather than the decline in the price of silver, there is submitted the following conclusions of the Subcommittee of the Foreign Relations Committee found in its report, upon which report the United States Senate, by unanimous resolution, requested the President to call an international conference for the consideration of silver as money:

> "The chief cause for the abnormal and sudden decrease in our commerce with China during the latter part of 1929 and 1930 was the sudden, great, and unprecedented fall in the price of silver. Silver is the only money in China, and it is the sole measure of the wealth and purchasing power of its people. From July, 1929, to date the price of silver dropped one-half."

"In the opinion of the subcommittee, therefore, the great sudden decline in our trade with China is due primarily to the extraordinarily depressed price of silver."

"The same cause is equally applicable to our depressed commerce with other silver-using countries that have been designated in this report."

The silver-using countries designated in that report are: China, Mexico, Central America, South America, India and Asia.

There is submitted in further refutation of such contention the conclusions of the British Economic Mission to the Far East, appointed by the Secretary of State for Foreign Affairs and the President of the Board of Trade, found in its published report as follows:

"302. The continued depression of the value of silver has enormously reduced the purchasing power of China, and if it continues will hasten the growth of industries in China, the manufactures of which will compete with imported products from Great Britain. Reduction in the value of silver also increases the difficulties of China in meeting interest on foreign loans, and so compels her to raise further revenue by increasing import duties. If the depreciation of silver were to affect the foreign loan service, much damage would be inflicted on British interests."

The conclusions of those two duly appointed investigating bodies, based upon incontestable facts, assembled after months of intensive investigation, are not answered by unsupported denials appearing in any circular letter issued by any national or international bank, or by any statement, appearing in such letter, that the restoring of silver as money, for which there is a world-wide demand, would benefit only the silver producers.

It would seem to be indisputable that the cutting in half of the price of silver, which reduced the purchasing power of the silver-using people 50%, resulting during the year 1930 in a decrease of American exports to China of 27%, to India of 19%, to Mexico of 13% and to South America of 37%, did seriously affect the business and incomes of the exporters, the farmers, the manufacturers and the railroads of the United States.

The commerce of this country will be lessened, if not permanently ruined, by our continuance of the single gold standard.

Those in authority in Great Britain have concluded and are negotiating special export and import treaties and agreements with silver-using countries to the loss and exclusion of the American people. Without trade relations the silver-using peoples will be forced to build factories for the production of the commodities they have been accustomed to import from this country and elsewhere. fn either event the people of the United States will suffer.

Too much business has to be conducted on credit. Why? Because the total amount of money is not sufficient to meet the every day demands of business and commerce. In other words, vastly more credit is loaned on which interest is paid than money on which interest is paid.

In addition to loaning their money on interest the bankers of this country are doing business and profiting by loaning the credit of their depositors upon which loans they are also receiving interest. The loans of deposits are many times more than the loans of the money of the banks, and unusual demands of depositors cannot be met, hence disastrous failures.



Upon an examination of the report of the Comptroller of the Currency of the date of December 7, 1931, it will be found that on June 30, 1931, the 22,071 reporting banks in the United States had issued deposit receipts to their depositors in the aggregate sum of $53,036,000,000 and that the cash in the vaults of those banks on that day amounted to $884,327,000, or less than one and three-fourths cents in cash in those banks with which to pay each dollar of indebtedness to their depositors. That appalling and intolerable situation is a complete refutation of the claim that the supply of money in the United States is sufficient for the business requirements and necessities of the people of this country.

There cannot be a surplus of money until the amount of money in circulation exceeds the money requirements of the business of the people. The impossibility of the remonetization of silver creating a surplus of money in this nation is established beyond controversy by the facts that the business of the American people demanded borrowing to the extent of $200,000,000,000, and that there is not in existence in our country a greater amount of money than that necessary to pay one year's interest on that vast indebtedness.

Our national wealth having been reduced from $488,700,000,000 in 1920 to $247,000,000,000, a sum only $47,000,000,000 in excess of our indebtedness, further emphasizes the necessity for an increase in our money supply. The statement that the supporters of silver remonetization are repudiators and the charge that they advocate the coinage of debased money and favor the payment of debts in 50-cent dollars are groundless and false. The proponents of silver would not like to have their debts paid in debased money or 50-cent dollars. Nor do they wish the debtors in this country to be longer forced to pay their creditors in dollars of increased purchasing power over the dollars borrowed, to the unconscionable enrichment of those creditors, or to be longer required to expend two or three times more effort and to market two or three times more produce to obtain the dollars with which to pay their debts than would have been required of them at the time of contracting those debts.

Silver money is not debased money any more than gold money is debased money. Silver dollars are not 50-cent dollars any more than gold dollars are 50-cent dollars. Had gold been demonetized and thereby its consumption limited to use in the arts, the 23.22 grains of fine gold in the gold dollar, which circulate as a dollar, would not have been worth 50 cents. Those grains of gold pass as a dollar by reason of an act of Congress and not because they would have a commercial value of a dollar in the event of the demonetization of gold.

It is just as legal, fair, and honest to make 412.5 grains of silver 0.900 fine a dollar as it is to make 25.8 grains of gold 0.900 fine a dollar. And based upon the commercial valne of demonetized gold and the commercial value of demonetized silver the remonetized gold dollar would not have a greater intrinsic value than the remonetized silver dollar.

In the event of the remonetization of silver, by law the silver and gold standard units of value would be maintained at a parity, and thereby the commercial values of silver and gold would be held at the same ratio as that provided by the act of Congress remonetizing silver.

There is nothing in the economic history of this country to support the claim that the inflation of our currency by remonetization of silver would cause gold to take its flight to foreign countries, or throw us off the gold basis, or involve the scramble for gold to pay maturing obligations. In fact gold cannot be ship-

ped out of this country, the Government has suspended gold payments, and it is unlawful to possess more than $100 in gold.

Nor is there any merit in the repeated statement that the American people should uot again adopt bimetallism on account of existing contracts payable in gold. After they had returned to the double standard there would be just as much gold in this country for the payment of gold contracts as before, and the debtors' ability to pay his contracts would be greatly increased by such restoration.

The practice in this country of inserting the gold clause into contracts is a mere formality and payments of such contracts are not made in gold. Their payment in gold could not be enforced for the simple reason there is not sufficient gold to pay them.

Do you know of an instance in the last 20 years in which a note or mortgage payable in gold was actually paid with gold, or in which a decree of foreclosure on a mortgage payable in gold was discharged with gold, or in which an individual paid gold for a bond issued by our Government or by any foreign country, or in which a banker paid a depositor's check with gold? Even the interest on a registered United States gold bond is not paid with gold but by a check drawn on the United States Treasury. (Since the delivery of this address and on June 5, 1933, Congress by Joint Resolution declared the gold clause to be against public policy and that every obligation, heretofore or hereafter incurred, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts.)

In her deposits of silver nature has provided ample wealth for the restoration of values, the return of prosperity, and relief from human hunger and distress.

The people should not be denied the advantages of the remonetization of silver simply because the use of that metal as a circulating medium of exchange will tend to increase the price which the silver mine owners will receive for it, since the prosperity that may come to the producers of silver by its free coinage into money, will be accompanied by the prosperity that such free coinage will bring to the workers, the producers and the owners of property not connected with the silver mining industry.

The two permanent cures for our sick and moribund business condition that will be effected by the remonetization of silver are the employment of unemployed and the advancement in price of commodities. Such remedies as debt moratoria, bank loans, which create debts, and coordinating charities are merely palliative and do not eliminate the causes of our business illness.

Independence as understood by American citizens includes individual, political, religious, social and financial independence. To them charity is offensive. They ask, and are entitled to ask, an opportunity to work at remunerative wages that will maintain them and their families.

Remonetization of silver in the United States will result in employment of the unemployed, consumption of commodities, advancement of the prices of produce and products, revivification of business and the return of prosperity.

Our country being the second largest producer of silver in the world, self interest demands that the American people return to bimetallism—to the use of silver as money such as existed in the United States for eighty-seven years.

If Congress remonetized silver, within one year thereafter that metal would be restored as money by the other nations of the earth, and foreign silver would



not be forced upon the mints of the United States since the business of over ninety per cent of the people of the world is not transacted solely on a gold basis and they need their silver for money. However, the importation of silver could be forestalled by the elimination for minting purposes of the silver of other countries.

The suggestion that the United States should defer action until England or France or any other nation has approved is not worthy of consideration. Why should those in authority at Washington take advice from those in authority in any foreign country as to what should be the monetary policy of the United States? Our Government is sufficiently resourceful, influential and powerful to remonetize silver.

Should the remonetization of silver not furnish a sufficient supply of money to meet the business requirements and necessities of the people it could be supplemented by the issuance of United States legal tender notes. The history of the United States supports the assertion that without the issue of greenbacks by Congress neither the Revolutionary War nor the Civil War would have been won.

In the "Legal Tender Cases" the Supreme Court of the United States upheld the constitutionality of the Acts of Congress during 1862 and 1863 authorizing the issue of United States Notes (Greenbacks) and giving them the legal tender quality. The Supreme Court affirmed the ruling of the lower court that there was no difference in value between the gold and silver coins and the notes of the United States. Mr. Justice Strong, who wrote the opinion in the "Legal Tender Cases", in emphasizing the importance of the issue of "greenbacks" said:

> "Something revived the drooping faith of the people; something brought immediately to the government's aid the resources of the nation, and something enabled the successful prosecution of the war, and the preservation of the national life. What was it, if not the legal tender enactments?"

In referring to the issne of paper money during the Revolutionary War Mr. Justice Bradley in his concurring opinion used this emphatic language:

> "At the breaking out of the war, the Continental Congress commenced the issue of bills of credit, and the war was carried on without other resources for three or four years. It may be said with truth, that we owe our national independence to the use of this fiscal agency."

Even the French assignats, so often referred to in connection with inflation of currency, served a useful purpose as will appear from the following language of Justice Bradley:

> "It is unnecessary to refer to other examples. France is a notable one. Her assignats, issued at the commencement and during the Revolution, performed the same office as our Continental bills; and enabled the nation to gather up its latent strength and call out its energies."

It was only after the unlimited issuance of the assignats that they depreciated in value. Such a degree of inflation is impossible under our Government.

Passing to the issue of legal tender notes during the Civil War, Justice Bradley said:

"The coinage of money and regulation of its value is conferred upon the general government exclusively. That government has also the power to issue bills."

As to the Act making such bills legal tender he said:

"It might subserve the present good if we should declare the legal tender act unconstitutional, and a temporary public satisfaction might be the result. But what a miserable consideration would that be for a permanent loss of one of the just and necessary powers of the government; a power which, had Congress failed to exercise it when it did, we might have had no court here today to consider the question, nor a government or a country to make it important to do so."

As to the power and duty of our Government he further said:

"It cannot force its citizens to take its bonds. It must be able to lay its hands on the currency—that great instrument of exchange by which the people transact all their own affairs with each other; that thing which they must have, and which lies at the foundation of all industrial effort and all business in the community." . . . .

"The heart of the nation must not be crushed out. The people must be aided to pay their debts and meet their obligations. The debtor interest of the country represents its bone and sinew, and must be encouraged to pursue its avocations. If relief were not afforded universal bankruptcy would ensue, and industry would be stopped, and government would be paralyzed in the paralysis of the people. It is an undoubted fact that during the late Civil War, the activity of the workshops and factories, mines and machinery, shipyards, railroads and canals of the loyal States, caused by the issue of the legal tender currency, constituted an inexhaustible fountain of strength to the National cause." . . . .

"But the creditor interest will lose some of its gold! Is gold the one thing needful? Is it worse for the creditor to lose a little by depreciation than everything by the bankruptcy of his debtor? Nay, is it worse than to lose everything by the subversion of the government? What is it that protects him in the accumulation and possession of his wealth? Is it not the government and its laws? And can he not consent to trust that government for a brief period until it shall have vindicated its right to exist?" . . . .

"It would be sad, indeed, if this great nation were now to be deprived of a power so necessary to enable it to protect its own existence, and to cope with the other great powers of the world. No doubt foreign powers would rejoice if we should deny the power. No doubt foreign creditors would rejoice. They have, from the first, taken a deep interest in the question. But no true friend to our government, to its stability and its power to sustain itself under all vicissitudes, can be indifferent to the great wrong which it would sustain by a denial of the power in question—a power to be seldom exercised, certainly; but one, the possession of which is so essential, and as it seems to me, so undoubted."

Would it not be to the benefit and relief of the American people to have issued non-interest bearing United States Legal Tender Notes instead of interest bearing Government Bonds? The bond is the promise of the government to pay. The government has equal capacity and power to pay the note as it has to pay the bond. If the note is fiat then the bond is fiat.



No fear should be entertained as to the inflation of our currency to an amount where any money issued or coined by our government will not circulate on a parity with gold when it is remembered that, by Act of Congress, it is made the duty of the Secretary of the Treasury of the United States to maintain all forms of money issued or coined by the United States at a parity of value with the gold dollar.

We all rejoice in any advance in the price of wheat which will stimulate the sale of that grain, thaw frozen assets and put into circulation idle dollars, but wheat is not a medium of exchange, and the sale of all the wheat on earth would not add one dollar to the insufficient money supply of the world. While the sale of a bushel of wheat may bring into circulation a dollar that has been stored in a bank vault or hidden in a safety deposit box, that bushel of wheat has not created a new dollar, and when it has been ground into flour, baked into bread and eaten it ceases to exist.

However, when you remonetize 412.5 grains of silver 0.900 fine into a silver dollar you have added another dollar to the money supply, which dollar will purchase a bushel of wheat or pay for a dollar of service and still be in existence, and again and again and again will purchase a bushel of wheat or pay for a dollar of service.

If, as asserted by many, it is impossible to stabilize the price of a commodity then the price of silver as a commodity cannot be stabilized, and the American people, who must save and who will save the Government of these United States, will never have the benefit and prosperity from the use of silver they are entitled to enjoy until it has been restored as money.

Silver, powerful, ready, but enveloped and shackled by demonetization, adopting the language of the beclouded ancient Greek warrior, presents to you its petition:

"Dispel this cloud, the light of heaven restore;
Give me to see—and Ajax asks no more."

American Citizens: Will you remain silent and inactive in respect to the remonetization of silver while the single gold standard continues unemployment, prolongs business depression and stagnates commerce!

# THE PRESIDENT'S ADDRESS*

WILLIAM HEALY

I shall not undertake anything so formidable as an address. I should like instead to suggest a question for the consideration of the Bar. It has to do with the subject upon which Judge Ailshie indirectly touched in his remarks just now. I do not pretend to know the answer to this question.

It might be framed in this manner: What is to be anticipated as the probable attitude of the Bar toward the profound social and economic changes that are being attempted in our national life? It may be said that there is no general answer to a question such as this; that lawyers are individuals like other people and that the attitude of the individual lawyer is determined by his outlook on life rather than by force of his membership in the legal profession. But I am thinking of the Bar as an institution—as an institution with traditions and settled habits of thought, possibly indeed possessed of certain inhibitions. And I am wondering whether those traditions, inhibitions and habits of thought may not prove to be in serious conflict with the spirit of the time.

In a recent opinion Justice Brandeis took judicial notice of the widely prevalent view that our economic system and practices have fostered a rapid and undue concentration of wealth; and that the resulting disparity in incomes was a major cause of the great depression. It is widely believed that the malady from which the country has suffered for the past four years was brought on in considerable measure by the ravages of uncontrolled greed. It is felt that economic health cannot permanently be restored and that equality of opportunity is not possible without fundamental changes in many of our old concepts. These convictions are widespread and they are deep and they have found their most rapid growth during the past few years. Ideas as to methods and remedies are tentative, even to the point of vagueness, but the will to act upon these convictions dominates the country. The philosophy underlying these ideas obviously did not originate with the Bar. It had its origin, or at least its vocal expression, in large measure, in the universities. Where does the Bar stand with respect to it?

Lawyers of course have long been familiar with the power of government in respect of business affected with a public interest. But the underlying thought of the Industrial Recovery Act is that all business is affected with a public interest; and that social ends take precedence over the freedom of private contract. The profit motive, hitherto reigning in solitary grandeur in the field of private enterprise, is asked to move over and make room for considerations of public service and the welfare of labor. The end of enterprise is thought to be not merely the making of profits, but rather the making possible of finer and happier living conditions for all.

Thus emphasis is being transferred from property rights to what are deemed to be human needs. Old concepts thought unchangeable are no longer held necessarily valid. Many barriers erected by lawyers and courts in the field of constitutional law must be surmounted or ignored.

*Address given before the annual meeting of the Idaho State Bar, Boise, Idaho, July 14, 1933.





The notion is expressed in many quarters that these changes are temporary only and are intended merely for the purpose of pulling us out of the slough of depression; and that once embarked on the highroad to prosperity they will be discarded, and the old unrestrained scramble for profits will be resumed in all its pristine vigor. These notions are to my way of thinking in the last degree fantastic. If these ideals are valid, if they contain within themselves the germ of essential truth, as even these commentators seem to concede, then they are with us to stay. The probable impact of ideas such as these upon the Bar of America is at least an interesting subject for speculation. In any suggestions that I may put forward with respect to the matter, I hope you will not consider that such suggestions are made in a bumptious or critical spirit, because I discover within myself the traits which I believe to be common to the profession. We lawyers in our thinking are largely circumscribed by the rule of *stare decisis*. The legal mind tends to look backward over highways already traversed rather than forward to new fields or by-ways where no path is discernible. We are perhaps better equipped as guardians of established institutions than as guides in a wilderness of experiment.

The legal mind is not accustomed to appraising a new idea with sole reference to its utility. Indeed its utility is frequently lost sight of in our attempt to reconcile the idea with what we conceive to be established principles. We have built a majestic temple of law and we desire humanity to adapt itself to the structure. We are apt to be nonplussed if humanity, deeming the structure a dwelling-house and not a prison, undertakes to make it over in some unorthodox way. We are inclined to insist that the changes shall at least conform to the traditional architecture, even though the utility of the changes may suffer in the process.

Bench and Bar are to a degree the victims of their own technique. It is a common charge of the laity that the Bar has an irresistible habit of substituting the fictions of precedent for the facts of life; and there is considerable truth in the charge. It seems at times as though we were in the service of some alien deity who is indifferent to the hot problems of mankind and pre-occupied only with maintaining the integrity of a pattern or a tradition. We have only to read many modern opinions dealing with social and economic legislation to mark how the court labors with matters that are beside the point and often from beginning to end of the opinion fails to come to grips with the real question involved.

In some such way as this we may seek to forecast the probable attitude of the Bar toward the tendencies of the age. It is not possible for us to remain aloof from this movement of which I have spoken. The very terms of our employment require us to come to grips with it. The only question is what is to be the spirit of our approach. Will it be in the traditional manner by seeking to confine the movement to old channels which, as many are persuaded, lead back inevitably to the swamps of yesterday; or shall we glimpse the movement for what it really is, the gropings of a people, perplexed and in extremity, striving to set their feet on the path to better days. Shall we put ourselves in harmony with the spirit which animates this movement and help as best we can to guide it wisely toward the ideals which it has set for itself; or shall we undertake to saddle and bridle it and ride it to futility.

There is room for wide divergence of opinion with respect both to the wisdom and practicability of these ideas. I am not now discussing either their

wisdom or their practicability. There can be no difference of opinion as to their profound significance. Nor is there room for difference of opinion that the problems out of which they grow are problems erying aloud for solutions. James Truslow Adams recently remarked that if we cannot measurably solve these problems we cannot be said to have a civilization, but only a mere existence. I am not suggesting either that the Bar embrace or that it reject these ideas. I am suggesting only that it approach the consideration of them, not on a plane of cold legalism, but on a plane of realities.

The task which the country has imposed on itself is a colossal one. It may well prove to be one impossible of accomplishment. I understand Al Smith to say that the job is not one for the lawyer and the legislator at all, but rather one for the priest, the philosopher and the doctor. But the art of the priest and of the philosopher is long and time is fleeting. There may be need for haste. He cannot be called an alarmist who ealls attention to the ominous warnings we have had that the fabric of things may eollapse before our eyes. The lawyer and the legislator cannot abdicate and leave the task to philosophy and religion, although they may well study with profit the precepts of both.

# RECENT DEVELOPMENTS IN THE FEDERAL REGULATION OF CARRIERS*

H. B. THOMPSON

Mr. President and Gentlemen of the Bar:

It is unnecessary for me to undertake to inform you concerning the history of Federal railroad legislation, but as a background or base for the matter that I am about to present, I shall recall briefly with you some of the preceding legislation governing common carriers in interstate commerce.

The original Act to Regulate Commerce was adopted February 4, 1887. Up to that time, at least so far as Congress had taken cognizance of the matter, the construction and operation of railroads was regarded as a private business enterprise. By the general laws of trade that operate under such circumstances abuses naturally arose. Heavy shippers were in a position to bargain with competing railroads for rates, passes, private traekage, demurrage, credit, and allowance of freight claims, without much regard to their individual merit, and for direct rebates. A normally honest carrier that wanted to be sueeessful had to yield to this pressure or trading advantage of the shipper or lose the business, so being unrestrained, the carriers did yield. The result was that the big shippers possessed the power practically to destroy the little fellows who had no trading leverage with the railroads. There were numerous other abuses developed in the same general manner, but the ones I have just mentioned serve to demonstrate that there was a real need for regulatory legislation. Conditions have so changed since 1887 that there would be no profit in now undertaking further to place the responsibility. It is enough to say that the year 1887 marked the beginning of an uninterrupted train of restrictive legislation, which included the Elkins Act of 1903, the Hepburn Amendment of 1906, the Carmack Amendment, the Cummins Amendment, and numerous other amendments down to 1920 when, as a part of the Transportation Act, Sec. 15a was enacted, which I shall hereafter discuss.

Coming now to the subject of the legislation of the last session of Congress, that legislation is embraced in an act approved June 16, 1933, entitled, "An Act to Relieve the Existing National Emergency in Relation to Interstate Railroad Transportation, and to Amend Sections 5, 15a, and 19a of the Interstate Commerce Act, as Amended." But little attention need be paid to Section 5. Section 5 was amended by striking Paragraphs 2 and 3 thereof.

Section 5 covers the subject of *pooling*. This paragraph was part of the original Interstate Commerce Act of February 4, 1887, and was amended by the Transportation Act of February 28, 1920.

In general terms it prohibits pooling of freight of different and competing roads, or the division between them of earnings, except upon express approval of the Commission.

Pooling consists of an agreement between earriers of a division of routing and receipts of freight in place of free competition. There were good grounds resting upon proper motives to support pooling, but the practice could be made an instrument of abuse. However, inasmuch as this portion of Section 5 is not repealed or amended, we shall not discuss it further.

*Address given before the Annual meeting of the Idaho State Bar, Boise, Idaho, July 14, 1933.

The amendment leaves the Commission with power to make a study and devise a plan for the consolidation of the railway properties of the continental United States into a limited number of systems and to hold hearings thereon as provided by the Transportation Act of 1920.

By amendment of Section 5, provision is made for the carriers to accept the invitation or plan of the Commission, or to present their own plans, for consolidation or the creation of systems, subject to notice and general hearings, to which any state affected may object.

Holding companies which are not common carriers are made subject to the Interstate Commerce Act, and Congress has by an amplification of the statute endeavored to define and prohibit all of the devious devices that have been attempted by some eastern or middle western roads to effect combinations and control without the consent of the Commission.

Section 15a was substantially repealed. At the beginning of the Section was a paragraph sometimes erroneously referred to as the guaranty clause, but it never was. Paragraph 2 of Sec. 15a read as follows:

> "Rates to permit carriers to earn fair return. In the exercise of its power to prescribe just and reasonable rates the commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: Provided, that the commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different portions of the country."

For the purpose of carrying Paragraph 2 into effect it was provided that the commission should determine the aggregate value of the property of the carriers, and on such valuation so adjust rates, of its own initiative if necessary, as to provide a fair return, and

> "In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation."

The section further carried what is termed the Recapture Clause, which provided that any carrier which received in any year a net railway operating income in excess of 6 per cent of the value of the railway property held for and used by it in the service of transportation, one-half of such excess should be turned over to the Commission to establish a revolving fund out of which the Commission should make loans to carriers to meet expenditures for capital account or to refund maturing securities originally issued for capital account, or by purchasing equipment and leasing it to carriers.

This law has failed so far chiefly for two reasons: first, the failure of the commission and the carriers to arrive at a mutually satisfactory basis of valuation, and secondly, the failure of the commission to carry out the provisions of Section 15a on any valuation. In all fairness to the Commission it may be



said that there are too many factors incapable of practical ascertainment and application with respect to valuation to prevent the act from being exceedingly difficult of practical application. First assuming that the Commission had determined, not what the actual net railway operating income of a carrier was, but what it would have been under honest, efficient and economical management, as prescribed by the act, and, secondly, assuming that it had determined the value of the property of the carrier devoted to transportation, it failed to apply the principle. In any rate hearing involving particular classes or commodities in any given zone or area, the Commission refused to take into account any showing by the carrier that it was not making a fair return on its property devoted to transportation, holding that that was subject to a more general adjustment as applied to groups and not to individual roads, but except for some horizontal increases just after the war and horizontal cuts thereafter, no general adjustments were made, and the carrying out of the principle appeared to have been abandoned, and with it the first and only constructive legislation in aid of the carriers ever adopted. All other legislation had been restrictive.

In the same connection the Commission was directed to utilize the results of its investigation under Section 19a of the law, in so far as deemed by it advisable. Section 19a was the law providing for the Commission ascertaining the physical valuation of the property of carriers. The law was enacted March 1, 1913. Its purpose was not beneficent to the railroads. One group in which Senator LaFollette of Wisconsin was conspicuous, and which probably constituted the majority, contended that the carriers were overcapitalized, or otherwise expressed that they had issued watered stock, and that a physical valuation would so disclose, while others believed that such an investigation would prove the charges to be unfounded in the main and serve as a basis for fair rates both to the carriers and the public. So far as the law has operated, it has been only a burden to all concerned. It has been only a source of expense to the public because millions of dollars have been appropriated by Congress and spent in attempting to ascertain the physical valuation of the properties, without ever having arrived at a settled figure used as a basis for rates, which was the purpose of the act. It has been a source of heavy expense to the carriers, with no benefit, except the rather nebulous one of demonstrating that as to most of the important lines or systems the stocks and bonds and outstanding indebtedness do not exceed the physical valuation, and in many instances are less. The very definite detriment has come to them at times of having the tentative physical valuation employed by taxing bodies in assessing valuation for taxing purposes, without the carrier against whom that factor is used being afforded that fair return on the investment contemplated by Sec. 19a and Sec. 15a of the Act.

Also there are so many factors involved in ascertaining physical valuation that it is difficult for two persons to agree as to what all the factors should be, and the policies and principles of the Commission in applying the Act, although undoubtedly fairly conceived, have on a number of occasions been held by the courts to be erroneous.

At a hearing before the committee of the House of Representatives on Interstate and Foreign Commerce, held June 19, 1932, at which Commissioner Eastman of the Interstate Commerce Commission appeared on behalf of the Commission and recommended the repeal of the Recapture Clause of Section 15a of the Interstate Commerce Act, he expressed his reasons in part as follows:

"The opportunities for litigation are legion, particularly because of the great uncertainties in the valuation doctrine, to which I shall advert in another part of this statement."

* * * * *

"Value for rate-making purposes, as defined by the Supreme Court, is quite a different thing from value in the sense in which that word is ordinarily used. The latter value is determined chiefly by what a property will produce in the way of earnings, and obviously can not be used as a basis in determining what earnings shall be. Value for rate-making purposes can, I think, be defined as the amount on which a company engaged in public service should reasonably be permitted to earn a fair return *if it is able to do so.*"

* * * * *

"Not only is the fair value rule very difficult and expensive to apply, but it is also very unstable, and this instability may be detrimental to the investors in a public service company or to the users of its services or both."

Speaking of the rule for determining fair value, as announced in the leading decision of the United States Supreme Court in Smythe vs. Ames, 169 U. S. 446, and its difficulty of application by the Commission, he said:

"It enumerates various factors or facts which are to be ascertained as 'matters for consideration, and to be given such weight as may be just and right in each case,' but it states that there may be other matters to be regarded in estimating the fair value of the property. The principles which are to be followed in giving weight to these various elements, some of which are mutually inconsistent, as in the case of original and present cost of construction, have never been clearly defined. At all events there is the utmost diversity of opinion in regard to them. Yet differences in judgment in attaching weight to these various factors may produce very wide differences in the final result reached. Of course this gives great latitude in appealing to the courts, in the event of dissatisfaction with the result reached by the regulating body in any particular case.

"Aside from this uncertainty as to principles and the probability of litigation, the fair value rule is as a practical matter exceedingly difficult to apply in regulation. It requires a continual reappraisal of constantly shifting factors, many of which require elaborate investigation to determine. The cost of reproduction constantly shifts as changes occur in the value of money, and also as improvements are made in methods of construction. The present value of land measured by adjoining land likewise shifts, and requires continual field investigation. Depreciation is a variable quantity continually changing. There are in addition a myriad of theories with respect to what is termed 'going concern value' and like so-called intangible values. To apply the fair value rule, all of this shifting information must be kept up to date and on tap for use at any given time."

He, accordingly, on behalf of the Commission as a body, recommended the repeal of the Recapture Clause.

So the Recapture Clause of Sec. 15a was repealed, and in place of that portion providing that the Commission should prescribe what percentage should



be deemed a reasonable return, and make such rates as would insure it, it now simply provides:

"In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service.

"All moneys which were recoverable by and payable to the Interstate Commerce Commission, under paragraph (6) of section 15a of the Interstate Commerce Act, as in force prior to the enactment of this title, shall cease to be so recoverable and payable; and all proceedings pending for the recovery of any such moneys shall be terminated." * * *

This brings us to the phase of railroad legislation that will at least be interesting. The Act of June 16, 1933, entitled, "An Act to Relieve the Existing National Emergency in Relation to Interstate Railroad Transportation" and to amend certain sections, constituted one of those recent radical innovations of government in the United States, particularly in that it provided for a dictator, more softly termed in the Act as "Co-ordinator." The bill was presented by the President, and the Co-ordinator is Joseph B. Eastman, the member of the Interstate Commerce Commission whose testimony before the House Committee I have just quoted to you. The bill provides that the office of the Co-ordinator shall be at Washington, and that the Interstate Commerce Commission shall provide such space, facilities and assistance as he shall request and it is able to furnish; that the lines of the carriers shall be divided into three groups, eastern, southern and western; that the carriers of each group should name a committee. The purposes of the Act are stated to be to "avoid unnecessary duplication of service and facilities of whatsoever nature, and permit the joint use of terminals and trackage incident thereto or requisite to such joint use, provided that no routes now existing shall be eliminated except with the consent of all participating lines or upon order of the Co-ordinator [which you will observe gives the Co-ordinator the right to do as he pleases], control allowances, accessorial services and all the charges therefor, and other practices affecting service or operation, to the end that undue impairment of net earnings may be prevented, and avoid other wastes and preventable expense; to promote financial reorganization of the carriers, with due regard to legal rights, so as to reduce fixed charges to the extent required by the public interest and improve carrier credit; and to provide for the immediate study of other means of improving conditions surrounding transportation in all its forms and the preparation of plans therefor."

The Committees are first given an opportunity to provide ways and means for carrying out the terms of the act. Section 5 provides:

"It shall be the duty of the committees *on their own initiative,* severally within each group and jointly where more than one group is affected, to carry out the purposes set forth in subdivision (1) of Section 4, so far as such action can be voluntarily accomplished by the carriers. In such instances as the committees are unable, for any reason, legal or otherwise, to carry out such purposes by such voluntary action,

they shall recommend to the Co-ordinator that he give appropriate directions to the carriers or subsidiaries subject to the Interstate Commerce Act, as amended, by order: and issue and enforce such orders if he finds them to be consistent with the public interest and in furtherance of the purposes of this title."

It will be observed from this language that whenever a committee evolves any plan that the law does not anthorize, they may take it to the Co-ordinator, and he shall thereupon determine by himself what the public interest demands, and issue an order accordingly. If this does not delegate the power of legislation, it would be pretty hard to find a case that does.

By Sec. 9 appeals to the Commission are provided.

Section 6 provides:

"If, in any instance a committee has not acted with respect to any matter which the Co-ordinator has brought to its attention and upon which he is of the opinion that it should have acted, under the provisions of Section 5, he is hereby authorized and directed to issue and enforce such order, giving appropriate directions to the carriers and subsidiaries subject to the Interstate Commerce Act, as amended, with respect to such matter, as he shall find to be consistent with the public interest," . . . .

the constitution to the contrary notwithstanding.

Section 13 provides:

"It shall further be the duty of the Co-ordinator, and he is hereby authorized and directed, forthwith to investigate and consider means, not provided for in this title, of improving transportation conditions throughout the country, including cost finding in rail transportation and the ability, financial or otherwise, of the carriers to improve their properties and furnish service and charge rates which will promote the commerce and industry of the country and including, also, the stability of railroad labor employment and other improvement, of railroad labor conditions and relations; and from time to time he shall submit to the Commission such recommendations calling for further legislation to these ends as he may deem necessary or desirable in the public interest. The Commission shall promptly transmit such recommendations, together with its comments thereon, to the President and to the Congress."

Section 12 provides a penalty of not less than $1,000.00 or over $20,000.00 for the wilful failure of any carrier or officer to comply with any order of the Co-ordinator.

Section 7 provides for the creation of a Labor Committee for each regional group and further provides:

"The number of employees in the service of a carrier shall not be reduced by reason of any action taken pursuant to the authority of this title below the number as shown by the pay rolls of employees in service during the month of May, 1933, after deducting the number who have been removed from the pay rolls after the effective date of this Act by reason of death, normal retirements, or resignation, but not more in any one year than 5 per centum of said number in service during May, 1933; nor shall any employees in such service be deprived of employment such as he had during said month of May or



be in a worse position with respect to his compensation for such employment, by reason of any action taken pursuant to the authority conferred by this title.

"The Co-ordinator is authorized and directed to establish regional boards of adjustment whenever and wherever action taken pursuant to the authority conferred by this title creates conditions that make necessary such boards of adjustment to settle controversies between carriers and employees. Carriers and their employees shall have equal representation on such boards of adjustment for settlement of such controversies, and said boards shall exercise the functions of boards of adjustment provided for by the Railway Labor Act.

"The Co-ordinator is authorized and directed to provide means for determining the amount of, and to require the carriers to make just compensation for, property losses and expenses imposed upon employees by reason of transfers of work from one locality to another carrying out the purposes of this title.

"Carriers, whether under control of a judge, trustee, receiver, or private management, shall be required to comply with the provisions of the Railway Labor Act and with the provisions of Section 77, paragraphs (o), (p), and (q), of the Act approved March 3, 1933, entitled An Act to Amend an Act Entitled 'An Act to Establish a Uniform System of Bankruptcy Throughout the United States Approved July 1, 1898, and Acts Amendatory Thereof and Supplementary Thereto.'"

In Section 10 there is a further provision:

"That nothing herein shall be construed to repeal, amend, suspend, or modify any of the requirements of the Railway Labor Act or the duties and obligations imposed thereunder or through contracts entered into in accordance with the provisions of said Act."

Subdivision (b) of Section 10 provides:

"The Co-ordinator shall issue no order which shall have the effect of relieving any carrier or subsidiary from the operation of the law of any State or of any order of any State Commission until he has advised the State Commission of said State, or the Governor of said State if there be no such commission, that such order is in contemplation, and shall afford the State Commission or Governor so notified reasonable opportunity to present views and information bearing upon such contemplated order, nor unless such order is necessary, in his opinion, to prevent or remove an obstruction to or a burden upon interstate commerce."

Otherwise stated, the Co-ordinator may, whenever he chooses, issue an order which has the effect of relieving a carrier from the orders of a State commission and the operation of the laws of a state, provided he first tells the Commission and the Governor that he is going to do so. It is true an appeal will lie from his order to the Interstate Commerce Commission, with respect to the wisdom of the order, but not concerning his right to make an order setting aside the law of a sovereign state—if there be such a thing.

The law is effective for one year, but may be extended by the President for an additional year, but orders made by the Co-ordinator or by the Commission

shall continue until set aside by order of the Commission or judgment of a court.

Nothing that I have said in analyzing this legislation should be regarded as a criticism for it is not so intended. The carriers are very sympathetic and I am sure they will heartily co-operate.

The use of joint facilities and requirement of direct routings, and we hope a number of other revisions in the system of transportation, may effect substantial economies and improvement of methods. The drawback is the requirement that in the execution of these plans the carriers shall employ as much labor as before.

An exceedingly able and well qualified man has been made Co-ordinator. He is avowedly a believer in government ownership of railroads, and has been counsel for labor groups. Upon his accepting the appointment, he issued a statement June 16th, which said, in part:

> "The 'Emergency Railroad Transportation Act, 1933' does not pretend to be a complete or final answer to the transportation problem of the United States. Nor does it put the railroads under the control of a federal railroad Czar. It is a temporary and preliminary measure which is designed to pave the way to a comprehensive treatment of the transportation situation of a more permanent and enduring character.
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> * * * * *
>
> "So far as the immediate or early accomplishment of important economies is concerned, the restrictions of the Act with respect to reduction in the number and compensation of railroad employees *will probably constitute serious obstacles.*"

# THE UNITED STATES AND THE WORLD COURT*

FRANK MARTIN

The relation of the United States to the origin and establishment of a world court invested with judicial powers as distinguished from a court of arbitration, is one of historical interest especially to an American.

Its adherence to the Permanent Court of International Justice, commonly known as the "World Court" is of first importance in firmly establishing and maintaining a feeling of security in the peace of the world so necessary under the present distressed and unsettled conditions.

In the intricate relations of nations to the various activities of government, commerce, business and moral regulations, some tribunal clothed with adequate judicial power to deal with disputes growing out of these relations is necessary. The old custom of adjusting disputes between nations by war must pass, but that can only be accomplished through an adequate substitute. If there be no tribunal through which investigation, determination and responsibility can be fixed and enforced, at least through the power of public opinion, then the power of force will necessarily be used.

These delicate international relations have multiplied many times since the beginning of the present century but even prior to that, the necessity for a world tribunal was pressing itself upon the attention of the world. In this thought and purpose the United States was a leader, and the present world court may truly be said to be an American idea.

It seems certain that the United States would have adhered to the court from the beginning had it not been for the bitter contest which developed over the ratification of the peace treaty after the World War and the League of Nations. During that contest some of the senators became so embittered that opposition to the Court grew solely from the reason that it had some connection with the League.

A short reference to the early history in this connection may not be amiss.

The American delegates to the First Hague Conference in 1899 received, among others, the following instruction:

> "The long-continued and widespread interest among the people of the United States in the establishment of an international court gives assurance that the proposal of a definite plan of procedure by this government for the accomplishment of this end would express the desires and aspirations of this nation. The delegates are therefore enjoined to propose, at an opportune moment, the plan for an international tribunal hereunto attached; and to use their influence in the conference in the most effective manner possible to procure the adoption of its substance, or resolutions directed to the same purpose."

It will thus be noted that this nation had, at that early date, worked out a plan of a world court with judicial powers which was entrusted to its delegates with instructions to present and urge its adoption by the Conference of nations about to convene. This plan provided a carefully devised project for a tri-

*Address given before the annual meeting of the Idaho State Bar, Boise, Idaho, July 15, 1933.

bunal capable of meeting in full bench and permanent in the exercise of its functions, similar to the Supreme Court of the United States. It did not, however, appeal to the conference and in its stead, what was known as the British proposal was accepted. This consisted of a panel from which arbitrators might be selected, and provided for certain international questions to be presented to such arbitrators so selected for consideration and decision. This tribunal became known as "The Permanent Court of Arbitration." Forty-four nations have become members of this tribunal since its establishment in 1899, and about 20 cases have been submitted to it for arbitration. It is not, properly speaking, a court but a board of arbitration.

The Second Hague Conference was called by Russia upon the suggestion of President Roosevelt in 1907. Mr. Rufus Choate was first delegate of the United States. Mr. Root, the Secretary of State, instructed the delegates to this Second Conference to bring about the organization of a World Court and in part said:

> "a development of the Hague Tribunal into a permanent tribunal composed of judges who are judicial officers and nothing else, who are paid adequate salaries, who have no other occupation, and who will devote their entire time to the trial and decision of international causes by judicial methods and under a sense of judicial responsibility. These judges should be so selected from the different countries that the different systems of law and procedure and the principal languages shall be fairly represented. The court should be made of such dignity, consideration, and rank that the best and ablest jurists will accept appointment to it, and that the whole world will have absolute confidence in its judgment."

Mr. Choate in presenting the American draft for a permanent court to this Conference, said:

> "Let us seek to develop out of it a permanent court, which shall hold regular and continuous sessions, which shall consist of the same judges, which shall pay due heed to its own decisions, which shall speak with the authority of the united voice of the nations, and gradually build up a system of international law, definite and precise, which shall command the approval and regulate the conduct of the nations."

This Second Conference after due consideration was in agreement on the acceptance of the American plan except as to the method of selecting the judges. On this point the Conference failed to reach a conclusion. It was said that this difficulty arose from the fact that there was a small number of large nations and a large number of small nations and that if each state were to have an equal voice in the selection, the small nations would control the court. The small nations insisted upon their equal sovereign rights and the large nations were not willing to put their large populations and extensive interests under the control of the small nations. The Conference adjourned, the permanent court of arbitration continued to function more or less irregularly, and so matters drifted until the close of the World War.

The present court owes its existence to the initiative of the League of Nations. From this fact has probably arisen its stormy reception in the Senate.

The covenant of the League of Nations did not attempt to create a world court, but by the provisions of Article XIV thereof it was provided that the Council of the League should formulate and submit plans for the establishment



of a permanent court of International justice which should be competent to hear and determine any disputes of an international nature which the parties thereto might submit to it and might also give advisory opinions upon any question or dispute referred to it by the Council or Assembly of the League. It was this question of advisory opinions which aroused the greatest opposition in the Senate.

In 1920 the Council of the League appointed an advisory committee of ten members, all eminent for their knowledge of international law and all but one of which were subjects of member nations of the League. The exception was the great Elihu Root. This committee of eminent jurists drafted a statute or law for the Court, and submitted it to the Council of the League which after making certain changes submitted it to the first Assembly of the League at Geneva and on December 13, 1920 it was unanimously approved by the Assembly. It was then submitted to the member nations who acted upon it independently and separately and not through the League. This submission was by way of a protocol to be signed by the separate nations. The ratification by 22 nations was required before it would become operative. By December, 1921 it had been ratified by 26 nations and thereby the Court was established. This protocol has now been signed by 55 nations, including the United States, and 48 nations have ratified the signatures. The nations signing the protocol but which have not ratified the signatures are: Bolivia, Costa Rica, Guatemala, Liberia, Nicaragua and the United States. The ready assent of a majority of the nations which made it possible to elect the first body of judges in September, 1921 was most gratifying. It had been expected that much more time would elapse before the actual organization of the Court.

The Court is composed of 15 judges serving for terms of nine years. It originally had four deputy judges but these have been eliminated by amendment to the statute. In addition the statute provides in certain cases for what is known as national judges. In cases between two nations, a judge from one of such nations is not disqualified thereby. If, however, the other nation has no judge on the Court it is permitted to name a temporary judge for that case which is known as a national judge. In case neither nation has a judge on the Court, each nation may name one for that particular case. These national judges take part in the decision on equal footing with the permanent judges. This is not for the purpose of giving national representation but in order that the Court through this association may be provided with a broader comprehension by which litigants of different racial traditions may be assured of an equal understanding.

It was intended to secure for the Court judges of the highest qualifications. The statute provides that the Court shall be composed of "a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law."

In the election of judges, the electors are required to bear in mind these qualifications so "that the whole body should represent the main forms of civilization and the principal legal systems of the world."

The provision for nominating and electing judges is both unique and simple, securing judges of the highest capabilities and at the same time free from any influence of nations or national groups. Mr. Root, who seems to have provided the committee with the plan doubtless remembered the difficulties which prevented the organization of the Court in 1907 for the reason that no arrange-

ment fairly and adequately protecting the large and small nations in the selection of judges could be agreed upon. Under this plan, the judges are nominated by the Permanent Court of Arbitration. No limit is placed on the number of nominations other than not more than one can be from any nation. These nominations are certified to the Council and Assembly of the League which proceeds to elect the judges therefrom. These bodies act concurrently but independently in the election. A judge to be elected, must receive a majority of both the Council and the Assembly. As the Council is controlled by the large nations and the Assembly by the smaller nations only such a judge can be elected as is satisfactory to both.

Article 38 of the statute provides the law which shall apply to the decisions of the Court, to-wit:

International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

International custom, as evidence of a general practice accepted as law;

General principles of law recognized by civilized nations.

The Court may consider judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

In short, the Court applies, as a basis of its decisions, the general principles of international law and international customs by which all civilized nations are already bound, and in reaching a conclusion may use the existing decisions of Courts and treatises of eminent writers on international law.

The Court is open to and may be used on equal terms by all nations.

The jurisdiction of the Court under the statute, extends to all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force to be submitted to the Court.

Under this provision should there arise between two nations a dispute as to the meaning to be given to the terms of a treaty between them, that matter must be submitted to the Court, provided the treaty itself so provides. This jurisdiction has never been objected to as it only gives the Court jurisdiction over such matters as the nations may specially agree to submit to the Court and matters which they have specially agreed by treaty to submit to the Court.

The second branch of jurisdiction of the Court is the one which has aroused whatever opposition exists and which is known as advisory jurisdiction, Article 14 of the statute being as follows:

> "The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly."

The Court has held 26 sessions and under the statute as revised, will now be in continuous session. It makes its own rules and has rendered 22 judgments and 25 advisory opinions.

Certain senators strenuously objected to the provision for advisory opinions, claiming that it would give authority to the Council or Assembly of the League to submit to the Court questions which might involve claims of the United States without the consent of this nation and thus bring this country into the disputes and entanglements of European nations. This objection has been removed by a revision of the statute and the special protocol embodying the reservations of the Senate which will be hereinafter referred to. The original protocol which had then been signed and ratified by some 53 nations, was signed by the United States and submitted to the Senate for ratification and on Jan-



uary 13, 1926 the Senate adopted a resolution consenting to the adherence of the United States to the protocol and statutes of the Permanent Court of International Justice with five reservations.

The first four of these reservations provided that in adhering to the Court, the United States assumed no legal relation to the League of Nations and no obligation under the Treaty of Versailles; that the United States should participate on terms of equality with the members of the Council and Assembly, in the election of judges; that the United States should bear its share of the expenses of the Court (which is estimated to be abont $50,000.00 per annum); that the United States might withdraw from the Court at any time, and that the statute should not be amended without its consent. The statute itself provided that there could be no amendment without the consent of every nation consenting thereto. These first four reservations were accepted to by all of the other nations. The fifth reservation contained two provisions:

> "That the Court shall not render any advisory opinion except publicly after due notice to all States adhering to the Court and to all interested States and after public hearing or opportunity for hearing given to any State concerned;"

This part of reservation five was already the practice of the Court and was immediately accepted by the other nations and has now been made a part of the statute of the Court.

The second part of reservation five was as follows:

> "nor shall it, without the consent of the United States, entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest."

The resolution with the reservations was transmitted by the Secretary of State to the Secretary General of the League in March, 1926; the Council and Assembly of the League accepted the first four reservations and the first half of the fifth but it was pointed out by Sir Austen Chamberlain that the wording of the second part of the fifth reservation was capable of bearing an interpretation that would "hamper the work of the Council and prejudice the rights of the members of the League;" that its meaning was not clear and suggested that that part of the reservation be made the subject of discussion and agreement between the nations represented by the League and the government of the United States.

In September, 1926, the nations represented by the League submitted for the consideration of the United States a change as to this part of reservation five which did not meet with the approval of the Secretary of State. Twenty-four nations then sent individual replies to the United States, including a request for a further exchange of views. No further action however, was immediately taken. On February 6, 1928, Senator Gillett of Massachusetts of the Foreign Relations Committee introduced a resolution in the Senate recalling that these states had asked for a further exchange of views and respectfully suggested to the President that the exchange be entered into "in order to establish whether the questions between the United States and the signatory states can be satisfactorily adjusted."

On November 24, 1928, President Coolidge announced that he desired to have a further exchange of views with the powers. On February 20, 1929, Mr. Kellogg, Secretary of State, made public a note sent to the powers in which he said:

"The second part of the fifth reservation raises the only question on which there is any substantial difference of opinion."

Mr. Kellogg's note was received by the Secretary General of the League as well as the signatories just before the meeting at Geneva in March, 1929. A committee of jurists had already been appointed to suggest amendments which experience might have shown to be desirable to the statute of the Court. This committee was to meet at the same time as the Council of the League. It consisted of 15 distinguished jurists, including Mr. Elihu Root.

Mr. Root submitted to the committee what has since been known as the "Root Formula" which consisted of a complete acceptance of the reservations of the United States, together with a formula for its application which is exceedingly simple and would seemingly, to an unbiased mind, satisfy every fear of the United States in connection with allying itself with the Court and at the same time satisfy every fear of the other powers that advantage might be taken by the United States by reason of the right of objection reserved.

It provided, that when a proposal was made to the Council or Assembly for a request for an advisory opinion that before acting upon it, it should be submitted to the United States with a request that the United States reply as to whether it had or claimed to have, an interest in the question. If the reply disclaimed any interest, the matter should proceed. If the reply claimed an interest, then the matter should become the subject of discussion by the League and the United States as to whether the United States had an interest in the question. If it was decided that the United States had an interest, the matter was ended unless the United States consented. If it was decided by the League that the United States had no interest and it still claimed to have an interest then automatically the United States ceased to adhere to the Court and such action was without any prejudice toward the United States or implication of bad faith. The formula further provided that the signatory powers to the League of Nations could at any time by giving notice to the United States withdraw their consent to the adherence of the United States to the World Court.

In order that the interests of the United States might be safeguarded from any inadvertence on the part of the Council or Assembly, it was further provided that when any request for an advisory opinion was filed with the Court, the United States should at once be notified, and given a sufficient time to reply as to whether it had or claimed an interest in the question submitted, or consented thereto. If the United States should reply that it claimed an interest and had not consented, the matter was to be immediately returned to the Secretary General of the League for further discussion with the United States.

The new protocol was approved by the Council and Assembly of the League in June, 1929 and the draft thereof transmitted to the United States. A conference of the signatory powers was held in September, 1929, which approved the protocol with the reservations which has been signed by fifty-five nations, including the United States. On December 3, 1929, President Hoover in his message to Congress called attention to the progress which had been made in regard to the question and transmitted therewith a report of the Secretary of State. In this report it is said:

"In the great future work of transforming the civilization of this world from a basis of war and force to one of peace founded upon justice, we today stand at the threshold. But it is already evident that in this work the World Court is destined to perform a most fruitful and important part. It is also clear that such an agency is more closely in line with the traditions and habit of thought of America, than of any other nation. And finally it is now possible for us to assist in the support and development of this judicial agent without in the slightest degree jeopardizing our traditional policy as a government of not interfering or entangling ourselves in the political policies of foreign states or of relinquishing our traditional attitude as a government towards purely American questions with which we are concerned. Is there any reason why on such terms our Government should not join in the support, moral and financial, of such a Court, or why it should not lend its efforts towards the selection of judges who will act in this great work in accordance with the noble traditions of the American judiciary? Or why our Government's great power should not be placed in a position where it can influence for good or check against evil in the future development of the Court's charter and work? I think not."



On December 9, 1929 the protocol was signed by the United States and on December 10, 1930 the President transmitted to the Senate for its ratification this protocol, together with the original agreement for adherence to the Court and the amendments to the statute. In transmitting these three protocols to the Senate, the President said:

"The provisions of the protocols free us from any entanglement in the diplomacy of other nations. We cannot be summoned before this Court; we can from time to time seek its services by agreement with other nations.

These protocols permit our withdrawal from the Court at any time without reproach or ill-will.

The movement for the establishment of such a Court originated with our country. It has been supported by Presidents Wilson, Harding and Coolidge; by Secretaries of State Hughes, Kellogg and Stimson; it springs from the earnest seeking of our people for justice in international relations and to strengthen the foundations of peace.

Through the Kellogg-Briand pact we have pledged ourselves to the use of pacific means in settlement of all controversies. Our great nation, so devoted to peace and justice, should lend its co-operation in this effort of the nations to establish a great agency for such pacific settlements."

The protocols were referred to the Foreign Relations Committee December 17, 1930 and this committee voted to defer action thereon except for hearing Mr. Root until December, 1931. On January 21, 1931, Mr. Root not only gave the committee a very careful review of the negotiations leading up to the adoption of the formula but a very clear and concise explanation thereof. His presentation was put in writing and filed with the Committee and is a most interesting statement. On May 12, 1932, the Foreign Relations Committee by a vote of eleven to nine favorably reported the protocols to the Senate. The report was presented June 1, 1932 but the opponents of adherence on the committee succeeded in having added to the report a provision by Senator Moses which required that as a part and a condition of adherence by the United States to the said protocol, it must again be submitted to the signatory powers and receive their consent thereto. This was so clearly unnecessary as the powers had already given a full and complete consent that it was construed by the friends of the question as simply being interposed to prevent immediate action,

to delay and if possible defeat the matter. The report had been prepared by Senators Walsh of Montana and Fess of Ohio. The pro-Court leaders on the committee had announced their intention to present a motion in the Senate to eliminate the addition by Senator Moses. The resolution, however was re-referred to the Foreign Relations Committee and is now there pending. It will doubtless come before the Senate for action in January, 1934. It behooves every friend of adherence to the Court to be active in calling to the attention of the senators the importance of favorable action and more especially the vigilance required to secure action as its foes will doubtless attempt to kill it by delay which has proven such a successful weapon during the last four years.

It is thought that at all times there has been the requisite vote in the Senate to ratify the treaties had the matter been brought to a vote.

That the interests of the United States are fully protected in every way and the reservations made by the Senate in 1926 fully complied with by the pending protocols seems without doubt.

The opinion of those entitled to weight on the question are too unanimous and positive to admit a doubt. For this view we have positive expression from the following sources:

Elihu Root, the most distinguished international jurist in the world.

Presidents Taft, Wilson, Harding, Coolidge, Hoover and Roosevelt.

Secretaries of State Hughes, Kellogg, Stimson and Hull.

The American Bar Association.

A majority of the State Bar Associations.

County and City Bar Associations too numerous to list and the opinions of large numbers of eminent judges of the State Courts.

This vast array of opinion and backing given the treaties would seem to insure their ratification by the Senate. The only danger is apathy on the part of senators professing to approve and ready to vote for ratification but indifferent as to whether a vote is taken and the danger of some delaying addition to the resolution of adherence such as that proposed by Senator Moses heretofore referred to.

I am asking this Association to add its endorsement along with the Bar Associations of other states and to request our senators to use their best efforts to secure an early ratification.

I am quite sure that the Bar of this State and the people of the state desire that the United States should take its place with other nations in firmly establishing this Court, the product of American ideals and the result of American desire for peace and good will throughout the world and for a settlement of national disputes by a judicial tribunal and not by force of arms.

# THE WORK OF THE AMERICAN LAW INSTITUTE*

ALFRED BUDGE

Mr. President and Fellow Members of the Idaho State Bar Association:

In the limited time at my disposal I shall endeavor to briefly outline the origin, purpose and accomplishments of the American Law Institute.

In 1922, at the invitation of a committee of the Association of American Law Schools, some thirty lawyers, judges and law professors met in New York City. Among those present were Elihu Root, John G. Milburn and George W. Wickersham, names familiar to all as lawyers of national prominence. The occasion of their meeting was their acknowledgment and appreciation of the impending and increasing difficulties in the interpretation of the common law, due to the ever-increasing volume of decisions and the complexity of modern life. Their purpose was to meet the problem of counteracting the defects in our common law system of expressing and developing law, and to do so without destroying the system. The result of the meeting was the appointment of a committee headed by Elihu Root to study certain defects in our laws and means to remedy and reduce them. The committee's report was submitted at a meeting of lawyers, judges and law professors held in Washington in 1923, which resulted in the organization of the American Law Institute, having for its purpose and object, as stated in its charter,

> "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 carry on scholarly and scientific legal work."

The two important projects upon which the Institute has been engaged since its organization have been (1) Restatement of the common law, and (2) drafting of model statutes covering criminal procedure. The actual work on the restatement began in June, 1923 and it is estimated that the work outlined will take twenty years to complete.

The financial difficulties attendant upon such an extensive undertaking were eliminated by the munificence of the Carnegie Corporation, which at the time of the organization of The American Law Institute, set aside for its use a sum in excess of one million dollars, and in 1930, after expressing its approval of the work of the Institute by resolution of its Board of Trustees, set aside an additional sum for its use approximating a quarter of a million dollars. The projects in the field of Criminal Law and Procedure have been financed through subsidies from the Rockefeller Foundation, which have aggregated approximately $150,000.

The Institute is composed of two classes of members—elected members and official members. Official members are the Justices of the Supreme Court of the United States, Senior Judges of the Federal Circuit Court of Appeals, the Chief Justices of the highest courts of the several states and the District of Columbia, the president and members of the executive committee of the American Bar Association, the presidents of the State Bar Associations, the presidents of the National Conference of Commissioners on Uniform State Laws,

*Address given before the annual meeting of the Idaho State Bar, Boise, Idaho, July 15, 1933.

the presidents of certain learned legal societies such as the American Society of International Law, and the deans of the member schools of the Association of American Law Schools.

Elected members are chosen upon nomination by a member, recommendation by a Committee on Membership, and election by the Council of the Institute. The articles of association provide for 750 elected members of which there are now 698. The membership is nationwide. The Institute has no dues. The obligations of a member are (1) to assist in the Institute's project by examination of the Restatements and submission by the member of such suggestions for their improvement as he may be able to offer, and (2) to attend the Annual Meeting of the Institute.

The executive body of the Institute is a Council composed of thirty-three members. The members of the Council are elected by the Institute and hold office for nine years. Incidentally, the last four additions to the Supreme Court of the United States—Chief Justice Hughes, and Justices Stone, Roberts and Cardozo—were members of the council. If any of the members of the bar have aspirations to their appointment to the United States Supreme Court, it might be well for them to become allied with the American Law Institute.

The executive officer of the Institute is the Director, who is also secretary and executive officer of the Council and ex-officio chairman of the legal staff. This latter office is ably and efficiently filled by Mr. William Draper Lewis.

The work of restatement which has been adopted is to develop the restatement of each subject through the labor of successive groups, each group larger than the previous one. A reporter is first selected for the subject of law to be restated, and in those subjects now in process of restatement, it has been the endeavor of the Institute to select men nationally recognized as authorities upon the respective subjects. Thus, Samuel Williston, a national authority on Contracts, was selected as Reporter for the Restatement of the Law of Contracts. The reporter is primarily responsible for the preparation of th successive preliminary, tentative, revised and finally, the official drafts. Working in conjunction and co-operation with the reporter are the advisers, which in the case of the Law of Contracts, were six in number. After the first draft of the first chapter is prepared by the reporter. it is submitted to the advisers, who review the work, propose amendments and make appropriate suggestions, holding meetings for that purpose, lasting sometimes as long as a week or ten days.

The restatement, when approved by the advisers, is then submitted to the Council, where it is again carefully scrutinized, discussed, simplified and made more definite for the purpose of clarification, correcting phraseology and terminology, the Reporter being present, and if and when amendments or corrections are made and adopted it is then submitted for final action at the next annual meeting of the Institute, where it is again discussed and amended, if amendments are deemed necessary, before final adoption.

Each chapter of each subject is disposed of in the manner I have described until each subject is complete. In this manner the restatement of the Law of Contracts has been made and published.

In a similar manner model statutes covering criminal procedure have been completed. The subjects of Torts, Agency, Conflict of Laws, Property, Trusts, and other branches of the law are now in the course of restatement.

In this connection it might be observed that copies of drafts of the restatement of the various subjects under consideration and in the course of final



preparation for submission to the Institute are sent to all members, leading law schools and associations allied with the Institute, for examination, criticism and suggestions, to be forwarded to the executive secretary and in this way are referred to the Reporter and advisers for consideration.

Upon completion of a restatement, local annotations are compiled in many jurisdictions, in support of the restatements or in some cases to distinguish the principles announced in the restatements, due to legislative enactments or contrary holding by the courts of the state. Annotations are made by or under the supervision of the deans of the various law schools with and sometimes without the co-operation of the State Bar Associations. By referring to the later issues of the Idaho Law Journal, published by the Law School of the University of Idaho, it will be noted that Dean Masterson has annotated a number of the chapters of the Restatement of the Law of Contracts and has cited many cases in this jurisdiction supporting the restatement and has distinguished in some instances, the principles announced in the restatement, and statutes and decisions of the court. It is to be hoped that the Dean will find the necessary time in which to complete the annotations to all of the chapters contained in the restatement of the Law of Contracts and such other subjects as may be completed by the Institute from time to time. I do not know of anything that will be of more practical benefit to the bench and bar of this state than the complete annotation of the various restatements with reference to the statutes and decisions of this state. This is not any easy task.

In this connection it might be here suggested that in a great many states, State Bar Associations have appointed committees to contact the American Law Institute and study the various drafts in the making and to supply annotations as has been done by Dean Masterson. As said by George Wharton Pepper, Chairman of the Pennsylvania State Bar Association:

> "Nothing in the history of our Bar Association has operated to arouse a livelier interest in the organization itself than has this opportunity to do a great piece of public work, in a constructive way. The great trouble with many of our American organizations is that we just create the organization, and then try to find some justification for having created it. There is nothing which will so quicken the vitality of your Bar Association as to give it an opportunity so to relate itself to the whole body of the American Bar that you will no longer think of yourselves as an isolated group, with limited geographical interests, but will think of yourselves as a portion of the whole bar of the Republic. You will presently be enlisting in an enterprise which will not only insure the success in your own state of the experiment of the American Law Institute, but will add many cubits to your professional stature."

Much might be said touching the value to the bench and bar of the work being done by the Institute in the restatements of the various subjects of common law.

Justice Cardozo, of the United States Supreme Court, and vice president of the Institute, in December 1923, described the aims of the Institute in these restatements of the common law, in the following language:

> "When finally it goes out under the name and with the sanction of the Institute, after all its testing and retesting, it will be something less than a code and something more than a treatise. It will be invested with unique authority, not to command but to persuade. It will embody

a composite thought and speak a composite voice. Universities and bench and bar will have had a part in its creation."

At the annual meeting of the Institute in May, 1925, Justice Cardozo also said:

"So far as the restatements themselves are concerned, we have worked out during the two years of our experience, a form and a method and a technique which at least in their fundamental features are not likely to be changed."

Dean Pound, of Harvard University, speaking before the Institute in May, 1926, characterized the work as the search for "a scientifically organized, logically presented body of experience, not a formulation of universal reasoning. This concrete aspect of the restatement" he said, "so far as it has yet gone, is a most favorable sign, for concreteness is in the very spirit of our law."

The restatement of the law of contracts, now completed, and restatement of the law of agency, conflict of laws, torts, and other subjects before final completion, have been cited in numerous jurisdictions throughout the United States and have received considerable amount of attention in textbooks and law reviews. A striking instance of judicial reception and use of the restatement appears in the opinion of Mr. Justice Mauck of the Court of Appeals of Ohio, in *Saunders Co. v Galbraith*, 178 N. E. 35, 36 as follows:

"By following the admirable notes of Professor Ferson it would not be difficult to sustain the soundness of Section 90 as the boiled-down essence of the law of Ohio. We are content, however, to take the Restatement as the law of this state without exploring its soundness, and hold that of its own vigor it is adequate authority. This is not to say that the Restatement is of necessity perfect and that in it is to be found the law's last word. We only hold that he who would not have it followed has the burden of demonstrating its unsoundness."

In just a word may I state that the object and character of the restatements is to state clearly and precisely in the light of the decisions the correct principles or rules of the common law. It is the function of the courts to apply the correct rule or principle of the law as applied to the facts developed upon the trial, if we know the correct principle or rule of law to be applied to the facts, our difficulties are solved and the case is correctly decided. To determine the correct rule or principle of law to be applied from the vast number of decisions of the courts of last resort is no easy task. Therein lies the difficulty that confronts both the lawyer and the court.

Since the organization of the Institute, with three exceptions if my memory serves me correctly, but three men from Western States have been connected with the Institute, other than as official members attending the annual meetings, namely: Justice Emmett N. Parker of the Supreme Court of Washington, Mr. Orrin K. McMurray of California, and William V. Hodges, of Colorado. This probably accounts for the lack of familiarity and interest displayed by the various state bar associations of these western states. It is to be hoped that a more generous distribution of members of the Council, reporters and advisers will be made, which would unquestionably result in greater interest being taken in the work of the Institute and greater publicity given to its accomplishments.

I cannot refrain from calling attention to the valuable services rendered to the Institute by its president, General Wickersham, who, since its organization has given of his time and talents ungrudgingly to the end that the work undertaken might be completed in such a way as to justify the expense and enormous labor contributed by those actively engaged therein.

For many years the editorial force, consisting of reporters, their advisers, and assistants and director, has numbered some eighty odd persons, many of whom give all or practically all of their time to the work.

Mr. William Draper Lewis has devoted practically all of his time since the organization of the Institute, filling the important position of Director, with all of its many and burdensome duties. To the two gentlemen I have named I am indebted for much of the information I have been able in a brief way to bring to your attention.

Much more might be said touching the importance and magnitude of what in the course of time will develop to be a scientific, constructive, concise and accurate restatement of the common law, which will lessen the confusion, uncertainty and inconsistencies found in the vast volume of reports of courts of last resort.

I heartily recommend the thoughtful study and investigation by the members of the bench and bar, of the Code of Criminal Procedure, the Restatement of the Law of Contracts, now published, and the tentative drafts of other subjects I have referred to, because in them I am thoroughly convinced that you will find much help in solving the questions arising in your professional activities.

In closing, permit me to suggest the advisability of the appointment of a committee selected from the State Bar Association to contact the Director of the American Law Institute and bring to the attention of the Bar at its annual meetings such information as may be of interest to it with reference to the work of the Institute as it progresses.

# PROCEEDINGS OF THE IDAHO STATE BAR

VOL. IX, 1933

NINTH ANNUAL MEETING—BOISE, IDAHO

JULY 14th and 15th, 1933

The meeting of the Idaho State Bar Association was called to order at 10 o'clock a. m., in the Chamber of the House of Representatives, Capitol Building, Boise, Idaho, by Honorable William Healy, of Boise, President, and the following proceedings were had, to-wit:

MR. HEALY: Gentlemen, the Association will first hear the report of the Secretary, Mr. Griffin.

## REPORT OF THE SECRETARY

James F. Ailshie, Coeur d'Alene, was, at the Annual Meeting at Pocatello on July 15 and 16, 1932, elected Commissioner for the Northern Division. Upon reorganization, Wm. Healy, Boise, was elected President of the Idaho State Bar, E. A. Owen, Idaho Falls, Vice President and Sam S. Griffin, Secretary. The Board heard the disciplinary proceeding against J. T. Cook, of Midvale, and recommended disbarment because of his conviction of a felony, i.e., embezzlement. Subsequently, the Supreme Court entered judgment of disbarment. Hearings were also held in proceedings for non-payment of license fees and orders of suspension entered—subsequently delinquencies were made good and the suspensions were withdrawn.

Again meeting at Boise, September 23, 1932, the Board considered ten disciplinary matters, dismissing five as without merit, continuing two for further preliminary investigation, instituting action in two, and in one, upon hearing, entered final recommendatory judgment (subsequently affirmed by the Supreme Court) suspending E. M. Wilson, Preston, for two years and in the event he shall not have paid his client money collected and not remitted within that period, the said Wilson to be disbarred. J. F. Ailshie was appointed delegate to the Conference of Bar Association Delegates. The applications and the qualifications of the thirteen applicants for admission were reviewed; six were rejected and seven granted permission to take examinations. Arrangements for examinations were made.

The Board conducted examinations at Boise, December 7 and 8, and continued meeting until December 9. Eight disciplinary matters were considered; two were dismissed, one as settled, and the other for lack of cause; five were continued for investigation; in one a petition for rehearing was considered and rejected. The question of improper election advertising by an attorney candidate was referred to a committee of the Bar for preliminary investigation and report to the Board. Three applications for admission were considered, two were granted permission to be examined, one rejected. A legislative committee was appointed to draft and present legislation (largely the recommendations of the Judicial Council as adopted at the Annual Meeting) with Hon. Frank Martin as chairman, and twenty-seven members of the Bar. Warning notices were sent attorneys delinquent in payment of license fees. At the conclusion of the examination, papers were graded by the Board and six candidates recommended and one rejected.





On January 23, 24, 1933, the Board met with the Legislative Committee at Boise; rules relating to admissions were revised so that the requirements of two years credits for general college study was relaxed by permitting a showing of evidence of equivalent qualifications; also the rule for review by the Supreme Court of recommendations of the Board for admission was changed so that the recommendation entitled the applicant to admission, unless within 10 days of filing the same, written objections thereto were made and filed with the Court. These changes were approved by the Court and are now in effect. Five complaints were considered; one was adjusted and dismissed, one was dismissed for lack of cause, two were continued for investigation and one, relating to the conviction of an attorney of felony was withheld pending the attorney's appeal to the Supreme Court. The Secretary was directed to file complaints against attorneys delinquent in payment of annual license fees. Examination papers were graded and the applicant recommended for admission.

On April 21, the Board met at Boise, arranged for the spring examination, annual division meetings in the Northern and Eastern Divisions and the Annual Meeting of the Bar at Boise. One applicant for admission on certificate was recommended; the applications of eight others were reviewed and seven granted permission for examinations and one rejected. Six complaints were considered; one was an appeal from a Disciplinary Committee's refusal to sustain a demurrer to the complaint, which appeal was dismissed and the proceedings sent back for answer and trial; a request for reconsideration of a direction of the Board to an attorney to repay excessive fees was refused; three were dismissed for lack of cause, one was dismissed having been adjusted. In addition, the Board ruled upon a layman's unlawful practice of law and considered and rendered opinion upon an ethical question submitted by an attorney. Twenty-seven complaints had been filed against attorneys delinquent in payment of annual license fees; twenty-six were adjusted and dismissed; in one, hearing was had and the attorney ordered suspended (affirmed by the Supreme Court.)

The final meeting of the present Board was held at Moscow, June 8, 9, 10. An examination of nine candidates was conducted, papers graded and all recommended. The Board attended the Northern Division meeting June 10; students and faculty of the University, College of Law, also attended; the meeting was perhaps the largest for that division; the exceptional program was due to Commissioner Ailshie's activity and the result will doubtless be larger and more representative meetings in the future.

In addition to the usual numerous informal complaints adjusted by the Secretary, the Board had under consideration twenty-one formal complaints and twenty-seven delinquent license fee complaints. Of the former, eleven were dismissed for lack of cause, and three dismissed upon adjustment; one attorney was disbarred and one suspended; one is pending final hearing, one is pending restitution of excess fees, and three are held over.

There were twenty-six applications for admission, one being under certificate, the others by examination. Eight applications were rejected, but one of them subsequently allowed; fifteen subsequently took the examination (one twice) and were recommended.

The 1932 Proceedings were published as an issue of the Idaho Law Journal, the excellent publication under the direction of the College of Law, University of Idaho.

The condition of the funds appropriated for the Bar, and made up of all attorneys license fees, from July 8, 1932, to June 24, 1933, follows:

APPROPRIATION

| | |
|---|---|
| Balance reported June 8, 1932 | $3,563.63 |
| Receipts from licenses | 1,805.00 |
| | $5,268.63 |

EXPENDITURES

| | | |
|---|---|---|
| Office — Secretary | $825.00 | |
| Stenographer | 160.47 | |
| Stamps, supplies, etc. | 136.41 | $1,121.88 |
| Travel | | 545.13 |
| Meetings | | 183.92 |
| 1932 Proceedings | | 321.60 |
| Examinations | | 56.35 |
| Discipline | | 102.60 |
| Judicial Council | | 7.00 |
| | | $2,338.48 |
| Balance in appropriation June 24, 1933 | | $3,030.15 |

| *Licensed Attorneys* | 6/30/33 | 6/30/32 | 6/30/31 |
|---|---|---|---|
| Northern Division | 126 | 131 | 137 |
| Eastern Division | 131 | 125 | 138 |
| Western Division | 277 | 277 | 269 |
| Out of State | 21 | 28 | 26 |
| | 555 | 561 | 570 |

MR. HEALY: Note the changes made in the rules, as indicated by Mr. Griffin, increasing the power of the Commission, with respect to the approval of applicants for admission to the Bar. Heretofore where the Commission had given an examination and approved an applicant for admission, the Court had undertaken in every case to go over again the matter of the examination of the applicants and determine whether or not in the opinion of the Court they were qualified to become admitted to the Bar. The effect of the change in the rules is that the Supreme Court accepts the report of the Bar Commission with respect to the qualifications of the candidates, unless written objections are filed with the Court within a designated period of time.

The Canvassing Committee for the canvassing of votes for Commissioner for the Western Division will be named as George E. Huebener of Emmett, Homer Martin of Boise, and Frank Kibler of Nampa. The balloting on candidates for Commissioner of the Western Division will close under the statute at 12 o'clock.

The Committee on Resolutions will consist of A. H. Oversmith of Moscow, Mr. Harland D. Heist of Shoshone, Mr. Dean Driscoll of Boise, Mr. Henry Hall of Jerome, and Hoyt Ray of Idaho Falls. The committee will consider such matters as are brought up during the course of the meeting, and of course any other matters that the committee desires independently to present.

Under the statute, the Bar in each division is required to hold an annual meeting prior to the general meeting of the State Bar. This year the meeting



in north Idaho only was held, the one for the Eastern Division not being held, and I will ask Judge Ailshie to make a report of the meeting for the Northern Division. I may say that the Bar of north Idaho, due to the scattered communities, and the difficulty of communication, find difficulty in attending, in very great numbers, either the Annual or the Divisional meetings held in that part of the state, but through the fine efforts of Judge Ailshie this year, and the response made to his efforts by the Bar of north Idaho, an exceptional meeting of the Bar was held there. I will ask Judge Ailshie to give us a report on it.

JUDGE AILSHIE: I will give you a brief outline of what we had up there. I have said a good many times that I thought there ought to be a provision in the law, or the rules approved by the Supreme Court whereby members of the Association who fail to attend either a Divisional Meeting or State Meeting within a certain period of time, as I suggested at that meeting up there, within three years, ought to be subject to disbarment measures. I will state my reasons for that later on.

We had a very fine meeting. There were about fifty attending, but when you recall that perhaps twenty-four of that fifty were from the law school, there wasn't such a large attendance. Notwithstanding that fact, we had the best program we have ever had at either a Divisional Meeting or a State Meeting in north Idaho. The addresses were well prepared—in fact every address was prepared with a great deal of labor and minute study by men who were men of experience and training, and men who knew their subjects. With the program that we presented, there wasn't a great deal of time for independent discussion by members of the Bar who were in attendanee. We did have some time for discussion, and what time we did have was exhausted in discussing the subjects that had been dealt with by the papers.

We had at that meeting an address by Mr. Babb of Lewiston, one of the oldest members of the Bar—a man who has been a member of the Bar of the State for over forty years. He discussed the question of taxation, and the methods of reducing the burden of taxation—a very able paper, which, with other papers, if funds are sufficient, will probably appear in the reported proceedings of the State Bar, in order that the members of the Bar may have them in their possession for reference. [The address of Mr. Babb appears on page 279.]

Among the very important and significant papers, and one that came from a source that carried a great deal of force and impressed all who were present, was that of Judge Reed of the Eighth District, on professional duties. The paper was one of great value and caused a great deal of comment, coming from a trial judge with a great many years of experience, and made a very profound impression upon the members of the Bar who were present. [Judge Reed's paper appears on page 284.]

We had a discussion on the Obligations of a Public Prosecutor by Mr. Greenough of Spokane—Prosecuting Attorney of Spokane County, and a member of the Idaho Bar. He started in Idaho, and was admitted to practice along somewhere about 1909. He has had a very remarkable career as a Public Prosecutor, and delivered a very interesting address. Most young attorneys, young men coming out of law school, have ambitions to become a public prosecutor—most of them will be elected some place as a prosecutor. We thought it was a very good time and place to have an address from some man who was experienced and who understood the problems with which a

prosecutor is confronted, and his duties and obligations. The subject was discussed by Mr. Greenough in a very forceful and able manner. He took a very high stand on the duties of a prosecutor, not only to the public but to the man who is being prosecuted. Unfortunately his address was not written and cannot be included in the publication.

Dean Masterson delivered a very scholarly paper on "The Lawyer and the New Legal Era." You know we are departing from constitutional government —no question about that. We are continuing to claim that we are operating under a constitutional government, but it isn't the constitutional government that we knew fifty years ago. Not many of the laws recently passed would have stood the constitutional test fifty years ago. Constitutional government in this country is breaking down. Dean Masterson's paper was a scholarly and able one, and it pointed the manner and the way out. Some great scholar, or judicial celebrity, in a written opinion, has said, that the constitution is an elastic instrument. Now, of course, the question is arising when the elasticity has been exhausted. [Dean Masterson's paper appears on page 291.]

We had as a closing address, an address by a man who has had political and official experience. He has participated in some of the largest litigation ever had in Idaho—that man was Charles W. Beale of Wallace, and his address was on the remonetization of silver. It was a very comprehensive, instructive and able address. I venture there were not a half a dozen lawyers in that gathering who ever heard some of the things that he presented to us as the law, and which have been the law of this country since the demonetization of silver in 1873. Beale delivered a very able and scholarly address on the subject. [Mr. Beale's address appears on page 304.]

In addition to these papers and addresses, we exhausted the rest of the day in a forty-five minute luneh and in discussion of the various subjects so far as time would permit.

I advocated up there, and fearing that I might not have an opportunity of again saying it, I want to say now, that I believe that there ought to be a provision of some kind to make attendance at Bar meetings, at least in the course of years, compulsory. I say that for this reason: no Bar Association, State or National, can have any force or effect, or carry any weight, unless it is organized. If we have an attendance of ten per cent of the Bar at a meeting, and some resolution is passed recommending to the legislature the adoption of certain statutes, the chances are the legislative committee will not pay any attention to it. That has been my experience. Now an organized Bar, such as the American Bar Association, when it passes a measure, sends a committee down to Washington, and they get a most respectful hearing, and have been most successful. I do not mean to say they got all their measures through; they certainly put an end to those that they opposed. If we are going to accomplish anything in improving administration of justice, we have to have organization—we have to have the full State Bar back of these matters. There is another side to it. I think the lawyer gets a distinct benefit by attending these meetings. He is better for having participated in the discussions, and for hearing the discussion that takes place on legal subjects. I know some say, "Well, I have got my business, I have a good many things to attend to." Gentlemen, that is true of most all of us who attend these Bar meetings. We have business to attend to, but if you will arrange your business with the view of attending these meetings of the Bar, you will have no difficulty in doing it. If you will bear with me a personal reference. I have had a little practice for



the last fifteen years myself, and yet within the last fifteen years I have missed only one meeting of the American Bar Association, and that was because I was in the hospital at the time, and I have only missed I think possibly two of the State Bar meetings, and that was because they conflicted with the time of the meeting of the American Bar Association. I have never found a trial judge yet who would refuse to set a matter over, or continue a matter in which I was interested, upon a showing that it was because I wanted to attend a Bar meeting. I think that is true of all judges. Not only that, but I have never had a lawyer, when I told him I was going to a Bar meeting, but who would try to accommodate me.

I advocated at the Division Meeting the necessity of some method being prescribed by which attendance could be made compulsory. There has been suggested to me a method for improving attendance, and that is that the dues be raised to fifteen, twenty or twenty-five dollars a year, with a provision that if a member present a certificate that he had attended a Bar meeting he be given credit for all but five dollars. I think that is a good method At any rate, it appears to me that in some way it ought to be made compulsory. I wouldn't say every meeting, but at least say a meeting every three years.

MR. HEALY: The suggestion of Judge Ailshie with respect to the possible means of encouraging, if not compelling, attendance at Bar meetings, might well be considered by the Committee on Resolutions.

Mr. Owen, Commissioner for the Eastern District of the State Bar, is present, and we would like to hear of the activities of the Bar in his section.

MR. OWEN: Mr. President, it necessarily follows that since we had no meeting of the District Bar in the Eastern Division I have no report to make. After advising with some of the attorneys in the Eastern Division, it was thought best to forego the meeting for this year. That was done. It would require some outside speakers to bring a good attendance to the Division Meeting. The Commissioner for the Eastern Division thought it best not to incur that expense this year.

However, I do desire to take the opportunity to say that the Eastern Division does have some active Bar associations, particularly at Pocatello and Idaho Falls. There is a wideawake interest in what the State Bar is doing, and when any questions concerning the State Bar are presented to the division for consideration, we do not fail to have the required attendance to consider those questions. No questions having been submitted by the Judicial Council, and nothing of real vital interest to be passed upon by the State Bar this year, was another reason why there was no Division meeting. I believe there is nothing else to report, Mr. President.

MR. HEALY: There is a place reserved at this point for the annual address of the President of the Association. [Mr. Healy's address appears on page 316.]

MR. GALLOWAY: If any lawyers are accompanied by their wives they should leave the wife's name and address with Mr. Griffin. A committee of ladies wants to entertain them.

I assume that all the members of the Bar present will attend the banquet this evening. The banquet commences at seven o'clock. The banquet is in charge of Jess Hawley and Judge Dunbar.

Arrangement has been made for visiting lawyers to play golf at either of the two golf courses in Boise. All you have to do is leave your name with the

club, and the local association will take care of the green fees. Mr. Carter and Mr. Hawley have charge of the entertainment.

Also leave with Mr. Griffin the place where we can find you this evening at six o'clock so that we can take you out to the Country Club if you haven't transportation.

MR. HEALY: I gather the meat of Mr. Galloway's statement is that you notify the Secretary whether or not you expect to attend the banquet. If you happen to have your wife with you, please leave her at home, the latter being the most important of the two points. Is that correct?

MR. GALLOWAY: Yes.

MR. HEALY: Is there any one of you that has any matters that you desire to bring before the Association this morning?

MR. OVERSMITH: Immediately upon adjournment of this meeting, those appointed on the Resolutions Committee will meet for a few moments here.

MR. HUEBENER: I would ask that the Canvassing Committee meet at the end of this session in this room.

MR. HEALY: This afternoon we have addresses by three able men, who are particularly well informed with respect to the subjects on which they are to speak.

If there is nothing further, the meeting will be adjourned until two o'clock this afternoon.

July 14th, 1933

2:00 P. M.

MR. HEALY: Gentlemen, I wish to stress again the importance of your not forgetting the banquet to be given at the Boise Country Club at seven o'clock. It is suggested that you not wait until seven before going out there. Anyone going from five o'clock on will be taken care of. There may be considerable advantage in going early.

The program this afternoon commences with an address by Mr. Walter H. Anderson of Pocatello on the subject of the development of the law with regard to automobile damage cases. I want to say to you that Mr. Anderson has prepared, and in faet has about completed a text on the subject of trial of automobile damage cases, a text to which he has given a very large amount of labor, extending over a period of several years, in which he undertakes to follow the trial of an automobile damage case from its inception to the court of last resort, without including, however, the subject of applied practice. His text has been contracted for publication by Bancroft-Whitney and will be available for the profession about October 1st of this year. We will now hear from Mr. Anderson.

(Mr. Anderson's address was not written and is consequently not available for publication in full. He called attention to the many new questions arising out of the advent of motor vehicles, necessitating new legislation. One such enactment was Chapter 34 of the last session laws providing service of process on a non-resident driver, who has caused injury in this state, through the Secretary of State and permitting personal judgment. The United States Supreme Court has sustained similar legislation. It is generally held the action may be brought in any county; that the Secretary may be served by mail; that the act applies to a non-resident corporation whose car is operated in the state, but not to a non-resident individual whose car is operated in the state by an agent.



Insurance companies usually take charge of and fully conduct litigation involving insured automobiles, and all courts, except one, hold that the fact of insurance cannot be brought out or inquired into. Yet, at least to the limit of liability, the company is the real party in interest and the named defendant a bystander. Nebraska has, however, held the contrary; that the company is the real defendant and may appeal even over the named defendant's objection; the company may impeach the named defendant. Mr. Anderson believed the courts would change; treat the company as having had its day in court and permit a direct judgment against it, and he thought illusory the fear that larger and unfair verdicts would result.

The labored effort to fix responsibility resulting in the "family purpose" doctrine was unnecessary since the common law already met the situation in previous holdiugs that where the operator of a boat was unidentified but the ownership of the boat was determinable, its operation would be presumed to be by the agent, servant or employee of the owner, withiu the scope of his employment, and the burden shifted to the owner to prove otherwise. This was a presumption of fact, not of law, and it did not disappear upon the owners producing contrary evidence, but the jury is to determine whether the presumption was overcome.

To require a plaintiff to submit to physical examination before trial was a common law right of defendant, enforceable by applieation to, and order of, court. The order will provide for examination by an appointed physician, in the presence of plaintiff's physieian, and the report to the court is available to either party.

A plaintiff may allege negligence generally and under such plea prove any negligence, but if he specifies he is confined to the specification. But defendant may demand a bill of particulars notwithstanding demurrer for indefiniteness and uncertainty. Even violation of a municipal ordinance may be shown under a pleading of general negligence, but it is necessary to plead and prove a foreign law relied upon in courts other than Federal.

A parent may sue his minor ehild, and the child his parent, for injuries caused by an insured automobile negligently operated. Under guest statutes gross negligence must be proven by the guest, if injured, but, if killed, his heirs need prove only simple negligence. If A invites B to ride and a collision oecurs with C, B must prove gross negligence as to A, but only simple negligence as to C, yet he may join A and C in one suit. C could plead contributory negligence but A could not, since it is not a defense to gross negligence.

In community property states if the husband or wife injures another and dies before judgment, the action abates.)

MR. HEALY: Mr. Thompson of the Pocatello Bar will speak to us on a subject which is of more than ordinary importance in these days, and one with which he, perhaps, more than any other lawyer in Idaho, is closely familiar. The subject of his address is Recent Developments in the Federal Regulation of Carriers. I have the pleasure of introducing Mr. Thompson. [Mr. Thompson's address appears on page 319.]

MR. GRAHAM: Without going into details of the legislation passed by the last session of the legislature, how is that interpreted by the carriers generally—whether or not it will be beneficial in the end?

MR. THOMPSON: Carriers generally—I am sure I speak on good information if I say the chief carriers of the west—generally recommend this: That a study be made which will tend to develop such a system of federal administration as will enable them to pay their operating costs, and insure

them a moderately fair return upon their investment. It is a matter of common knowledge that they were in frequent contact with the administration prior to the passage of the law, and even though this be an experiment many of them received the law as the only remedy. That is not true everywhere. We find in this territory that it is particularly welcome, and so do others, and it is hoped that it may result in our operating at least with a fair return.

MR. GRAHAM: Did I understand you to say that there has been considerable trouble in arriving at the valuation of these railroad properties?

MR. THOMPSON: Yes.

MR. GRAHAM: Isn't it a fact that the Commission has had a bureau investigating this for a number of years, in order to arrive at a valuation?

MR. THOMPSON: Yes, a very able bureau, and spent lots of money.

MR. GRAHAM: They have been eight or ten years, haven't they, trying to arrive at a valuation?

MR. THOMPSON: They have been possibly twenty years, since 1913.

MR. GRAHAM: Have they ever been able to give us a valuation on the property?

MR. THOMPSON: Yes, subject to qualifications: They have procured a lot of interesting data, but, as Commissioner Eastman has explained, there are so many factors that one economist would use that another would disagree with in trying to solve the problem. The result is that the railroads and the Commission have not agreed, and having disagreed some cases have gone up to the Supreme Court of the United States, and I say, without disrespect to the Commission, that the Commission has lost.

MR. GRAHAM: Now how in the world do they expect to arrive at an equitable freight or tariff rate if they can't find out what the properties are worth. Don't they need a dictator, somebody to tell them—an arbitrator?

MR. THOMPSON: The proposition is not one that yields to a rigid formula. It is not one to which a rigid formula ought to be applied, and as I stated, exact results cannot be obtained on account of so many factors which are incapable of exact ascertainment. However, it is hoped that the legislation that is authorized may evolve something out of this—develop something that will be fair both to the public and to the carriers.

MR. GRAHAM: Who is responsible for this condition, with respect to not being able to ascertain or to know what the valuation is. That is what I do not understand. What condition has come about, what set of men has evolved that? Is it beyond human comprehension?

MR. THOMPSON: It is as I have stated—the failure of the Commission and the carriers to arrive at a mutually satisfactory valuation, and a failure of the railroad companies to receive a rate of return on the fixed valuation. Those are important factors. In arriving at a valuation, among the factors to be considered are the costs of reproduction now, original costs less depreciation, book value, and other items, all entered into the matter.

Now if rates are going to be based upon that valuation, you are not going to throw anything away, you are going to try to put it all in, for the purpose at least of coming to a final adjustment. So far the Commission has not come to a final adjustment. If it had come to a final adjustment with any of the carriers, it has declared that it is a tentative valuation, which will be the valuation so far as they are concerned. That was the valuation for rate making purposes. That result was never obtained, as I have explained. But at the same time, when we come before a Board of Equalization, the taxing body they say, this is the physical valuation of your property, and we are going to tax you on that valuation, which would be perfectly all right and fair, if the Commission, pursuant to the law I have been discussing, would at the same time allow the railroads a fair return on that basis.



MR. HEALY: The final number on the program for this afternoon was to have been a paper by Ralph Nelson of Coeur d'Alene, on the subject of Workmen's Compensation. I do not see Mr. Nelson in the room, and I haven't been made aware that he is here in the city. Apparently he is not present.

The report of the Canvassing Committee on the election of Commissioner for the Western District is now in order. We will receive that report.

MR. HUEBENER: Mr. President: We, your Canvassing Committee for the Commissioner for the Western District, beg leave to report that we have canvassed the vote cast for Commissioner for the Western District, and find that forty ballots were received by the Secretary, two thereof not being qualified to vote by reason of the fact that they had failed to pay their annual license fees, and that John W. Graham received thirty-six votes, D. L. Rhodes one vote, and E. V. Larson one vote.

MR. HEALY: The report shows that Mr. John W. Graham has been elected Commissioner for the Western Division. We would be glad to hear from you, Mr. Graham.

MR. GRAHAM: Mr. Chairman, and Gentlemen of the Bar, sometimes during our life honors are thrust upon us. That is what happened to me. This honor has been thrust upon me, and I deeply appreciate it.

I hope that I am going to be in a position to help the Bar. For the last number of years I have attended Bar Association meetings, taken quite an interest in them, and I hope that the interest I have had in the past will continue to grow, and that I will be able to render some service to the Bar.

I want to sound this warning, that the Bar Commission cannot do anything unless it has the active co-operation of the members of the Bar. It is an uphill grade all the time. We have got to have interest manifested by the members of the Bar in what is going on. The suggestion was made this morning in regard to forcing the members of the Bar to take an interest and attend the District and State conventions. We have between five and six hundred members of the Bar of this state, and if you can get five or six hundred men together, in unison, they will wield a mighty and a powerful influence, while individually they can accomplish little or nothing. An illustration of this was the last session of the legislature, where the legislature passed a law taking away from the Courts certain rights and granting them to another branch of the government. Those conditions should not exist, if the Bar is functioning as it should. We are asleep at the switch, and if we do not take charge of things, the layman is going to do it and that is just what they have done. I suggest at the coming session of the legislature that we have a legislative committee to try and advise at least as to whether or not the laws about to be passed by the legislature are beneficial to the state. We are passing through a period of evolution and revolution, and it is up to the members of the Bar to try and protect our institutions and Constitution. I thank you.

MR. OVERSMITH: As a member of the Resolutions Committee, any who feel the Bar should pass any particular resolution, hand it to some member of the committee consisting of myself, Driscoll, Hall, and Ray. We will

not consider any resolutions not presented by twelve o'clock tomorrow noon. We have to get them in shape by tomorrow afternoon, and every member of the committee will be glad if you have anything at all on your chest, if you will bring it before them. Bring it in some kind of form if you can, but if you can't, any suggestion of a resolution to the committee will be given consideration.

MR. HEALY: We will be at recess until ten o'clock tomorrow morning.

The banquet of the Bar, will be held at the Boise Country Club on the bench at seven o'clock this evening. You will be welcome out there, and your wants will be taken care of at any time from five o'clock on. The committee in charge of the program has gone to considerable length in making arrangements which will insure your entertainment, and for those who have no means of transportation to the Country Club, transportation will be arranged for you if you will tell Mr. Galloway or Mr. Griffin that you want transportation.

Saturday, July 15th, 1933
10:00 A. M.

MR. HEALY: We will proceed with the morning's program. General Martin has undertaken to speak to the Association this morning on the subject of "The United States and the World Court." General Martin. [General Martin's address appears on page 327.]

MR. HEALY: The resolution submitted by General Martin, at the close of his very splendid and very interesting address, will be referred to the Committee on Resolutions, and the Chairman may have a copy at the desk.

The concluding part of the program of this morning consists of an address by Justice Budge on the work of the American Law Institute. Permit me to say that Justice Budge is a life member of that important body, a very distinguished honor which has come to Idaho in that connection, and further than that he has been selected to take an active and important part in the work of the institute. The subject of the activities of the American Law Institute is an interesting subject, and it is one with which most lawyers are not familiar, and I am sure you will all be interested in what Justice Budge has to say. [Judge Budge's address appears on page 335.]

## RESUME OF SUPREME COURT CALENDAR

First Six Months of 1933

### CASES FILED

| | BOISE | | NORTH | | POCATELLO | | TOTAL | | GRAND TOTAL |
|---|---|---|---|---|---|---|---|---|---|
| | Civil | Criminal | Civil | Criminal | Civil | Criminal | Civil | Criminal | |
| Jan. | 4 | 0 | 3 | 2 | 1 | 0 | 8 | 2 | 10 |
| Feb. | 6 | 1 | 3 | 0 | 1 | 0 | 10 | 1 | 11 |
| March | 3 | 0 | 3 | 0 | 4 | 0 | 10 | 0 | 10 |
| April | 6 | 0 | 5 | 1 | 1 | 1 | 12 | 2 | 14 |
| May | 7 | 0 | 6 | 0 | 3 | 1 | 16 | 1 | 17 |
| June | 0 | 0 | 0 | 0 | 5 | 1 | 5 | 1 | 6 |
| Total | 26 | 1 | 20 | 3 | 15 | 3 | 61 | 7 | 68 |
| July 13th | 2 | 1 | 0 | 0 | 1 | 0 | 3 | 1 | 4 |
| Total | 28 | 2 | 20 | 3 | 16 | 3 | 64 | 8 | 72 |



### CASES DISPOSED OF

| | BOISE | | NORTH | | POCATELLO | | TOTAL | | GRAND TOTAL |
|---|---|---|---|---|---|---|---|---|---|
| | Civil | Criminal | Civil | Criminal | Civil | Criminal | Civil | Criminal | |
| Jan. | 3 | 0 | 0 | 0 | 0 | 0 | 3 | 0 | 3 |
| Feb. | 10 | 0 | 0 | 0 | 0 | 0 | 10 | 0 | 10 |
| March | 10 | 0 | 0 | 0 | 2 | 0 | 12 | 0 | 12 |
| April | 9 | 1 | 0 | 0 | 2 | 0 | 11 | 1 | 12 |
| May | 1 | 0 | 0 | 0 | 11 | 1 | 12 | 1 | 13 |
| June | 3 | 0 | 3 | 0 | 5 | 0 | 11 | 0 | 11 |
| Total | 36 | 1 | 3 | 0 | 20 | 1 | 59 | 2 | 61 |
| July 13th | 1 | 0 | 8 | 3 | 1 | 0 | 10 | 3 | 13 |
| Total | 37 | 1 | 11 | 3 | 21 | 1 | 69 | 5 | 74 |

### CASES ON DOCKET, JULY 1, 1933

| | BOISE | | NORTH | | POCATELLO | | TOTAL | | GRAND TOTAL |
|---|---|---|---|---|---|---|---|---|---|
| | Civil | Criminal | Civil | Criminal | Civil | Criminal | Civil | Criminal | |
| Under Advisement | 0 | 0 | 3 | 0 | 1 | 0 | 4 | 0 | 4 |
| At Issue | 14 | 1 | 5 | 0 | 1 | 0 | 20 | 1 | 21 |
| Appellant's Brief | 8 | 1 | 2 | 0 | 6 | 0 | 16 | 1 | 17 |
| Transcript | 7 | 0 | 7 | 0 | 0 | 1 | 14 | 1 | 15 |
| Clerk's Certificate | 11 | 0 | 5 | 1 | 6 | 2 | 22 | 3 | 25 |
| Total | 40 | 2 | 22 | 1 | 14 | 3 | 76 | 6 | 82 |

MR. HEALY: I want to thank you, Judge Budge, for your very splendid and instructive address. It is a subject that lawyers generally have not had a chance to become informed on, and I know we all appreciate the information you have given us in regard to the work of the institute.

I want to go back a moment to the address of General Martin. The resolution on the subject puts the Bar of the State on record as recommending an adherence to the World Court under pending protocols of the United States Senate, and as it may be a controversial subject, I think I should have given an opportunity for discussion at the close of his remarks. Does anyone have anything to say on this subject? You may prefer to postpone discussion until the report of the Resolutions Committee at the time this resolution will be more formally presented. The matter is open for discussion now.

A MEMBER: I believe the best time for that is when the resolution is presented.

MR. HEALY: If there is no further discussion, the program for the morning has been completed and we will recess until two o'clock this afternoon.

Saturday, July 15th, 1933
2:00 P. M.

MR. HEALY: If you will come to order, we will proceed with the program for this afternoon. Aside from the reports of certain committees, the only

matter on the program is an address by the Honorable T. C. Coffin, on a subjeet which he himself will designate.

(Mr. Coffin's address was not written, and is consequently not available for publication in full. He praised the ethies of lawyers, contrasting them with situations such as the oceurrences developed by the Senate investigations of the National City Bank where it appeared the bank loaned money to Cuban sugar interests; due to no fault of either party the value of the loans declined; whereupon the bank caused the sugar companies to be taken over by the bank's affiliates and sold the bonds and stocks, paying off their own loans; it was able easily to sell such bonds through its own, and affiliatc banks' lists of depositors; today the bonds arc of little value. A custom has grown up where a bank serves two masters—its depositors on the onc hand, and its own interests on the other. The lawyer would not permit himself to be placed on two sides of the same case.

In one respect lawyers havc failed—they have not taken cognizance of the fact that legislation is largely dictated by organized minorities. For instance, there are anti-gambling laws unenforeed becausc if the places are closed the gambling will nevertheless go on, but unsupervised, in homes and out of the way places where the police have no chance. As practical men, we know this is so. The Bar must be willing to accept leadership to prevent such situations. Nearly all sumptuary legislation is based upon the efforts of the church to take a short cut to the millenium rather than undertaking the arduous duty of educating the people. We are violating our obligations if we don't teach people the futility of passing laws at the behest of an organized minority, who deliberately violate them. Nevada has the most liberal laws—fewer sumptuary laws than any western state; comparing the census of 1920 and 1930, while Idaho was saturated with a wet blanket of blue laws, Nevada showed a more healthy growth than we did, because they didn't have government interference with things that didn't concern it.)

MR. HEALY: Mr. Coffin, we thank you. While waiting for Mr. Overstmith's committee, we will hear the report of the Legislative Committee from Mr. Hawley.

MR. HAWLEY: Mr. President and Gentlemen: Your Legislative Committee is a permanent part of the Bar Association, whose function it is to translate into law the thoughts and decisions of the Bar Association on matters connected with jurisdiction and administration of justice. The committee, in years past, had very remarkable success in securing considcrable recognition from the Executive and Legislative Departments of the State, and those laws which we have a right to recommend for legislation, have on our recommendation, been passed. The life of this committee will, I think, be co-extensive with the life of the Bar Association. It will have its sad days; it will have its better moments.

The last session of the legislature was one which witnessed more or less failure from the standpoint of actual accomplishment on the part of the Legislative Committee. The Dean of the south Idaho Bar, Honorable Frank Martin, was chairman of the Legislative Committee. He took that committce into action in Deeember, drawing bills to meet the direction of this Bar at the Pocatello meeting. They were then presented to the Governor, and they were presented to the Judiciary Committee of the House and Senate. On the question of a non-political judiciary, your committee drew a bill quite in conformity with your direction. The Executive had his own bill on that subject, and that



bill was passed. It did not embody some of the important features that we thought sueh a bill should embraee. The Re-districting Bill was presented, and it was not thought well of by the powers in the state house, and probably no division or redivision of our state into distriets will ever be accomplished simply through the recommendation of this bill. Now we agreed pretty well as to how this state should be re-districted, but we found that lawyers in the House and in the Senate did not agree with our collectivc notion. Also we found that some of the men who disagreed with the majority at Pocatello brought the fight to Boise this last session. The result was that another idea of re-districting was suggested. That idea was the idea of individual lawyers, and possibly of those who were not lawyers, but it was not the thought at all agreed upon by this Bar. This Bar probably knows more about re-districting, from the standpoint of administration of justice, at least, than any other element of our citizenship, but the people, through the legislature, refused, and probably will continue to refuse, to act upon our suggestion as to re-districting. I understand that the Resolutions Committee will not report in favor of pursuing that bill any further in the legislature. It was defeated, and our notion with reference to probatc administration was likewise defeated. The Bar, which is held responsible by the press, and to some extent by our friend who just addressed us, for public opinion and for the laws—the Bar made a recommendation, and did not have the power to carry it out, and perhaps in the public eye and the eye of a few of the editors, will be held responsible for not having brought about a relief from the ancient, venerable and inefficient probate system under which we are now operating. Gentlemen, therc was not a bill which you gentlemen in your wisdom agreed upon and directed us to draw and present that was passed by the last session of the legislature, and so far as actual accomplishment is concerned your Legislative Committee reports a total loss with no insurance.

To go beyond the mere report of the committee, and I think in my last statement I epitomized the report, may I suggest that it is the habit of men of our profession, and of men in the newspaper business, and business men in other lines, but more noticeably in these two avocations, to hold the lawyers responsible for the short comings in legislation, as if we, as a profession, had the power to pass laws and to make laws. We have much red tape, we have many unjust laws, we have many fool laws, and I believe that they should be wiped off the statute books, but why should anyone come to the lawyers, in our professional assembly, and tell us we ought to do it. Where is the concomitant power to do it? I think we ought to protest against being held responsible for bad laws, for inefficient laws, unless somebody gives us the power to make correct laws, and I notiee that when we do come together and agree upon some line or change in our laws, we present it to a body where we have probably less than ten per cent of our membership, a body that decides, and we do not decide, and we are held responsible for failure. I call your attention to that unjust source of holding us responsible, and let's, gentlemen, when somebody begins to criticise the Bar and the Bench for these ineffieient laws, these fool laws, let's just say right back that we, as a Bar, are not responsible, and we haven't the power. Let us not have a false brand put upon the legal profession. I, for one, am quite tired of being held responsible as a lawyer, when I haven't the power that goes with the responsibility. Please do not misunderstand me in this last suggestion as in any way criticising the former speaker. I can't thoroughly agree with him, and if he was talking to us as a citizen,

and merely urging us as citizens, probably better informed about the laws than the average citizen, asking ns to wake up and perform, very fine, and I rather regarded his speech as made in that light, but, if he is asking us—intended to suggest that we, as lawyers, are responsible for these conditions, I protest. I don't like to see our profession made the scape goat.

Well gentlemen, these are my personal views, and I rather fancy, just a bit tedions. I hope the day will eome when we have some power to enforce the recommendations we make regarding the changing of procedure and the proper administration of justice. Just to illustrate. We suggested a non-political judiciary, but we have a non-partisan law, in which there is no requirement that lawyers nominate the judges. It is my notion that a man who seeks the honor of the judieiary should at least have the confidence of enough lawyers so that his petition should eontain the signatures of a number of the members of the Bar. You know that is probably a good way of getting effieient judges, yet the people refuse to put that into the law.

I am satisfied that there are a number of suggestions that we should never attempt recommendations concerning. We should not attempt recommendations concerning substantive laws. We should not make reeommendations nntil they have had the thought of the whole Bar Association, and we should only make recommendations regarding matters which have directly to do with the administration of justice, and beyond that it is better policy not to go. We should never get into controverted questions, such as whether we believe in the Eighteenth Amendment or don't believe in it—whether we believe a certain type of law that has to do with the rights of the people should be passed or whether we believe it shouldn't be passed. We should be very carful not to go beyond what is distinctively and admittedly within the peculiar knowledge and province of our profession in the administration of justice.

Gentlemen, your Legislative Committee will earry on, it will keep carrying on—it will have its failures, but I believe over the period of ten years you will see improvement, you will see accomplishment through this Legislative Committee, and you will see your wishes which have been translated into directions to your Legislative Committee carried into the statute.

MR. HEALY: While we are waiting for the Resolutions Committee to report, we have present in the room two District Judges of this district, and we would like to hear from them. Judge Koelsch, will you speak to us for a moment on some matters you think might he interesting.

JUDGE KOELSCH: Mr. President, I have been taken completely by surprise, and I have no subject in mind. I think I would rather be excused, because I have not formulated any idea that I would like to inflict upon you at this time.

MR. HEALY: Judge Winstead, may we hear from you?

JUDGE WINSTEAD: Mr. President, it has been the practice of our district to be uniform and follow the same precedent, and in view of the precedent established by my senior brother here, I have no particular remarks that I desire to make to this assembly.

MR. HEALY: I think our Beneh is entirely too modest. I understand Judge Sutphen is in the room.

JUDGE SUTPHEN: Mr. President, I might say that I have enjoyed the hospitality of the Boise Bar. I enjoyed the chicken, iee cream, the tea, and the three-two, and we had some lemonade that I thought was very good, except that I had a suspicion that somebody might have got their boot in it. I have enjoyed my stay very much. I wish we could have had a larger attendance, but I know it is very difficult to get members to eome from distant towns. The Association has done wonderful work, and I hope that it ean be continued. I feel that as time goes on the Association will gain in strength, and become a great power in this state.



MR. HEALY: The Bar Commission, pursuant to statute, has organized itself for the ensuing year, and has elected E. A. Owen, of Idaho Falls, as President of the Bar for the coming year. We would like to hear from Mr. Owen.

MR. OWEN: Mr. President, and members of the Bar: This is an honor, and I deem it a real honor. It has eome to me by virtue of my position on the Bar Commission, and likewise by virtue of the unified Bar Act of this state. From five years' experience just closed as a member of the Bar Commission, I have found that there is considerable responsibility connected with the offiee of Bar Commissioner. Your Secretary has given you some idea of the number of eomplaints that have been handled by the Bar Commission during the past year. That in and of itself should bring very forcibly home to the minds of the members of the Bar that the charaeter of the members of the Bar, in a measure, is in the hands of the Bar Commission. Many complaints come to us that are absolutely without foundation. The Bar Commission serves as a clearing house, so to speak, upon those complaints, and looking at it from that view point there is a responsibility plaeed upon the shoulders of the members of the Bar Commission that is a serious one. I believe I have missed but one meeting in my five years' service. I enjoy the work. I enjoyed the work of giving the examinations to the young men who are to be our future lawyers in the State of Idaho. Perhaps I might not be standing here thanking you if the seleetion for the office I hold was left to the popular vote of the Bar, but anyway as a part of the organization I want to thank you sincerely, and I feel confident that with the assistance of the other men who are on the Bar Commission, Judge Ailshie of Coeur d'Alene, and John W. Graham of Twin Falls, we can in a measure do justiee to the members of the Bar, and in the end promote the work of the Bar Association in the State of Idaho.

MR. HEALY: Is the Committee on Resolutions ready to report?

MR. OVERSMITH: The Committee has reported, and I helieve the Secretary should read the resolutions.

MR. GRIFFIN: (Reading) Resolution No. 1.

"The Idaho State Bar Association at its annual meeting held at Boise, Idaho, on the 14th and 15th of July, 1933, expresses its appreciation of the hospitality that the City of Boise has exhibited to it and also of the many eourtesies shown by the local Bar and their efforts for the entertainment of the visiting members. We also express our appreciation and extend our thanks to those members of the Bar who have given their time and thought to the preparation of the splendid addresses whieh we feel have been of great benefit to those attending our deliberations."

MR. OVERSMITH: I move the adoption of the resolution.

A MEMBER: I second the motion.

MR. HEALY: If no objection, the resolution will be considered as having the sanction of the Bar.

MR. GRIFFIN: (Reading) Resolution No. 2.

"We pause in our deliberations to pay tribute to the memory of our brethren who have passed over the Great Divide since our last meeting. The Committee on Resolutions has attempted to ascertain the names of those who cannot be with us. Our ranks have been depleted by the death of the following members:

Ralph Adair, Judge of the District Court
F. E. Fogg of Grangeville
Guy Martin of Sandpoint
Myrvin W. Davis of Sandpoint
Claude W. Gibson of Boise
G. F. Hansborough of Blackfoot
W. M. Edens of Pocatello
M. W. Griffith of Moscow
M. D. Jackson of St. Anthony
Supreme Court Justice R. D. Leeper of Lewiston
Ex-Justice of the Supreme Court and of the District Court, Charles O. Stockslager.

By the death of these men, the state and Bar have lost the services of citizens who have contributed towards the development of Justice and the upbuilding of our communities."

MR. OVERSMITH: I move the adoption of the resolution.

A MEMBER: I second the motion.

MR. HEALY: The resolution will be adopted.

MR. GRIFFIN: (Reading) Resolution No. 3.

"Your Committee on Resolutions recommends for discussion at the next annual meeting, the advisability of amending our statute, providing for the annual meeting of the Bar to be held in the City of Boise on account of its central location. It is the opinion of your Committee on Resolutions that a greater interest can be developed in our Bar Association and a larger attendance will be assured if our annual meetings are held in our capital city."

MR. OVERSMITH: That resolution was prepared and submitted to the district meeting at Moscow by Mr. Feeney of the Bar at Moscow. So far as I could I tried to ascertain the sentiment of the members on the outside, and while this is only a recommendation for discussion at the next meeting, I feel that it is one that should be given some consideration. I move the adoption of the resolution.

JUDGE AILSHIE: This resolution in substance was adopted by unanimous vote at Moscow. I second the motion.

MR. HEALY: All in favor of the adoption of the resolution say Aye—opposed No. The resolution is adopted.

MR. GRIFFIN: (Reading) Resolution No. 4.

"The Committee further suggests for the consideration of the members of the Idaho Bar the advisability of amending our Bar law by raising the annual dues to at least $15.00, with a provision that those presenting a certificate of attendance upon the annual or district meetings of the Bar, shall be entitled to a rebate of all sums in excess of $5.00. We further recommend that the question of the holding of an annual district meeting be taken up for discussion at our next meeting. In the opinion of your Committee on Resolutions, such district meetings appear to have been poorly attended, and unless the members of the Bar will take a greater interest in such a district meeting the provision of law for such meetings should be repealed."



MR. OVERSMITH: I will ask Mr. A. L. Morgan to discuss that. It is his resolution. I move the adoption.

A MEMBER: I second the motion.

MR. A. L. MORGAN: In my judgment if our Bar Association is going to accomplish anything it is going to be necessary that some method or means be devised to increase the attendance. The matter was thoroughly discussed with the committee, and elsewhere, and also the question came up as to how lawyers should be advised as to the particular question they were interested in before the legislature. The California method was discussed and argued, and also the method in Idaho. The difficulty and the objection that I have to the California method is that, from the average practitioner, the questions do not get the consideration they should get. You all remember that prior to the action at Pocatello with reference to the re-districting of the state, the report of the Judiciary Committee was sent out all over the state, and lawyers were requested to inform themselves as to the report of the committee, and be prepared to discuss it at the Bar meeting at Pocatello. I don't want to say that a majority of the people who attended that Bar meeting at the time they reached Pocatello didn't know anything about what the report contained, but a good many of the people didn't.

It is my judgment that the only way we can have a Bar Association that will have the force and effect that we desire it to have is by getting the members to attend the meetings, and discuss these questions and present their ideas, and in that way we will eventually get some influence. In other words, if we can get a majority of the members of the Bar to attend our annual meeting, we will sooner or later develop a power which the legislature will not dare turn down. I do not believe it can be done in any other way. Now if we increase the Bar fees, and arrange a refund for those who attend, we are not only offering an inducement to the members to come, but in case they do not come their money is available, and that money can be used to advantage in accomplishing many things that the five dollar fee does not reach.

Another suggestion that was made is that one day before the Bar meeting convenes, for a period of three days, we have a judicial holiday in Idaho, extending throughout the time of the Bar meeting. I believe the courts will close. Such action would impress the lawyers, and help give them to understand that one of the biggest things that a lawyer can do for his profession and for his state is to attend the Bar meeting. I think the courts should respect the Bar meetings enough to close during the time we are holding our annual session. I feel that every member should deem it a pleasure to come down here and perform one of the biggest duties that devolves upon any lawyer, and that is to mingle with his fellow members and find out what the state needs, and help find a remedy. If we can get that kind of interest manifested we can do the things that Mr. Coffin suggested that the Bar should do, and be of very marked assistance in the matter of controlling legislation. I feel that these suggestions will aid in getting a greater attendance at our Bar meetings, and that is the purpose of the two ideas.

MR. OVERSMITH: I concur in everything that Mr. Morgan has said. I have said that the fee should be at least fifteen dollars. There might be some exception to that in the case of the younger members of the Bar who can't afford perhaps to attend the Bar Association meetings. I think that a twenty-

five dollar fee might possibly be better. That would make a real inducement for every member of the Bar to attend.

JUDGE AILSHIE: Some reference was made awhile ago in the discussion to the California method of ascertaining the sentiments of the members of the Bar by referendum, and comparing that with our system. I am familiar with that, as I happened to be at the American Bar Association meeting at the time that the first form of the enactment for compulsory organization was adopted and passed, and these two systems were advocated and sent out. California adopted one and we adopted the other. I think it is the general concensus of opinion in the states, so far as they have adopted this compulsory Bar Act, that it is the better. Alabama has exactly the same act as we have. The difficulty with the referendum vote is that you don't get both sides presented unless you send out an argument prepared by some one on each side of the question. The compulsory provision will bring about a large attendance of members of the Bar, and will enable us to get an intelligible expression of opinion, that kind of expression of opinion from members of the Bar that won't be easily dissolved or changed after we go home. We meet here in a hall like this, with a hundred and fifty or two hundred lawyers present, and discuss and debate these important questions confronting the Bar and the people of the state. We hear both sides of the questions debated, we hear arguments presented pro and con, and when we get through we have got something—we have a concensus of opinion that will carry weight, the kind of concensus of opinion that will make itself felt in the legislature, and the chanees are that lawyers who happen to be in the legislature will be men who have attended these meetings. As it is now, I venture to say that there were not two lawyers in the legislature that had attended our meetings. There was only one in the House that ever attended. I do not recall that there was any in the Senate that have attended.

What we must have is better attendance at these Bar meetings—men who will come here and participate in our deliberations, hear discussions, and participate in the vote, and then when we have resolved to do a thing we have got the force of the organization behind us. We are between five and six hundred strong. A united Bar wields influence, a disintegrated Bar wields no influence. We have so far a practically disintegrated Bar, for the reason that we have only had a handful in attendance at our meetings. I think perhaps we had a better attendance at the Bar meeting a year ago at Pocatello than we have here today. We have no larger attendance here today than we had in our northern division meeting on June 10th.

Now let's pass this resolution, and give notice to the members throughout the state that we are going to discuss this at our next annual meeting, with the view to adopting and recommending that our Legislative Committee present it to the legislature, and let's have such an Aet that has teeth in it. Let's place the teeth so that a man will pay something if he doesn't attend, and let's have an inducement for him to attend. I heartily approve what Mr. Morgan has said. I do not see why we couldn't have a judicial holiday during our Bar meetings. I see no reason why every judge in the state could not let it be understood that there is going to be no judicial business transacted in his district, except the issuanee possibly of some neeessary writ, or something of that kind, while our Bar Association is in session. I never had any difficulty in attending these meetings.

JUDGE KOELSCH: We have a notiee posted on our doors right now.



JUDGE AILSHIE: That is fine, and the rest of the courts could do the same. I was just about to say that I never had any difficulty in any court in this state in getting business put over while I attended the meeting of the Bar Association of this state, or the American Bar Association. I have been doing that for fiftcen years. We do not realize the importance of it as one of our professional duties. When a lawyer comes to a meeting of this kind, he comes back a better lawyer, better cquipped every time. If he doesn't, he isn't fit to be a lawycr.

Now I submit that this is a matter that we should take home to our several communities, to our local Bar Associations, and present it to them, and let it be discussed, and let's come back here a year from now with the purpose of adopting and sending out a legislative committee armed with the full force of the organization, and its full authority, so that we will have the legal profession of the state back of it.

MR. RATHBUN: Mr. President, I am not going to take issue with you gentlemen, and as I recall this resolution, am in favor of it, but the brother over here was talking about some protection for some of the beginners. I just want to serve notice that I want some additional protection for us old people, those of us who might be so weak and infirm that they would not be able to attend. There is one member of the Bar left home now older than I am. I am next to the oldest, but when a man isn't fit physically, or is too old or too feeble to attend a Bar meeting, he shouldn't be taxed on that account.

MR. OVERSMITH: That can be attended to.

GENERAL MARTIN: I am in favor of this. I only want to make one suggestion, and that is instead of talking about penalizing a man because he doesn't attend, let's call it a reward because he does attend. Every man who attends an Association meeting gets a compensation or a refund of so much for attending. I think if we can present it in that light, we will be put in a mueh better position.

MR. OVERSMITH: That is in the resolution.

MR. FEENEY: I belong to an organization that eharges an additional fee for non-attendance at the annual meetings, whieh is divided amongst those who do attend to help pay their traveling expenses, so that is not such a novel idea. I think it is a very fine idea.

MR. GRAHAM: It occurs to me that there is a little inconsistency here in the resolution. I think possibly there might be some criticism to the part which refers to Boise as the permanent meeting place. Wouldn't we be penalizing lawyers outside for not coming to Boise? I am hardly in favor of establishing Boise as the saered spot on earth. We might want to penalize Boise lawyers sometime later for not attending.

MR. OVERSMITH: That can be taken care of later.

MR. GRAHAM: What I wish to say is this: The result of it will have some value. If we pass this resolution here today, we will get more interest amongst the members of the Bar in what is going on. Without some greater interest being manifested by the members generally, we are not going to get very far. We will be overruled all the time. But with the interest manifested, that is capable of being manifested, by members of the Bar, getting them to participate, we are going to have a far-reaehing influence. By the mere fact that we adopt this proposed resolution, you will notice we will have twice as many members present—three or four times—as we have at the present time.

They will be afraid they are going to be penalized. I think this resolution should be adopted, if for no other purpose than to give the members an incentive to find out what is going on in the State Bar Association.

MR. KEYSER: I understand this resolution is simply a recommendation for discussion at a futnre meeting. If that is all, I have no objection, but I don't want to be precluded from opposing it hitterly if it becomes a serions question at the next meeting. The maiority of the members of the Bar are not wealthy. I think a good cross section of any Bar is the one at Boise. I venture to say that out of all the lawyers in Ada County, there are not more than twenty who could afford to go to Moscow, or take the time and spend the money, under present conditions. I think the statement of our young friend and Congressman, Mr. Coffin, against sumptuary legislation, is applicable to the situation we have here. We are not going at it from the right angle. I do not think it is right to put a penalty upon the long snffering members of the Bar Association.

MR. OVERSMITH: What remedy have you?

MR. KEYSER: I do not know as I have any remedy. I think this: We have got to do something to interest the members. I think that we have in our Bar Association enough talent to make the meetings so interesting that every member of the Bar that could possibly come would want to be there. If we can't do that, we ought not to have the meetings. That is my opinion of the solution of the thing. If we are going to have Bar meetings, we have got to present matters in snch interesting shape and in such manner as to induce the intelligent members to come, and we are not going to have them here unless we do that. There are a great many lawyers that attend two or three meetings, and not finding them interesting, they gradually fade out. So far as the other proposition that has been discussed here, that is, what we call the California plan, I have this to say: Every member who can attend a Bar Association meeting, who does attend a meeting, should have every opportunity, when he gets there, to hear the matters discussed by those who meet, and in addition to that the opportunity and the obligation to get the express vote of every member of the Bar on every important question. We don't have that—we don't get that here. We have just a handful of men here, who are trying to speak for this Bar.

I will ultimately try to conform to the best of my ability to the decision of the Bar on this question, but I do not believe in penalizing members of the Bar; I do think that the best way that we can uphold the membership of the Bar, and maintain interest at all times in the proceedings of the Association, is to let it be known before a Bar meeting that some members of the Bar will have addresses so scholarly, and the proceedings will be so interesting, that no member of the Bar can afford to miss it. Now we have had some very good papers here, but I have been a member of the Bar for twenty-five years, except thirteen months I spent in San Francisco, and I have attended meetings more or less regularly in this vicinity and I have the interest of the Bar just as much at heart as any member, whether big or little, prosperous or poor. I know before this unified Bar Act was passed a number of years ago, we had a statewide Bar organization which biennially held meetings here in Boise, that being the most convenient time to get them together because the legislature was in session, and we had more interest in those gatherings, and we had better addresses at those meetings, than we have ever had since. Why it is, I do not know, but there must be some reason for it.



As this resolution is merely for the purpose of carrying on discussion, and creating interest amongst the members of the Bar, that is perfectly all right and I am in favor of it. In the last analysis, however, I am entirely and unalterably opposed to raising rates. The license fee in California is $7.50. In California there are approximately thirteen thousand attorneys at the present time, while we have five hundred and sixty. California is spending something like one hnndred thousand dollars a year in the official operation of the State Bar Organization, and there isn't any question hut they are getting much benefit from it, but there is to my mind, and I think in the minds of the people living down there, an ever growing feeling that they are not getting results anywhere commensurate with the fabulous sum it costs to maintain the institution. We haven't as large a state as California, nor as mnch in the way of development of natural resources. As a state we are not as wealthy as they are, neither are onr lawyers as wealthy. Many of our lawyers are having a very hard time at the present, and I don't care how good they are, and now to work any kind of a hardship on the members of the Bar seems to me to be ill-advised and nncalled for.

MR. HALL: The committee had in mind that if we passed this resolntion there will be a number of attorneys here who will objeet to the resolution, and there will be a nnmber up here at the next meeting for that pnrpose. It is just a recommendation, and they will be here armed with considerable facts, and we will have a fighting session, and that is what we want. Whenever we ean stir up enough interest, stir np a qnarrel, a fight, and a lot of fuss, then we are going to have a good attendance at Bar meetings. This resolution is for the purpose of getting interest stirred up. The meetings are too apathetic. I think you will agree with me on that. We don't want agreements, we want arguments, and a good Irish fight. Let the boys know that if they don't come in and fight this thing, they are going to have to pay.

MR. HEALY: All in favor of the adoption of the resolution, will indicate by saying Aye—contrary No. The Aye's have it. The motion is carried.

MR. GRIFFIN: (Reading) Resolution No. 5.

"Wherever it is possible, local county Bar Associations should be formed, and in the less populated counties the members of the Bar should form local organizations composed of members of the Bar of such counties as can conveniently meet at some central point, or join with a Bar Association of some adjacent county."

A MEMBER: I move the adoption of the resolution.

A MEMBER: I second it.

MR. HEALY: All in favor indicate by saying Aye—contrary No. The resolution is carried.

MR. HALL: Just a moment—Mr. Chairman, let's make it the duty of the Bar Commission—I move this amendment: "It shall be the duty of the Bar Commission to favor, foster, and encourage the formation of county organizations, and give them all assistance needed to form the local Bars." I move the adoption of the amendment.

A MEMBER: I second the motion.

MR. HEALY: All in favor of the motion will signify by saying Aye—contrary No. The resolution will be adopted as amended.

MR. GRIFFIN: (Reading) Resolution No. 6.

"The next annual meeting of the Bar Association, under the provisions of the law, must be held in the northern section of the state. It is suggested that the Bar Commission in calling the next annual meeting, take into consideration the advisability of complying with the law by calling such meeting and then adjourning the same to some convenient date, and that the adjourned meeting of the Idaho State Bar Association be held at Payette Lakes.

It is further recommended that in view of the legislature meeting in 1935, that one day of the session be devoted to discussion of legislation affecting the judicial department of our government and that the Commission shall write each member of the Bar in order to obtain suggestions for such discussion."

MR. OVERSMITH: I have talked with a number of members of the local Bar of Ada County, and also with a number on the outside, and I think it was the unanimous opinion of everybody I talked to that the Bar Association should meet at Payette Lakes. It was also suggested that we might make the meeting date July 4th. Suppose we were to hold the meeting at Moscow next year, we know that that is a long trip, and we haven't very many members of the Bar compared with the entire membership of the Bar in the state. I think the Bar as a whole will be satisfied with meeting at Payette Lakes next year. This is simply a suggestion for the Bar Commission to consider. It is simply a resolution that the Bar Commission study the legal phase of the question as to whether or not we could call the meeting for north Idaho, and adjourn to Payette Lakes.

MR. HAWLEY: This is just a suggestion to the Bar Commission?

MR. OVERSMITH: That is all.

MR. HEALY: Any further remarks. All in favor of the adoption of the Resolution No. 6 will indicate by saying Aye—contrary No. The motion is carried.

MR. GRIFFIN: (Reading) Resolution No. 7.

"Civilization has developed a judicial system for the settlement of private disputes among the citizens of each nation, and for the punishment of those who have disregarded the mandates of the people. International trade and travel have eliminated, at least to some extent, boundaries.

"The members of the Idaho State Bar Association are not unmindful of its pride of American citizenship, and its members would resent any surrender of our sovereignty. The Constitution of the United States has been interpreted by our courts, and its provisions have been construed in accordance with conditions as they exist, and our decisions are based on the General Welfare clause. Our own government has survived by reason of the liberal and progressive interpretation of the Supreme Court of the United States in accordance with the demands of the social and economic conditions. Prior to the World War there was no tribunal by which a nation, or an individual or citizen of a nation, could bring his case before the international tribunal. The World Court as we view it, furnishes a tribunal by which a nation or a citizen of a nation may be heard on any international question, and by the adherence of our government to the World Court, disputes of nations, and disputes of individuals against another nation, would have at least a chance to be heard.

"The United States presents to the world the unique position of having three departments of government. The final determination of any question arising between our citizens, and the final determination of any question affecting the rights of a citizen of any state as against the citizen of another state, rests with our judicial system. Therefore, this country should take the lead in promoting international justice and no better tribunal has been suggested than the World Court, for the settlement of international disputes.



"The Idaho State Bar Association therefore resolves that the United States of America should adhere to the World Court and lend its influence toward the settlement of international disputes through a tribunal composed of the world's most eminent jurists, it being assumed that the men composing such court will be our most learned men in international law, and by such tribunal it is at least hoped that peace and harmony will be promoted and future disputes settled, in accordance with the facts and international justice instead of War.

"We further recommend that copies of this resolution be sent by the Secretary of the Idaho State Bar Association to Senators Borah and Pope, with this endorsement of the Idaho State Bar Association and its recommendations to speedily pass the necessary resolutions or legislation which will bring our country into the field of the international adjustment of those disputes which for want of such tribunal might result in the more costly and disastrous resort to arms."

MR. OVERSMITH: I move the adoption of the resolution.

A MEMBER: I second the motion.

MR. HEALY: It has been moved and seconded that Resolution No. 7 be adopted. All in favor of the resolution will make it known by saying Aye—opposed No. The resolution is adopted.

MR. GRIFFIN: (Reading) Resolution No. 8.

"We extend our thanks and appreciation to the members of the Commission who have given their time towards the up-building of our Association."

MR. OVERSMITH: I move the adoption of the resolution.

A MEMBER: I second the motion.

MR. HEALY: If no objection the resolution will be considered as adopted.

MR. OVERSMITH: We are not limited to these resolutions, as I understand it. Is there any other resolution that any member of the Bar wants to offer? We are not going to take snap judgment against anybody.

MR. HEALY: Does anyone have anything further?

GENERAL MARTIN: The resolution just before this last one I assume was intended to take the place of the resolution I submitted.

MR. OVERSMITH: In explanation of that I might say that the resolution the General had prepared was read, and was considered quite lengthy, and the Committee felt it could be boiled down. I think the resolution as passed will show every statement that the General had in his—perhaps not as good, I conldn't say it is, but we did the best we could.

GENERAL MARTIN: I assume this resolution was offered in lieu of the one I submitted.

MR. OVERSMITH: It was.

GENERAL MARTIN: I would suggest that the record show that this resolution was offered in leiu of the other. It should show what disposition was made of my resolution.

MR. OVERSMITH: The record will show what disposition was made of it.

JUDGE WINSTEAD: I wish to say that, setting a precedent, the judges of the Third Judicial District reeessed during the meeting of the State Bar. It occurs to me that it might be proper at this time to request an additional resolution to the effect that the members of the State Commission request the District Judges of the state, and the Supreme Court, to recess during our next State Convention, in order that there may be a larger attendance.

JUDGE AILSHIE: I think the motion should come directly from this Association, and not from the Commission.

MR. OVERSMITH: I move the adoption of a resolution that this Bar Association go on record in favor of the Supreme Court, the various District Courts of the state, Probate Court and Justice of the Peace court, if necessary, declaring a judicial holiday for three days—assuming that the Bar Association will meet Friday and Saturday, in order to give time for the members to get back Sunday—and that no judicial business be transacted during that period of time, and that the Commission be instructed to confer with the various Judges of the Supreme Court and the District Courts to observe the request of the State Bar Association until such time as we can properly present the matter to the legislature.

JUDGE AILSHIE: The resolution should include a statement to the effect that certain matters of importance, writs, etc., could be issued.

MR. OVERSMITH: A judicial holiday recognizes that important writs can be issued. As a matter of course important writs can be issued on Sunday, or any other holiday.

MR. HEALY: You have heard the motion. It is that the Association go on record as being in favor of the adjournment of courts during the three-day period of the annual meetings of the Bar Association, and that the Bar Commission be instructed to transmit the requests to the various courts.

JUDGE AILSHIE: I offer an amendment—that the Supreme Court Judges and the District Judges be requested to attend our meetings—to honor us with their presence.

MR. OVERSMITH: That will be included.

MR. GRAHAM: They ought to be here. We are working for their interest as well as ours.

MR. HEALY: All in favor of the resolution as amended, signify by saying Aye—contrary No. The resolution is adopted.

MR. HAWLEY: I have another one: It is the sense of the Bar Association that the Judicial Council be continued, and that such financial assistance as may be necessary for that purpose shall be, as in the past, furnished through action of the Bar Commissioners.

A MEMBER: I second the motion.

MR. HEALY: You have heard the motion, all in favor say Aye—opposed No. The motion is carried. Are there any other matters coming before the Bar meeting?

MR. OVERSMITH: I move an adjournment of the meeting.

A MEMBER: I second the motion.

MR. HEALY: All in favor say Aye. The motion is carried and the meeting adjourned.

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