PROCEEDINGS

of the

Idaho State Bar

VOLUME XXII, 1948

TWENTY-SECOND ANNUAL MEETING

SUN VALLEY, IDAHO

July 16 and 17, 1948

PAST COMMISSIONERS

WESTERN DIVISION

JOHN C. RICE, Caldwell, 1923-25.
FRANK MARTIN, Boise, 1925-27.
JESS HAWLEY, Boise, 1927-30.
WM. HEALY, Boise, 1930-33.
JOHN W. GRAHAM, Twin Falls, 1933-36.
J. L. EBERLE, Boise, 1936-39.
C. W. THOMAS, Burley, 1939-42.
E. B. SMITH, Boise, 1942-48.
CLAUDE V. MARCUS, Boise, 1948-51.

EASTERN DIVISION

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

NORTHERN DIVISION

ROBERT D. LEEPER, Lewiston, 1923-26.
C. H. POTTS, Coeur d'Alene, 1926-29.
WARREN TRUITT, Moscow, 1929-32.
JAMES F. AILSHIE, Coeur d'Alene, 1932-35.
A. L. MORGAN, Moscow, 1935-38.
ABE GOFF, Moscow, 1938-41.
PAUL W. HYATT, Lewiston, 1941-44.
E. T. KNUDSON, Coeur d'Alene, 1944-47.
E. E. HUNT, Sandpoint, 1947-50.

PRESENT COMMISSIONERS AND OFFICERS

R. D. MERRILL, Pocatello, (1946-49)
E. E. HUNT, Sandpoint, (1947-50)
CLAUDE V. MARCUS, Boise, (1948-51)
SAM S. GRIFFIN, Boise, Secretary

LOCAL BAR ASSOCIATIONS

Shoshone County—Robert E. Brown, Vice President, Wallace; Eugene F. McCann, Secretary, Wallace.

Clearwater (2nd and 10th Judicial Districts)—Earl Morgan, President, Lewiston; Russell S. Randall, Secretary, Lewiston.

Third Judicial District—David Doane, President, Boise; Robert Copple, Secretary, Boise.

Fifth District (5th and 6th Jndicial Districts)—Louis Racine, President, Pocatello; Don Bistline, Secretary, Pocatello.

Seventh District—Herman Welker, President, Payette; Gilbert Norris, Secretary, Payette.

Eighth District—W. J. Nixon, President, Bonners Ferry; Clay V. Spear, Secretary, Coeur d'Alene.

Ninth District — Ralph Litton, President, St. Anthony; Louise Keefer, Secretary, Idaho Falls.

Eleventh District (11th and 4th Judicial Districts)—Edward Babcock, President, Twin Falls; Roy E. Smith, Secreary, Twin Falls.

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IDAHO STATE BAR

1948

COMMISSIONERS OF THE IDAHO STATE BAR

E. B. SMITH, President, Boise
R. D. MERRILL, Vice President, Pocatello
E. E. HUNT, Sandpoint
SAM S. GRIFFIN, Secretary, Boise

FRIDAY, JULY 16, 1948
10:30 A. M.

PRESIDENT E. B. SMITH: The 1948 annual meeting of the Idaho State Bar will please come to order. Mr.Griffin, will you please make your report?

SECRETARY'S REPORT

That cold, gray, dull thing denominated the Secretary's Report for at least 25 years, is again the first thing on the program in order to fill in time for an audience to appear and welcome that other usually cold, gray, thing—the President's Message, which fills in more time for more of an audience to gather to listen to the real entertainment.

I am emboldened to such impoliteness and false characterization of the President's address by the fact that he and I have lived as neighbors in the same community so long, fought beside and against each other so many times, worked for so many years in the Bar together, that our mutual compliments are said in the form of insults, else to us they would seem trite and over-emotional.

Furthermore, he ceases to be my boss in the work of the Bar at 12 noon today.

Upon the work of the Bar for the benefit and honor of lawyers of Idaho, E. B. Smith has gladly spent more hours, more worry and thought than those lawyers will ever know, save that I now report it to be so.

E. B. Smith, a twice elected commissioner, for the second time was President of the Idaho State Bar during the past year; Ruel D. Merrill was Vice President and E. E. Hunt the third commissioner.

Only two complaints were filed against lawyers last year—both against the same lawyer, both arising out of misunderstandings which were satisfactorily explained and adjusted and the complaints dismissed. No disciplinary matters are on file.

Of the fifteen applicants examined for admission in June, 1947, nine (two repeaters) were passed, six failed. Of the 15 examined in December, 14 (five repeaters) passed, one failed. Thirty-three (including three previously failed) have applied for permission to take the next examination in September. This is by all odds the largest class of applicants for the Idaho Bar, and represents the veteran whose college was interrupted by war.

Rules relating to admissions were changed so as to eliminate the June and

December examinations and substitute April and September examination, with closing dates for filing applications fixed at February and July 1. The fees were increased to $25.00 per examination for student applicants and $75.00 for the first, and $25.00 for the second, examination of foreign attorneys entering Idaho. The changes were made largely for the accommodation of veteran students graduating at mid-year or after summer school sessions, and upon recommendation of faculty and students of the University of Idaho, College of Law, and because of large increases of expenses in handling examinations. The increased fees do not yet cover costs, the deficit being paid from bar license fees.

The delay in the distribution of 1947 Proceedings was, as in the case of 1946, due to difficulty in securing bids stating a sum which the Bar could afford to pay. Not only the State Purchasing Agent, but President Smith and myself sought to interest printers. It may surprise you to know that the only bid originally secured demanded $1,400.00 for 600 copies. This would have been approximately 30% of the Bar's annual income, and 233% increase over cost of printing 1946 proceedings. After several months, and much cutting of material, we finally procured printing for $555.00.

The following deaths have been reported since July 1, 1947:

Robert Ailshie, Boise
Walter G. Bell, Portland, Oregon
Hon. T. Bailey Lee, Burley
James R. Bothwell, Twin Falls
Ed. L. Bryan, Junction, Oregon
A. S. Dickinson, Blackfoot
A. L. Fletcher, Dunsmuir, Calif.
Francis Griffin, Coeur d'Alene
M. Reese Hattebaugh, Denver, Colo.
A. A. Johanneson, Idaho Falls
M. L. Lewis, Jerome

Licensed lawyers, and judges, as of July 1, 1948, are:

Northern Division	100
Western Division	276
Eastern Division	101
Out of State	23
	500

It is interesting to note that in 1925 (the first year the integrated Idaho State Bar actually began operating—the act was passed in 1923, but activity delayed by litigation) there were listed in Idaho 629 active lawyers and judges; in 1926, 600, and the number steadily declined to a low of 409 in 1944. It has now returned upward again but is still 129 less than 23 years ago.

APPROPRIATION FUNDS

June 1, 1948, Balance in Fund	$ 6,261.04
June 1, 1947 to July 1, 1948, License Receipts	4,890.00
Examination Fees	722.00
July 1, 1948, Total Balance and Receipts	$ 11,873.04

EXPENDITURES
June 1, 1947 to July 1, 1948

Personal Services	$3,009.70
Travel	963.38
Other Expeuses (Express, Postage, Telephone, Publications, Supplies, etc.)	2,263.56
	$ 6,236.64
July 1, 1948, Balance in Fund	$ 5,636.40

PRESIDENT SMITH: The Canvassing Committee for the Western Division will be composed of Sidney Smith, William Nixon and William Galloway.

The Canvassing Committee are to report later this afternoon.

I will now appoint the Resolutions Committee. On that committee will be O. R. Baum, Pocatello, Chairman, Laurel E. Elam of Boise, Vice Chairman, Earl Morgan, R. M. Elder, H. P. Stinson, David Doane and Adonis Nielson. Jim Cunningham will act as Secretary .

We have a Judicial Council Committee of the Bar. The members of that Council who are here, will be advisors to the Resolutions Committee.

In advance of my own report let me say that I do not desire any of you to take anything that I say personally. The emergency of the situation is such that I am going to cover a few subject matters which I deem are "musts" of the Bar. Some of the remarks that I must make are a matter of duty. And sometimes duty is very difficult to perform.

DUTIES OF THE IDAHO STATE BAR

The Idaho State Bar is an integrated body created by the legislature as an arm of the judiciary to cooperate with and coordinate that department with the executive and legislative branches of government; thus the Bar was created by legislative enactment to be an arm of the Supreme Court to assist it in some of its functions, for example, admission to the Bar and disciplinary proceedings, and to aid in the advancement of the science of jurisprudence and improvement in the administration of justice. But it did not stop there; the legislative department directed that the Bar assist it and the Governor—the executive department—in any problem in which the departmental interests or activities impinged one upon the other.

We must not forget that the most important duties, obligations and privileges are imposed and rest upon the organized Bar in Idaho, expressed as follows:

"There shall be an annual meeting of the Idaho State Bar ° ° ° for the discussion of the affairs of the bar and the administration of justice." (I. C. A. sec. 3-417).

"The Governor, Supreme Court and the Legislature of the State of Idaho, may request of the board (of commissioners) an investigation and study of and recommendations upon any matter relating to the courts of this state, practice and procedure therein, practice of the law, and the administration of justice in Idaho, and thereupon it shall be the duty of said board to cause such investigation and study to he made, reported to an annual meeting of the Idaho State Bar, and, after the action of said meeting thereon

to report the same to the officer or body making the request. The board may, without such request, cause an investigation and study upon the same subject-matters, and after a report thereon to an annual meeting of the Idaho State Bar, report the same and the action of said meeting thereon to the governor, Supreme Court, or the legislature of the state of Idaho." (I. C. A. sec. 3-418).

"The Idaho State Bar and its board of commissioners shall have the power and authority to aid in the advancement of the science of jurisprudence and in the improvement of the administration of justice." (I. C. A. sec. 3-419).

The Idaho State Bar, because of those duties of such vast import imposed upon it, need feel no embarrassment in approaching and recommending to the legislature a program designed for the betterment of the judicial branch of the government, or any other branch for that matter. We do not ask the representatives of any branch of the government to do something. We are by the legislative enactment their chosen advisors, and we have not only the right but must by duty make report and recommendations.

Pursuant to such statutory authority, and a resolution of the Idaho State Bar at its 1929 annual meeting, a committee was appointed designated as a Judicial Council, which attempted detailed studies, including surveys of judicial work in Idaho, and made reports and recommendations at the annual meetings of the Bar during the ensuing three years, through the year 1932, relating to the advancement of the science of jurisprudence and improvement in the administration of justice. Efforts were thereupon made, without success, to carry out certain of the recommendations of that Judicial Council.

At the conclusion of the 1947 meeting of the Idaho State Bar resolutions were adopted requiring your Commissioners to bring to reasonably current date the judicial survey data obtained by the 1930-32 Judicial Council and to make its report and recommendations to this, the 1948 meeting of the Bar, for action; also, the Commissioners were charged with the duty of investigating various methods proposed at the 1947 meeting for the selection of judges, and to make report and recommendations thereon at this meeting.

Pursuant to such action, the Commissioners appointed a committee, referred to as a Judicial Council, but with no more real power than any other Bar committee, whose Chairman apportioned the work with instructions to report and make recommendations at this meeting of the Bar. That committee consists of members fairly representative of the various portions of the state, namely: Paul W. Hyatt, Justice of the Supreme Court, Chairman; Hugh E. Baker, Clarence J. Taylor and Charles E. Winstead, District Judges; Jess B. Hawley, Sr., A. L. Merrill, J. F. Martin, George Van de Steeg, Marshall B. Chapman, Ezra Whitla, H. J. Hull, Sam S. Griffin, and E. D. Smith.

THE NEED OF A UNIFIED COURT SYSTEM

The lack of a unified court system immediately became evident in the attempt merely to obtain information about courts and court business. The weakness of an ununified, directionless, unsystemitized court system was well illustrated immediately.

No one, and no court, had power or direction to get statistical information as to the amount of judicial work in the state of Idaho. The Supreme Court had no information about any other court; the District Courts knew nothing about the volume of business in the Probate Courts or Justice's Courts; the information about

districts was in as many clerks' offices as there were counties in a district; the information about Probate Courts was in 44 offices, none coordinated; the statistics about Justices and Police Courts were in God knows how many offices . . . the fact is no one place even knows how many such courts there are in Idaho. There was no uniformity of such statistics as might, by a system, become available in an administrative office.

Furthermore, the Clerks of Court are NOT clerks, save in name, of the District Courts. The Judges of Courts not only have nothing to do with their qualifications or selection but further, have nothing to do with necessity for or appointment of their deputies who may sit in the Court; that is determined by the County Commissioners. The Clerk is elected by the electors—so is the Judge. Now who does *that* make who?

The fact is that the only thing "supreme" about the Supreme Court is its name. A Justice of that Court and a Justice of a Justice's Court are on the same level within their respective jurisdictions. Each is his own complete little solar system.

The fact further is that there absolutely is no judicial *system* in Idaho—there are merely a number of independent courts and independent clerks, each of whom has full and independent direction over his own activities.

The five Justices of the so-called Supreme Court, the Judges of the 11 District Courts; the 44 Clerks of the District Courts in the Counties, the County Commissioners of the 44 Counties, the 44 Probate Judges, the unknown number of Judges of Justices' Courts in the 44 Counties, are on the same level, except only as to amount of salaries, tenure in office and jurisdiction.

And if you, and the Judges and the Legislature, and the Governor, and the people of Idaho, don't know those things you will find out if you *try* to find out about judicial business; and you'll find out that some of those officials do know it. For the sad truth is—that the best the Judicial Council could do, or the Supreme Court could do, was to beg for information—and in some instances (fortunately because most offices tried to co-operate), the response was to tell the Council (and therefore in substance, the Supreme Court) —and I mean literally—to go to hell as it was too much work, and besides the lawyers were just trying to cook up something! Others were not even that polite—they just didn't answer.

And so here we are—with duties, and inclination and desire to perform a duty, which the Legislature has laid upon us so that the legislative and executive departments can co-operate and co-ordinate with the judicial department in the administration of justice and the efficiency of this equally independent branch of government—and absolutely stymied by a system which isn't a system at all.

The work attempted to be accomplished by the 1930-32 Judicial Council and by the present Judicial Council clearly illustrates the dire need of a system of unification of the courts of this State with definite controls established and responsibility centered in an executive head.

AN EMERGENCY FACES THE GOVERNOR, LEGISLATURE AND BAR

An emergency status with respect to an independent department of our State government exists, and demands immediate consideration and action. I refer to the judiciary and to the continuance of courts as a means of determination of facts, law and controversy.

The emergency is an emergency of time and of opportunity. The condition recognized as existing longer than 20 years ago when the first committee of the Bar,

designated a Judicial Council, began gathering material, and recommended constitutional and legislative improvements of court organization, ought not to be dallied with and delayed further.

This Bar spoke in 1932, recommending specific constitutional and statutory changes. I apprehend that similar changes will be now recommended by our present committee or Judicial Council.

Like the matter of court rules of procedure, the Bar reiterates and re-emphasizes; but the burden of final action now shifts from the shoulders of the Bar to the shoulders of the Supreme Court with respect to procedure, and to the shoulders of the executive and legislative departments of government with respect to creation of a court system, where none now exists, and adequate provision for competent staffs of judges, clerks and other personnel, adequately compensated and with power to conduct the affairs of the judicial department, commeusurate with the responsibilities and duties. This is for the Governor and the legislature, and this Bar must now determine what it should recommend, and aid the Governor and legislature in procuring.

Over 50% of our present judges are due to retire within the next two years. The emergency then is one of time and opportunity and *this* legislature and *this* executive must have this program in order *this* session.

If there is the objection that any such program may require constitutional amendments, such is no excuse for doing nothing. If in 1932 when the Bar proposed constitutional amendments to accomplish the program of judicial organization, such program had been commenced, it would have been accomplished by now, if only it had been begun with some measure of determination of accomplishment.

Isn't the time now ripe to advocate amendment of the Constitution instead of putting off a reform because it might require a constitutional amendment? Remember, that the recent decision of our Supreme Court (Keenan v. Price) removed what has been one of the greatest difficulties in accomplishment of constitutional amendments namely, the multiplicity of questions involved in an amendment, each of which is required to be voted upon separately and yet all of which must be adopted in order to create any kind of a system. In view of this last decision, is it not now possible to express in a resolution of amendment the legislative intention that all changes are intended to constitute but one proposition or question and, if all are not adopted, it is intended that none be adopted?

NON-PARTISAN JUDICIARY

The principle of the non-partisan judiciary, embodied in Idaho's Constitution during the year 1934 (S. L. 1934, p. 374), in practice has resulted in life tenure of members, usually first appointed and then elected, to serve our judiciary. Such was early recognized, and as the necessary complement of life tenure, retirement of our judges became not only a recognized necessity but a recognized safeguard of the principle of the non-partisan judiciary.

In practice actually two things have taken place. First the appointment of members of the judiciary by the executive department, and second, the creation of an independent profession, namely, that of being a judge. Throughout the years with a few notable exceptions district judges and supreme court justices have in the first instance been appointed, and then the wisdom of such appointments has been confirmed by later election.

Though we have created a judicial profession which we desire to be non-political and which, as a practical matter, almost always results in depriving the judges utterly

of any possibility of profit over and above a salary, or of again profitably rejoining the profession of law, we have not, at the same time, created any security in the judicial profession. On the contrary we have put the individual judges out on their own with short terms, and the bogey man of fear of the electorate by short terms, and obvious and clearly inadequate compensation .

We have recently endeavored to alleviate the situation somewhat by an inadequate retirement plan and by an extremely inadequate increase in salary. The increase in salary is so pitiful that it would be laughable if it were not tragic. The increase was some 20 to 25 per cent over the 1907 salary, an increase which the C.I.O., A.F. of L., or any clerk in a mercantile establishment would turn his nose up at. Even a minor John L. Lewis is not needed to recognize this situation, and here we are claiming to be professional men, entitled to professional pay, actually increasing the pay of our judges over 1907 to hardly enough to pay the increase in income taxes.

If "take home" pay means anything in industry and labor, it certainly means nothing in Idaho respecting pay for the judicial servants of the people, who expect dignity, even-handed justice, and at least a semblance of respectability in dress and social activity.

The contest to secure retirement privileges for members of our judiciary commenced with the 1937 legislature, but the principle was not recognized, although presented to six successive legislatures over a period of 12 years, until by 1947 legislature. Now that Idaho has recognized the principle of retirement, we, the members of the Idaho State Bar, the judiciary, and the public in general should be more jealous than ever in our joint efforts to preserve the principle of the non-partisan judiciary; it now is recognized nationally as well as in our state, as a sacred bulwark against partisan entanglements and as an added safeguard of the constitutional principle that justice shall be administered without sale, denial, delays or prejudice. The privilege of retirement upon a basis economically sound, it would seem, ought to doubly safeguard the principle of the non-partisan judiciary.

Experiences of the last 18 months have illustrated that partisan politics have no place in the field of selection for appointment or election of any of Idaho's high judicial officers. Those experiences have created a militant Bar—a Bar willing to name those it thinks most fitted to serve, without the element of political qualifications flavoring the selection, and have illustrated a willingness on the part of the Bar to fight for those principles against those of politics and partisanship.

I impress upon each and every member of the Bar that each by-law is an officer of the courts, and that each, by virtue thereof is, or ought to be, considered a member of the judicial branch of the government of this state; by virtue of that high office it behooves each and every member of the Idaho State Bar to hold that office sacred and to fight for the ideals that it ought to instill, with special relation to the principle of the non-partisan judiciary and, that it is the duty of each member of the Bar, regardless of position, opposition, or personal politics, to uphold, defend and safeguard that principle.

It has been illustrated in our state that the Bar is eminently qualified to select judges for appointment by our Governor. Most of our judges presently in office were selected in the first instance by the Bar and, by virtue of satisfactory services in office, they have been retained in office by the electorate. The Bar should have substantial voice in selection for appointment or election of our judges.

Polls, taken of the public in general, likewise have indicated that the public believes that the Bar is better qualified than the public, to select those who are

fitted by education, experience, character and reputation to serve as members of the judiciary.

I therefore hope that the Bar will recommend a feasible plan, consonant with our present laws, which will permit the Bar a voice in the selection for appointment or election of members of our judiciary.

TENURE IN OFFICE, SALARIES, AND RETIREMENT

The subject of tenure in office was considered by the 1930-32 Judicial Council, and the recommendations made:

> "The term for both District and Supreme Court Judges should be not less than twelve years."

Members of both the bench and bar have given the matter considerable thought during the past few years. The trend of opinion has not changed from that expressed by the former Judicial Council. Longer tenure in office than at present appears to be the prevailing view.

The subject of salaries has been discussed from time to time by the Idaho State Bar. During the 1947 convention E. T. Knutson, your then president, briefly summarized the subject; he pointed out that the takehome pay of our judges, notwithstanding the 1945 increase granted by the legislature, is less than it was in 1907. If the 1907 salary was anywhere near right, either from the living standpoint or the ability of the State to pay, mere mathematics requires $10,000.00 for District Judges and $12,000.00 for the Supreme Court Justices, and a more adequate salary to be allotted to the Clerk of the Supreme Court. The income of the State and of *every* citizen of the State, whether skilled or unskilled, whether farmer, laborer, merchant, clerk, or whomsoever, has without any consideration except mathematics, increased far above the 1945 Judges' increase.

It has often been said—why have men of high attainment taken these jobs knowing the salaries to be paid? Aside from the honor, prestige, or closure of a career in later age, let us see how judges have been literally trapped. It is axiomatic in the profession that one who accepts judicial office, renounces more or less forever any further active practice of law—he renounces his clients; to return to and build up a practice puts an ex-judge in the exact status of a recent student just entering practice. Hence, once a judge, in most instances, he must endeavor always to remain a judge. What was the situation respecting salaries in Idaho when the present judges were "trapped?"

Of the Supreme and District Court judges now in office, the majority came to office when the salary was *not* subject to income tax, or to only low tax rate, and when the salary was adequate according to the times, namely, the depression of the 1930's or before. Of the total of 21 judges, 15 assumed office in or prior to 1938—eight before 1930 (one as early as 1914); seven during the depression. The other six accepted office for reasons largely influenced by considerations other than the amount of salary. (This is not intended to imply that the other 15 accepted judgeships solely because of the amount of salary).

The point I make is that approximately 75% of all judges accepted office when the salary, unaffected materially by tax deductions, was fairly substantial, though not in step with 1907 standards and values.

A peculiar situation now looms up which may never again be present in the judicial history of this State, of which the Idaho State Bar, the Governor, and the

legislature must be reminded. We have five Supreme Court justices and 16 District judges, a total of 21. The enactment of the Judges' Retirement Bill by the 1947 Legislature appeared to make necessary the appointment or election of 11 of those judges during the ensuing four years and one at the end of six years—a total of 12. During the last two years, death has called three of the judges who held office, and their successors have been appointed; a Supreme Court justice will retire at the end of 1948, and at that time a District judge may be elevated to the Supreme Bench. There still must be appointed or elected at least 10 of our judges within the next two years. Thus it is not to be expected that those who presently hold office may amass resistance against any forward movement relating to the judiciary merely because in instances the specific office may be affected.

In other words *this* legislature, *this* Governor and *this* bar *must* reorganize the court system so as to accomplish objectives most beneficial to the advancement of the science of jurisprudence and the administration of justice, while it can be done without stepping on toes of some few members who otherwise might be inclined to regard their own selfish and personal objectives, to-wit: the immediate office he holds—above the great objectives mentioned, all designed for improvement of the over-all picture.

A PERMANENT JUDICIAL COUNCIL

Assumption, by the Idaho State Bar and your Commissioners, of the entire responsibility relating to the various subject-matters, briefly presented to you at the 1947 meeting of this body, and which again will be presented to you at this meeting with specific recommendations, assumes aspects of great and heavy responsibility.

The need of a separate representative committee or body becomes apparent when we consider subjects having for their objects some measure of re-organization of the judicial system of our State, broken down into subjects such as—a system of unification of our courts; selection, tenure in office, salary and retirement of our judges; transference of probate jurisdiction, establishment of county courts; abolition of the present system of justices of the peace, with power of appointment of such justices in communities where committing magistrates may be necessary; appointment of district court clerks by the district judges, or at least the appointment of courts' deputies.

It would thus seem that a separate body ought to represent essentially the interests of the judiciary, separated and distinct from the Commissioners of the Idaho State Bar who represent the members of the Bar. It should be recognized, however, that both such bodies should work together harmoniously.

At present there does not exist such an intermediary link between the judicial and legislative branches of the Government. Such a body could fulfill such a need and lend aid and power to various objections of the bench and bar.

Such a body might further the project of adoption of rules of procedure in this state; also, a unified system of rules for district courts, and a unified system of reports required to be submitted at stated intervals by inferior courts and their clerks.

It has long been recognized that much dead or obsolete material ought to be deleted from our laws, and some ought to be reconstructed to meet present day needs and situations. Such a Council could cause to be made studies and recommendations relating to the improvement and betterment of Idaho's Code.

Fears have in the past existed in the minds of some of our judges, of contingent

legislative criticism relating to the budgetory needs of the judiciary based upon reasonable requirements, which state of mental fear in instances, has resulted in legislative requests based only upon absolute minimal and curtailed requirements. A unified court system harmoniously coupled with a permanent Judicial Council and other quasi-judicial bodies, where facts and figures could be obtained, would afford a pattern for immediate future needs and requirements, based upon the pattern of past experience, and thus result in more efficient expedition of legislative requirements, with legislative programs based definitely upon *facts* and then existing economic need, and not upon mere guesswork.

A Judicial Council, working with your Commissioners, the Code Commission, and the Commission on Uniform laws, could well advance the improvement and modernization of our judicial system.

If the recommendations suggested were put into effect, our judicial-executive system then would appear perhaps as follows:

CHIEF JUSTICE

As executive head of a unified system of Idaho Courts; the Presiding District Judges; the Judicial Council representing the Judiciary; Commissioners of the Idaho State Bar representing the Attorneys; the Code Commission; Uniform Laws Commission.

A CONTINUING IDAHO CODE COMMISSION

The 1947 Idaho Code Commission consisting of Oscar W. Worthwine, President, and Ralph R. Breshears and Carey Nixon, members, assumed an extremely heavy and burdensome responsibility for the preparation and compilation of a new Idaho Code. A mandatory provision of the 1947 enactment is that the code must be delivered not later than December 15, 1948. The 1932 Code and legislative accumulations of eight legislatures, covering a period of 16 years, must be codified, compiled, annotated, cross-referenced, assembled, printed, bound and delivered, with the aid and assistance of the editorial staff of a lawbook publishing company, within a relatively short period of time.

Sixteen years is too long a time to await a re-codification of our laws. The trials, tribulations, failure and resultant litigation of the 1943 Code Commission, with the four years' additional delay in obtaining a new code imposes upon the bench and bar, as well as the legislature, the mandatory duty of inventing a remedy based upon the theory of continuity of service, that such an incident and delays will not happen again, and to the further end that the Idaho Code will be kept up to reasonably current date. During the last two or three sessions of the legislature, it became a current phrase among legislators that only one highly trained in the law could expect to know what the law is because of the mass of uncodified legislative material enacted since the compilation of the 1932 Code and, that the duty rested upon the bench and bar to present to the legislature in the near future a plan designed and intended to alleviate the recurrence of any such untenable situation.

The 1948 Code will be split up into 12 volumes. When necessity arises a new volume of any of the series of 12 ought to be recodified and published.

The contract for publication of the Code provides for continuance in that it provides for pocket parts, but the law does not.

The need for a continuing code commission is clear. Studies should be undertaken relating to future requirements and a suggested system of continuing code compilation, and appropriation of fees to the needs of such a commission to be so used from time to time. Under such a plan a tremendous burden, in like or similar intensity of a re-codification of Idaho laws, such as has been heaped upon the 1947 code commission, ought never to occur again.

We may quite safely assume that the present Code Commission at the completion of its present prescribed duties, and as a result of its experiences, will make a report and recommendations to the next legislature, designed and intended to create a continuing code commission for the State of Idaho, having for its objectives those just expressed.

RULES OF PROCEDURE

Previous studies, reports and recommendations made to and by the Idaho State Bar, its resolutions, and particularly the 1941 legislative enabling act recognizing the power of the Supreme Court to make Rules of Procedure and authorizing the promulgation of such Rules, were summarized by E. T. Knudson, your president during the year 1947, at the meeting of this Bar a year ago.

I have only this to add to the history of this too-long delayed subject:

The Bar has approved it, the legislature has approved it, and the court has sat on it. The Rules should have been included in the new Idaho Code. The reason why they won't be is as follows:

The 1947 Idaho Code Bill authorized the compilation of Idaho's Code into not less than eight nor more than 12 volumes, the same to include the Rules of the Supreme Court. Eleven volumes were intended to contain the general statutes and the 12th to contain these court Rules of Procedure.

The first eight volumes were subsidized at a price of $75,000.00, with additional volumes over eight, but not exceeding 12, at $2,000.00 per volume; 11 volumes, would have cost $81,000.00, leaving $19,000.00 of the $100,000.00 appropriated, to pay expenses of the Code Commission and additional editorial work of a lawbook publishing company under a collateral contract for aid and assistance to the Court in preparation of the Rules, to be embodied in the 12th volume authorized.

The lawbook publishing company, with whom the contract was made, offered to enter into such a collateral contract to the end that its editorial services be made available, and the Code Commission was willing that such be done. The Bar Commission urged that it be done. A representative of the Supreme Court attended a combined meeting of the two commissions, at which the representative of the law book publishing company was present. Nothing was done by the Court as a Court. Some of its members, however, have shown a deep interest in promulgation of the Rules.

As the situation now stands, Rules, even if promulgated, will cost the Bar and the public the price of reprinting of at least two volumes of the Code containing material such Rules will supplant.

PUBLIC RELATIONS

The Bar from time to time has discussed the subject of Public Relations. I shall briefly discuss the topic of group advertising.

Marcus J. Ware, chairman of a committee appointed to make a survey of the economic status of the Bar of Idaho reported to our 1941 meeting:

"* * * a substantial majority seems to be in favor of group advertising * * *. If the Bar can fairly get before the public the idea of consulting

an attorney on matters within the province of law practice, it should go a long ways toward eliminating the illegal practice of the law by laymen." During 1942 the public relations committee of the California Bar stated:

"The state bar of California * * * is the first to adopt a plan to publicize its work on behalf of its members, and to offer its full cooperation to other agencies striving to improve and bring about certain reforms in the administration of justice.* * * Whether it will take the form of paid advertising, or be confined to proper publicity in other channels, cannot yet be determined."

A series of illustrated advertisements relating to legal problems were published by Lawyers Cooperative Publishing Company and Bancroft Whitney Company during 1942. Each advertisement mentioned the publication in behalf of the public and the legal profession by agencies named.

During the past few years various state bar associations have presented radio programs and circularized the public on matters relating to domestic relations, marriage and divorce, adoption, negligence, criminal law, property, wills, etc., and in instances have held round table discussions over the air.

The Manitoba Bar Association ran a series of once-a-week advertisements in newspapers for one year at a cost of $2,300.00, and assessed its members $10.00 each to pay such expense. The Secretary of that Association wrote to us:

"We have had many complimentary remarks, both from members of the profession and from the public, and have heard of many instances where lawyers were consulted as a direct result of the advertisements. Altogether, we consider that the scheme has been very successful."

About 18 months ago our own Third District Bar Association was furnished, by a professional advertising agency, an estimate of costs of about $3,000.00, subject to change, of a program designed to appear in a weekly newspaper, and on the radio for 15 minutes weekly, to extend over a period of a year, such estimate to include the advertising agency's research, contact, writing of programs and advertising script.

In June, 1948, Horace Van Valkenburg, President of the Minnesota Bar Association, referring to the program of that bar designed by expert agencies, said:

"Actually the public has no concern about us as lawyers or judges, nor is there any particular reason why it should have.
* * *

"Public Relations is a job for experts, those trained in the techniques of capturing public attention and creating good will. It is absurd to expect a bar committee composed of busy lawyers to have time or energy to learn a new profession and then apply it gratis for the benefit of the bar. We should formulate a program, and determine its scope. We should employ the expert. We should invest sufficient money to pay for an effective program. If $10.00 a year per member will pay back $100.00 and will create the good will that we seek, it is the best investment that the bar can make. We should, however, not expect immediate results. Any program undertaken should run for at least five years before we pass judgment upon its merits.
* * *

"Actually the problem is one of improving the regard of the public, not towards the bench and bar, but towards securing a public acceptance of the judicial system and American methods of administering justice. As the public realizes that the judicial system is effective, then we, as lawyers and judges, will receive the good will that we deserve."

After all, why not follow the advice which we give our clients? We advise the services of a lawyer in legal matters. The sick person goes to a doctor. If an advertising project was suggested to be undertaken in connection with the transaction of a substantial piece of law business, the lawyer would recommend the services of a professional advertising agency. We likewise ought to consult the expert in his chosen field. If the project is group advertising, then we should seek the services of the professional in that field and pay him for his services. Purely a sound business proposition, is it not?

CANONS OF ETHICS

It ought not be necessary to direct the attention of the organized Bar, which by statute and history includes all of the judges in the State, to those ethical principles which hundreds of years of public confidence and trust have established as standards of honorable conduct by judges and lawyers.

These principles have, as all of you well know, been embodied in the Canons of Professional Ethics and the Canons of Judicial Ethics.

It is ordinarily said that they are Canons of the American Bar Association. Let me remind you that they are also Canons of the Idaho State Bar. They are measures of conduct *accepted* by the common consent of lawyers, professional in outlook, as the common law of decency in the profession. Let me repeat—they were *accepted*, not *imposed*, and if they had never been reduced to writing they would still be accepted. But also they have been written down so that none need question a word, nor in most instances, require an interpretation. The American Bar Association has written them. The lawyers of Idaho and the Supreme Court of the State of Idaho have written them.

Rule 151 of the Supreme Court of Idaho and of the Commissioners of the Idaho State Bar provides:

"The Canons of Professional and Judicial Ethics adopted by the American Bar Association and now in effect are hereby adopted as Canons of Ethics of the Idaho State Bar."

Rule 158 provides, among other things, that any violation of the "rules of conduct or canons of ethics as prescribed by these rules or failure to perform duties imposed by, or by reason of, rules relating to the Idaho State Bar * * * shall render the offending person subject to disciplinary proceedings."

Section 3-405, I. C. A., provides:

"All judges of the district and supreme courts of this state are declared to be members of the Idaho State Bar."

The Canons of Judicial Ethics, No. 30, provide in the second paragraph:

"While holding a judicial position, he (a judge) should not become an active candidate either at a party primary or at a general election for any office other than a judicial office. *If a judge should decide to become a candidate for any office* not judicial, *he should resign* in order that it cannot be said that he is using the power or prestige of his judicial position to promote his own candidacy or the success of his party."

In Idaho we have what is called the non-partisan judiciary. It has been in effect since 1934—over 13 years. It became law because the people of Idaho wanted it. They voted it into the Constitution.

It is perfectly obvious that one cannot ethically hold a non-partisan judgeship and at the same time as a party man, devoted to and bound by party principles and partisanship, advocate not only his own election to a public office, whether state or otherwise, but also support the success, and advocate on a party basis, the election of other party candidates with whom he must necessarily associate in a campaign.

This is not a question of whether a judge has a lawful *right* to run for other than judicial office as a party man, under party designation and with party support. That he may do so and be within his *legal* rights is utterly beside the question. It is not a question of the right so to do; it is solely a question of judicial *morality* in so doing. The lawyers of the United States and of Idaho, and the Judges of the United States and of Idaho, and the Idaho Supreme Court, all have stated the standard of moral conduct for non-partisan judges to be such as to make such party candidacy morally unacceptable.

The standard was intended to *assure* the people of decisions from judges not subject to party whims, party coercion, party persuasion. It was likewise intended to *insure* the judges against such influences and to keep from the least breath of suspicion the judiciary and the legal profession.

If one occupying a judicial position feels the desire to offer himself as a party candidate for office, he has every legal right to do so, but the written rule of judicial conduct seems clearly to rest his ethical right to do so upon a prior laying aside of the judicial robe which he donned in accepting the judicial office. This, the Canon requires.

The situation which has called forth this statement of mine is well known to all of you through the public press. The Canon, if temporarily forgotten by Justice Miller, was brought to his attention before he filed his candidacy for non-judicial office.

If there be a duty upon the Judges, the Bar and the Bar Commission, neither I, nor they, can possibly escape public condemnation and censure if that duty be not performed, nor can consideration be given to whether the performance of that duty advances and aids such candidacy, or interferes with it. The Canon itself is neither for nor against party politics—neither should be its observance. It is time that the Bar and Judiciary, if it be possible to believe they have forgotten, re-examine and rededicate themselves to the Canons of Professional and of Judicial Ethics.

Even that is not enough if there be weakened public confidence in the adherence of our profession and the judiciary to those Canons. We must not only rededicate ourselves, but our professional and judicial conduct must be so above suspicion of deviation, as to assure that public that rededication is a fact accomplished. (Applause)

PRES. SMITH: Justice Givens, will you and Justice Hyatt accompany our most honored Justice of the Supreme Court, Justice Budge, to the rostrum?

Justice Budge, on behalf of the Idaho State Bar, may I say that we are very, very glad that you are on our program today. You, Justice Budge, are Dean of the Judiciary and of the Bar, and your 46 years of experience in the judiciary of the State of Idaho has been a very, very honorable career. (Applause) It is a great regret that you, Justice Budge, are to be soon on the retirement list. I introduce to those today here assembled our most honored member of the judiciary, Justice Budge.

He has a wonderful wealth of experience based upon so many years in the judiciary, and I am sure he has a real message for us all. (Applause)

JUSTICE ALFRED BUDGE: Mr. President, members of the State Bar, ladies and gentlemen: I doubt that I am entitled to the eulogy paid me by your distinguished President, but I do thank him.

When I entered practice back in 1892, we had no Bar Association. We had no Judicial Council. We had no non-partisan judiciary. We had no primary law. The parties met in conventions, nominated their candidates, put up the best men they could possibly find and we tried to put up a ticket that would *beat* the ticket on the other side. Both sides did that. And when we got through, after examining into our candidates' past, into their qualifications, into their learning, into their ability and fitness and what not, we thought that we had selected the very best men that were obtainable. And we put up a good fight. All down through the years, for a long time, judges were so nominated, and so were the Governor of the state and all of the Constitutional officers. Whether we have adopted a better system or not is a question that will remain debatable for a long time yet to come. Now our judges are selected in an entirely different way than they were before the Non-partisan Judiciary Act, and they may be selected in a different way in a few years to come.

There is no reason for the statement that lawyers should not be interested, and vitally interested, in the selection of the judges of the state. They are the men who work with the judges. The judges stand upon the very same high pedestal that the lawyers do. If in the state you have a class of lawyers who are not up to standard, in all probability you will have a court that is not up to standard.

I have known all of the Supreme Court Justices and all of the District Court Judges in this state since statehood. I have been intimately acquainted with every Supreme Court Justice who has sat on the Bench of Idaho. Yes, I knew those who were here before statehood, but not so well as those who have been on the Bench since, of course. And I know that we have had on the Bench of Idaho some of the finest, some of the most brilliant, some of the most honest men whom you could find anywhere in the United States. And I say that unhesitatingly. We have never had a judicial scandal in this state, and there are few states, if any, that I know of in the Union that have not had judicial scandal.

The first men on the Supreme Court Bench after statehood were Sullivan, Honston and "Old Gentleman" Morgan—we called him "Old Gentleman" Morgan to distinguish him from our later Morgan. You men have read their opinions. You have studied the cases that they have decided. You have followed their reasoning. You know what problems they have been up against at different times. You know the responsibility that rests upon a judge that people in the other walks of life do not understand. You know what it means when a judge is required to sentence a man to death, to take a man's life. You know what it means when a judge is called upon to take children from one parent and give them to another or to take the children from both parents and give them to an institution. You know what it means when a judge is called upon to divide the property in divorce cases. You know what that responsibility is, because you are lawyers.

I don't know why I ever stayed on the Bench as long as I have. I wish I could tell you the answer to that riddle. I didn't go on the Bench for the money that was in it. I don't think I asked what the salary was. I went on the Bench for a certain purpose. That purpose has been accomplished and accomplished some years back. I wanted to be on the Bench so that all the people in this state might be free, might have a right to exercise their franchise, might have a right to hold office, might have

a right to be heard in the government of this state and in the administration of justice. That is what I went on the Bench for. And if the salary had been only one dollar, I would have thanked God for that opportunity, because if there is anything we lawyers do love in life, it is freedom. It is the right to exercise our franchise. It is the right to participate in our government and in our governmental affairs.

There is something about the Bench that I cannot explain. I have thought it over thousands and thousands of times. After he has been on the Bench a judge finds the work fascinating. He loves it as a mother loves her child. The interest in it ties him to it, and he stays. It is something like the feeling of the great architects who have built the great buildings you have seen and read about. When a judge has finished a case, he is just as proud of it as is the great architect in his completed building, and as you are when you have finished a brief of great importance, or as you are when you have won a case involving a large amount or established some great principle which you have contended for and deeply believed in. Something gets hold of you. Somebody told me it was something like the fellow who was accustomed to playing poker—you just can't leave it alone.

I have seen many judges come to the Supreme Court and the District Bench who couldn't afford it. They must have known just as well as we now know that the best men that we could choose for judges simply couldn't afford to accept the position. And those judges who have gone on the Bench were very often not able to make the sacrifice—but they made it. Many of them did, and what was the result? They stayed there, and they worked, and they toiled, and they took upon themselves all of these responsibilities and sacrifices in order that they might serve the people of their state. It was not for money or the love of money. I know that the judges, those who are here and those who have gone before us, have always been underpaid.

When our Constitution was adopted at the Constitutional Convention, the question of salaries for judges was discussed. Actually there were there at that convention some of the most able lawyers in the State of Idaho. And what did they do? What did they advocate? And why did they advocate it? To tickle the ears of the public? I don't know. But they advocated a salary for a Supreme Court Justice down as low as $2,000.00 a year, out of which he should pay his own traveling expenses. Can you beat it? $2,000.00 a year and pay your own traveling expenses! They fixed two terms of Court, one in Boise and one in Lewiston. They finally raised the salary by compromise. There happened to be some there who were in favor of fixing it at $4,000.00, but they finally fixed it at $3,000.00.

So all the way down the line, I might say, from the very beginning of our Constitution until the present day, there seems to be the thought in the minds of so many people—and I think that they are perfectly honest—that judges should not be paid a salary that is adequate for the service they render or that will compensate them for the responsibility they assume and the great sacrifice they make.

In Idaho not only have the judges been underpaid, but the Constitutional officers generally have heen underpaid. With the possible exception of two states, the pay in Idaho has been the lowest of all the states in the Union.

I noticed in the paper the other day an article about an old gentleman down in one of the southern states who had been on the Bench 50 years. He had reached 80 years of age, and he retired under a statute they have down there that fixed his retirement pay at $80.00 a month. Handsome, of course, because the old man couldn't live very much longer anyhow! I don't know what trouble he could get into with $80.00 a month! Do you? But perhaps he was made more happy by having to worry only about $80.00 a month rather than if he had $500.00 a month to worry about.

Of course, most states are more fair in equalizing through decent retirement pay the inadequacy of salary during active service.

We have a Constitution that was passed 58 years ago or thereabouts. It is not applicable to conditions as they exist today. It is absolutely inapplicable in so many different ways. It is obsolete. It is antiquated. It is 58 or 59 years behind us. It is full of legislative matters. It is a breeder of law suits and contentions and is not helpful to the administration of justice. The amendments are conflicting. Section after section is subject to double construction.

The many basically good things in our Coustitution should, of course, be retained, but certainly we should face the accomplished fact of fundamental changes in the people's views of many things, and bring our Constitution into line with modern needs and thought. That is something you lawyers should be interested in.

If we are going to reduce the number of our Supreme Court Justices (and it is true that the business on the Bench recently has been very meager) perhaps we should do it. We have had very little business in the Supreme Court for the past three years. Many times in the history of the Court a single Judge has written more opinions than the five men do at the present time. Before I came on the Bench, and afterwards, there was quite a volume of business. There were quite a number of cases filed. They ran well above 200, and later on they ran up even higher; and after that they went lower, and now today we have had 56 cases filed in the Supreme Court to be heard during the year. We don't know, and nobody knows, whether litigation in the Supreme Court will increase or decrease. But you men must decide whether you will have five Supreme Court Judges or whether you will have three or seven.

One thing I want to fix in your minds, if I can, is that at this particular time we ought to show in the administration of justice in this state some way to save some money that is used for purposes other than salary. Have we too many courts? I don't know. Should be reorganize our court system? That is a matter for you gentlemen to decide. But there is no reason on earth why judges should not be busy on the District Bench. They love to be busy, and a finer class of men you will not find anywhere in the United States nor a more able class of men than the District Judges we have in Idaho. I know what I am talking about. I have been in other states, and I know that our judiciary is certainly not less able than the judiciary of any other state in the United States. Frankly I think it is generally better, but I am probably prejudiced a little.

There are things that might be corrected, but we have been trying and are going to correct them. If it is neccessary to redistrict the State of Idaho and have a presiding District Judge in each District and send the judges from one county to another wherever there is a congestion of litigation or wherever their labor is necessary, we will do that. If it is necessary to reduce the number of judges, we may have to do that. If it is necessary to increase judges, we will do that. But the business of the judiciary in the state must be expeditiously disposed of. The people demand that, and they have a right to do so.

Now, should we hold as many terms of the Supreme Court as we do? When we were admitted as a state there were only two terms held in the state. Now there are eight. Twice we go to Coeur d'Alene, twice to Lewiston, twice to Pocatello, and the term in Boise, of course, is continuous. Is that necessary? You can get from Coeur d'Alene to Lewiston in about two hours. You can get to Boise from Pocatello in about five hours. Is it better to take the Court off of wheels or to grease the wheels and keep going? It's nice to ride. One makes many acquaintances. But it costs

money to move the Supreme Court from place to place. And at times there really isn't business to justify that expense or those terms. Don't forget either that these terms actually often result in delay of decisions, simply because while we may not be busy at Boise, we still must delay hearing a case until we get, let us say, to Coeur d'Alene months later. You must look at it as a business man would and not as a politician. Then ask yourselves, is it worth it? Can we afford it? Can we take that money and add it to the salaries of our judges? Can we obviate the delay litigants justly do not like?

Should we maintain as many law libraries as we do? We have one at Lewiston, one at Pocatello and one at Boise. We pay out from seven to nine thousand dollars a year and better to maintain those libraries, exclusive of the cost of the books. Many of the counties maintain law libraries of considerable extent at the expense of the counties. Should we maintain all of these libraries, or should we cut down? Is there some way that we can make a savings out of some of the expenditures that are not so essential in order to give the laborer, the judge, a fair salary?

I know the District Judges are not eating pork chops, and I know the Justices of the Supreme Court are not buying sirloin steaks on the salaries they are getting now. Sometimes I wonder how they make it at all. It is shameful. There is no question about that.

Twice we passed an Act increasing the salaries of judges while one gentleman was in office as governor. And twice he vetoed it. So I went to him, and I asked him why he was so opposed to judges getting a little increase in salaries. "Why," he said, "that is simple. I can go down on the street here in Boise, and I can hire any number of lawyers to take your job for $1,500.00 a year." (laughter) Maybe he would have made a good trade, but I don't know what kind of a lawyer he would have gotten. But that is the conception so many people have.

As I said before, we must see if we can curtail some of the expenses, save some of the money that is being spent on non-essentials, to raise the salaries of our judges. What we want here in Idaho, and what is wanted all over the nation for that matter, are the best and most capable men we can find to fill the office of judge. We want to pay them all the money we can raise in any legitimate way so that they will be properly compensated. That is what we want. We want better men, more learned men, men with great judicial wisdom, men who can even decide a case so that it will please both sides! (laughter) I haven't been able to do that.

But without joking, and in all seriousness, if we are going to have the kind of a judiciary we ought to have, it is imperative to meet the conditions and pay them at least a decent wage.

Let's demonstrate that we are not wasting the taxpayers' money. When we demonstrate to the Legislature that we are not going to waste money, that we are not extravagant, that we are not maintaining more men in office than is necessary—and I think the need for increased compensation will be recognized by any sensible person—the Legislature will be glad to be a party to maintain the high standards that we now have in the state.

I don't know how popular this thought is, but I have no hesitancy in talking to you folks, and I don't know whether you will agree with me or not—so many people have disagreed with me all my life that is common practice and it doesn't worry me—but I think we should either abolish Probate Courts, or enlarge their jurisdiction and abolish some of the Justice Courts. It seems to me that we have a sort of dual administration of justice. It overlaps and is duplicating. Except for about three counties in the state, I could never understand why we needed a Probate

Court and Justices' Courts. And when you consider that is true all over the state, gentlemen, you will realize that it amounts to a lot of money.

They are all fine, splendid men, but that is not the point. The point is that we should adeqnately pay those whom we must employ, if we are going to have a judiciary that the country generally will respect. Let us do away with some of these things that we do not really need. There are three counties in the state where I think possibly the Probate Judges are reasonably busy. But you know and I know that all over the state the good men who are elected to that office are not lawyers. I don't have to stand here and tell you that probate law is one of the most important branches of law. In probating estates and things of that sort, very important steps must be taken that are fixed by statute. And still we don't have men who know anything about law. They are good citizens, excellent farmers, excellent cattle men, wonderful neighbors and all that sort of thing, but they know absolutely nothing about probate law, and still we elect them time after time.

When discussing these things I think of the little Aesop fable I read when I was just a kid:

Little Jack Horner
Sat in his corner
Eating his Christmas pie.
He stuck in his thumb
And pulled out a plum
And said, "What a great man am I."

So when we try to reduce some of these lower courts, maybe we might be treading on very dangerous ground. I don't know. It is a luxury, and perhaps the people may want to keep it.

I think when the fathers of the Constitution conceived the idea of having three independent departments of government—Executive, Legislative and Judicial—that the Finger of God touched their brains when they created the Judicial department. It has been the ship of state that has sailed the Union over the roughest seas that any nation ever knew. It is doing so today, and it will continue to do so. It will save them. It will save not only their lives, their property, but the greatest gift from heaven, it will save them their freedom.

I am not going to take up any more of your time. I certainly have enjoyed being here with you. It won't be long until I am defrocked of my judicial robes. Maybe I have worn them long enough. I think maybe I have. At any rate I feel perfectly happy about it. I don't think there is any man living on the face of the earth—that is putting it pretty broad, I realize—who is more grateful than I am for the privilege the people of this state have given me of serving them during all these years. And I know of no man anywhere who appreciates more than I the assistance that the lawyers have given me in the performance of my duties. I have always loved the lawyers. I have no enemy that I know of among the lawyers. I don't know one of them to whom I wouldn't stretch out my hand and put forth every effort that I have the energy to put forth to help in distress or trouble. So if among the Bar there are any enemies of mine, I don't know anything about it, and I don't want to know anything about it. I don't care anything about it. I have done the best I knew how. On my conscience I have no burden.

Perhaps I am like an old Justice of the Peace over in Wyoming before whom I appeared in the early days when I was just a young lawyer. I learned something, although the old man didn't seem to me to know much, as I viewed it at the time. I had a client who was arrested for a felony. It was a horse stealing case. I got hold

of the complaint, and, of course, it stated no public offense. I took my books over in my buggy. There were no automobiles. In those days the people gathered for miles and miles around whenever there was any kind of a trial. The meeting house was full to overflowing, and this fine old Scotchman was sitting on the bench, glasses down on his nose, a look of dignity on his face.

He said to me, "Are you ready, young man?"

I said, "Yes, Your Honor." And I talked and I read and I did everything I could to try to show him that the complaint did not state a public offense at all.

He said, "Are you through?"

I said, "For the present and until I hear from the Prosecuting Attorney."

He said, "The Prosecuting Attorney need not say anything. I drew that complaint myself, and it is good as it stands!" (laughter)

So what I have drawn in life or what service I have been to the Bar or to my state, I drew it myself. If I accepted underpay, that is my trouble. But I will tell you boys that if you are going to have what you hope to have and what you should have, and I do sincerely pray that you will have, select the best men that you can find in your profession and pay them a salary large enough so that they will stay.

My successor has been appointed. He is an able Judge. I know him personally. He is a fine lawyer. That I know. He is an honest man. He is a man of integrity and high standing, and upon him, when the time comes, I will gladly place my robe and pray that during his term, which I hope will be long, he will enjoy that happiness and joy that comes only to the man who works and toils that he may do justice, that he may be of service, that he may do no man wrong. Gentlemen, I thank you. (Standing applause)

PRES. SMITH: Thank you very, very much, Justice Budge, for that splendid address. You gave us some ideas which we need.

I bave a wire from Abe McGregor Goff, former President of the Bar, who was to be the next speaker, that he is unable to attend because of necessity of disposing of urgent matters before return to Washington for the special session.

Whereupon several announcements were made and the meeting was adjourned until 1:30 P. M.

PRES. SMITH: Our afternoon session will please come to order. You will observe on the program that we have Judicial Reorganization and Unification; Sectional Administration of Judicial Business; Fewer Judges? Selection and Tenure of Judges; Salaries; Retirement; Transference of Probate Jurisdiction; County Courts; Justices of the Peace; County Clerks; Judicial Council. It has been very difficult to attempt to separate the subject matters into definite subjects, hecause they all dovetail into one another. In order to present the program to you, bowever, Mr. Marshall Chapman will lead out on proposals relating to a system of unification of courts. Earle W. Morgan will handle the salary question, and J. F. Martin will handle tenure, selection of judges, and I believe that the retirement features will dovetail all through this program. They have already to some extent. We have resolutions with reference to retirement which we are going to throw into the Resolutions Committee. I believe it will be covered without it being separately covered here in the resolutions.

We also have three other people on the program: Mr. Hull of Wallace, Mr. Merrill of Pocatello and Mr. Whitla of Coeur d'Alene. Mr. Whitla is the only one

of those three who is here. Those gentlemen were going to open up the discussion, but Mr. Whitla, you will open up the discussion, I believe, and then we will throw the whole thing open for discussion.

MARSHALL CHAPMAN:

REPORT OF JUDICIAL COUNCIL ON REORGANIZATION AND UNIFICATION OF THE JUDICIARY OF THE STATE OF IDAHO

Mr. President, Members of the Bar of Idaho, and our Guests:

I herewith submit to you the Report of the Judicial Council on the subject of reorganization and unification of the Judiciary of the State of Idaho.

Since the 1947 Convention, and the appointment of the Judicial Council, several meetings have been had of the Council, and considerable thought has been given to the question of reorganization and unification of the Judiciary of this State.

In approaching the subject of reorganization the Judicial Council considered first the advisability of recommending merely a redistricting of the Judicial Districts of the State, retaining the present number of District Judges, with a more fluid system of assignment of these Judges, in a hope of working out a more coordinated and unified judiciary. However, it was felt to be of more importance to bring about a substantial increase in the salaries of our Judges, with an improved retirement and a more permanent tenure of office. To bring about this result, the Judicial Council felt, with the data available as to the work of the judiciary in this State, that we would not be justified in going before the Legislature with any plan calling for higber salaries and improved retirement, without a material reduction in the number of Judges.

In other words, with the available data before us, can we justify asking the continuation of the First Judicial District of this State, where, over the period covered by the various surveys, we find, on an average, only 201 civil cases filed annually, 16 criminal cases, 47 days consumed in jury trial work, and nine days in Court trial work? The Second Judicial District, where there was an average annually of 150 civil cases filed, 37 criminal, 13 days engaged in jury trial work, and 24 days in Court trial work? The Fourth Judicial District, where there was an annual average of 146 civil cases filed, 11 criminal, nine days of jury trial work, and 50 days of Court trial work? The Sixth Judicial District, wbere there was an annual average of 199 civil cases filed, 24 criminal, 31 days of jury trial work, and 32 days of Court trial work? With these figures it would be difficult to prevail upon the members of our Legislature to substantially increase the salaries of our Judges, coupled with an improved retirement pay. As can be seen, the work of our District Judges in this State is not equalized, and the number of Judges is in excess of the number required.

In counection with a study of these subjects an attempt was made to secure an efficient and reliable survey of the work of the judiciary of this State. In this there was no legal means of requiring the respective Clerks of the District Courts of this State to make an accurate and complete survey of the work. In some Counties, where the Clerks were willing to cooperate, the data furnished, on its face, was inaccurate and unreliable. In other Counties the Clerks refused even to cooperate in the making of any survey. The data used in this report comes from the survey made by the Judicial Council of this Association which functioned during the years 1929-32, and the data which your present Judicial Council was able to gather.. In passing, your Judicial Council has found that some method of procedure must be adopted under which accurate and reliable information can be secured from time to time with respect to the work of the judiciary of this State.

In making our recommendations to you the Judicial Council had in mind that in redistricting the State it could be done at this time without embarrassment to any present Judge who might have a desire to continue in office.

Thanks to the cooperation of Justice Budge, of the Supreme Court, we find, with five Justices, the Supreme Court of this State handed down 58 opinions in 1945; in 1946, 57 opinions, and 1947, 48 opinions. At the end of each calendar year every case on the Supreme Court calendar at issue or that could be heard, was disposed of. On the other hand, in 1914, at the time of Justice Budge's elevation to the Supreme Court, with three Justices, there were some 200 cases pending, and which were disposed of, in some years with the assistance of District Judge Commissioners. On account of the tremendous drop in the business of the Idaho Supreme Court, we do not feel that we are justified in asking the Legislature to substantially increase the salaries of the members of this Court, and not, at the same time, recommend a reduction in the number of Justices.

The recommendation of your Judicial Council as to the number of Justices of the Idaho Supreme Court is that this Court be reduced from the present five to three Justices without eliminating, necessarily, any of the present eligible members of this Court. With two Justices required to retire, and with the provision that the remaining Justices are to fill their unexpired terms, no Justice of the Supreme Court would be affected by this change.

The recommendation of your Judicial Council as to a redistricting of the State is as follows:

That the State of Idaho be divided into four Judicial Districts;

THE FIRST JUDICIAL DISTRICT, consisting of Benewah, Bonner, Boundary, Clearwater, Idaho, Kootenai, Latah, Lewis, Nez Perce and Shoshone Counties, which territory now comprises the First, Second, Eighth and Tenth Judicial Districts of this State, *with three District Judges.*

From the data available, in this proposed District there would be an annual average of 1,080 civil cases filed, 163 criminal, 164 days in which the Judges would be engaged in jury trial work, and 231 days of Court trial work. This would mean, for each Judge within the District, over the period covered by the data available, an annual average of 360 civil cases filed, 54 criminal cases, and each Judge would be engaged in jury trial work 55 days of the year and 75 days in Court trial work.

In the territory now comprising this proposed District there are five District Judges. Under the Compulsory Judicial Retirement Law, four out of the five existing Judges within this territory are required to retire at the conclusion of their present term.

THE SECOND JUDICIAL, DISTRICT, consisting of Ada, Adams, Boise, Canyon, Elmore, Gem, Owyhee, Payette, Valley and Washington Counties, which territory now comprises the Third and Seventh Judicial Districts, *with three District Judges.*

In this proposed District there would be, from the data available, an annual average of 995 civil cases filed, 139 criminal cases, 78 days of jury trial work, and 435 days of Court trial work. This would mean an annual average for each Judge of 249 civil cases filed, 35 criminal, and each Judge would be engaged in 19 days of jury trial work and 109 days of Court trial work.

Within the territory embracing this proposed District there are at present four

Judges. Two of these Judges, under our Compulsory Judicial Retirement Act, must retire at the conclusion of their present terms.

THE THIRD JUDICIAL DISTRICT, consisting of Blaine, Camas, Cassia, Gooding, Jerome, Lincoln, Minidoka and Twin Falls Counties, which territory now comprises the Fourth and Eleventh Judicial Districts, *with two District Judges.*

In this proposed District, from the available data on hand, there would be an annual average of 696 civil cases filed, 102 criminal, 82 days consumed in jury trial work, and 176 days in Court trial work. This would mean an annual average per Judge of 348 civil cases filed, 51 criminal cases, and each Judge would be engaged in jury trial work 41 days, and 59 days in Court trial work.

There are now three Judges in the territory comprising this proposed District, being Honorable James W. Porter; Honorable Hugh A. Baker, and Honorable Doran H. Sutphen. There will be a vacancy created by the elevation of Judge Porter to the Supreme Court in January of 1948. The failure of the Governor to fill the vacancy created by the elevation of Judge Porter to the Supreme Court would leave Judge Baker and Judge Sutphen, for the next two years, as the Judges in the territory comprising this proposed District. By doing this, it would not necessarily mean the elimination of any Judge in the event the State is redistricted, notwithstanding the fact that no Judge in this proposed District is required to retire under our Compulsory Judicial Retirement Act.

THE FOURTH JUDICIAL DISTRICT, consisting of Bannock, Bear Lake, Bingham, Bonneville, Butte, Caribou, Clark, Custer, Franklin, Fremont,, Jefferson, Lemhi, Madison, Oneida, Power, and Teton Counties, *with four District Judges.*

This territory now comprises the Fifth, Sixth and Ninth Judicial Districts with four Judges.

In this proposed District, from the available data, there would be an annual average of 1,155 civil cases filed, 168 criminal cases, 121 days of jury trial work, and 312 days of Court trial work. For each Judge in this proposed District there would be an annual average of 289 civil cases filed, 42 criminal cases, and each Judge would be engaged in 30 days of jury trial work and 78 days of Court trial work.

In the territory embraced in this proposed District there are at present four District Judges, and in this territory there would not be any reduction in the number of Judges. However, from the data available, this territory justifies a continuation of the same number of Judges, but under the proposed reorganization the work of these Judges would be more evenly distributed and the work more efficiently expedited.

Your Judicial Council further recommends the elimination of Probate Courts in the respective Counties of this State, with the ministerial work of these Courts going to the Clerk of the District Court and the judicial work of these Courts being consolidated with the work of the District Judges.

We were unfortunate in not securing an accurate and complete survey of the work of the respective Probate Courts of this State. Some of the Counties cooperated, and a goodly number failed to furnish any information whatsoever. The available data brings out that our Probate Court work in this State runs proportionately with the

population of the respective counties. This likewise is in accord with the law of averages, as disclosed by data acquired through statistics and from various Bureaus of Vital Statistics.

The Judicial Council, in considering the consolidation of the work of the District and Probate Courts, has likewise taken into consideration the fact that this consolidation has taken place in many of our adjoining States. In the larger Counties of this State it may be desired to create a County Civil Court, but in most of the Counties of this State the Probate Court can be eliminated without working any undue hardship on the District Court.

There has been criticism from the members of the Bar from the smaller Counties of the State, as well as those having business in such Counties, of the delays and handicaps encountered in getting cases at issue. We also found that in some of the neighboring States, where a consolidation of the work of the District and Probate Courts has been brought about, criticism has been made of the delays occurring by reason of the failure of the District Judge to go into the smaller Counties, and to dispatch the business.

To overcome this criticism, the Judicial Council recommends that the District Courts be required to set aside at least one day per month, if not more, depending upon the business of each County, at which time probate matters can be noticed for hearing and all preliminary matters, such as demurrers, motions, etc., can be heard without notice. If this is not done, matters will be heard where convenient to the Judge and attorneys residing in small Counties will be required to go to the resident chambers of the Judge to take care of routine matters. Even though it may be unpleasant for a Judge to journey into an inaccessible County Seat, nevertheless, we have forty-four Counties in this State, and as long as we have this number of Counties some procedure must be had to see that the judicial business in these smaller Counties is dispatched without delay.

There has also been considerable discussion as to the advisability, due to the proposal to place the ministerial work of the Probate Courts in the office of the Clerk of the District Court, that all Clerks of the District Courts be appointed by the District Court, instead of being elective officers. The Judicial Council feels that this is a matter that should be seriously considered.

Your Judicial Council further recommends that there be at least one Justice of the Peace in each County of the State, the number being fixed by the District Court, and each Justice to be appointed and to hold office at the pleasure of the District Court. This would follow the system used by the Federal Courts in the number and selection of United States Commissioners.

In bringing about the proposed reorganization of our judiciary, a Constitutional Amendment will be required to reduce the number of Justices of our Supreme Court. Insofar as the reorganization of the District Courts is concerned, no Constitutional Amendment will be required, and this can be accomplished by Act of the 1949 Session of the Legislature of the State of Idaho. The elimination of the Probate Courts and their consolidation with the District Courts will require a Constitutional Amendment, as will likewise the proposed change with respect to the Justice Courts. Because of the necessity of securing Constitutional Amendments to bring about the proposed changes in the Supreme, Probate and Justice Courts, no reorganization of our judiciary can be consummated until the 1950 general election. Further, under our Compulsory Judicial Retirement Act a large number of our present Supreme Court and District Court Judges will be required to retire at the conclusion of their present terms, and for this reason it is our recommendation that the reorganization of

our judiciary be effective at the conclusion of the present terms of our District Judges, which coincides with the conclusion of the terms of such members of the Supreme Court as are required to retire.

With a reduction of the Supreme Court from five Justices to three; with a reduction of District Judges from 16 to 12, and with the elimination of the 44 Probate Judges, the Judicial Council feels that no difficulty should be had in bringing about a substantial increase in the salaries of Justices of our Supreme Court and salaries of our District Judges. In making our recommendations with respect to the compensation, the Judicial Council had in mind that the men filling the high offices of our judiciary would prefer a compensation commensurate with their labors rather than a smaller salary without adequate work to keep them occupied. The Judicial Council recommends that the District Judges of this State receive a salary of not less than $8,000.00 per year, and preferably $10,000.00, and that the Justices of our Supreme Court receive a salary of not less than $10,000.00 per year, and preferably $12,000.00, with retirement at full pay.

In our recommendations for a reorganization of our judiciary, the Judicial Council also had in mind the necessity of expediting the dispatch of judicial business in this State, and to take care of any congestion of work which might occur in any particular County.

In this connection it was felt that there should be a head to our entire judiciary system. It was thought that probably it would be well to have the Chief Justice of our Supreme Court be the administrative head of our judicial system. However, in a distribution of the work of the Supreme Court, it was felt that the Supreme Court itself might prefer to designate another member of the Court rather than the Chief Justice. For this reason we recommend that the Supreme Court by election designate a member of that Court, whether he be Chief Justice or otherwise, as the administrative head of our judicial system. To further coordinate the work in each Judicial District, it was thought that, instead of having the senior Judge act as the administrative head of the judicial work in each respective District, that the Judges of each District elect the administrative head from among their members. In order to bring about a proper unification of the work of our judiciary, the respective Clerks of the District Court in each County would be required to make, from time to time, reports to the administrative head of the judiciary in each respective District and of the State as to the status of the Court calendars in each County. The administrative District Judge in each District would have full authority to assign himself and his associates to the trial of any case, or any term of Court in any County of the District. Likewise, the administrative head of our judiciary in the State, having before him the proper information with respect to the status of the calendar in each County of the State, and after consultation with the administrative head in each District, would have the power to assign any District Judge within the State to the trial of any case, or the holding of any term of Court within any County of the State, to eliminate any congestion which might occur.

Should the judicial business of this State increase, or the business of any Judicial District, the Legislature should have adequate authority to increase, from time to time, not only the number of District Judges in this State, but the number of Supreme Court Justices, comparable with any increase in work.

The Judicial Council in making these recommendations is doing so impersonally, without having in mind any personalities whatever. I desire to say on behalf of each member of the Judicial Council that we have the highest respect for each individual Judge now occupying the bench in this State. Our purpose is to benefit and to

improve their lot in life, and, at the same time, to bring about a more efficient expedition of litigation in this State.

We respectfully recommend that proper resolutions be adopted approving the proposed plan of reorganization and unification of our judicial system as above outlined, providing for the preparation of proper Legislative enactments and Constitutional Amendments to put into effect the proposed plan approved, and that the Idaho State Bar and each individual member exert every honorable means to bring about their adoption by the 1949 Session of our Legislature and the voters of this State.

PRES. SMITH: Our next speaker is the President of the Clearwater Bar Association of Idaho, and also the President of the Prosecuting Attorneys' Association of the State of Idaho, Earle W. Morgan.

PHIL. J. EVANS: Mr. Chairman, I would like to ask at this time if we are going to have any discussion on the recommendations of the Judicial Council. Would it not be better to have that discussion at this time before proceeding with the presentation of the various other topics that are included in this part of the program? We could do that while the matter is still fresh in our minds.

PRES. SMITH: Our thought was that the whole picture be presented together, because each of the subject matters dovetails into the others. You will have two chances. One will be today when we get this whole picture before you, and tomorrow we will take some more time when we discuss the resolutions.

Of course, we will proceed as the Association wants to proceed. But we would rather proceed this way if there is no objection to it. However, I will entertain any motion that the Bar wants to put.

EZRA R. WHITLA: I move that we get the entire matter of this unification subject before us and then discuss any one or all of the topics at that time.

The motion was duly seconded from the floor, was put to a vote and carried.

EARLE W. MORGAN: Mr. Chairman, members of the Association:

I want to begin this short paper by asking a question. Of the three departments of our government, which is the most important? Which safeguards and enforces the rights of the mighty, and the lowly? Which can review the acts of the other two, and reach an enforceable determination? The Judicial Department is truly and admittedly the most important factor in the make-up of our nation.

And that leads to a second question. What is the Judicial Department? We promptly brush aside a consideration of jurors, because they play no part in judicial functions. They are triers of fact only. Lawyers are officers of the court and assist it. But they do not conclude, determine, nor bind. The Judge, then, *is* the judiciary.

I have used this academic approach to the discussion of the subject assigned me because I wanted it as a foundation on which to proceed. Moreover, we are so close to these known facts that it is easy to neglect a true consideration of their overall importance. We, too, are apt not to see the forest for the trees.

As our President has pointed out, there are many considerations affecting our State's judicial system. Mr. Chapman has considered some of them. Others will be presented. But when we get all through the necessary and important phases—when we have re-districted, re-ruled, re-tenured—in fact, when we have completed a perfect structure—then we have to put a qualified man on the bench. To get him there, it is necessary that the position be attractive to him.

Judges are best chosen from one field—the bar. They should be chosen from the better qualified lawyers. But to be a good lawyer requires experience. A lawyer is an advocate, and the better the lawyer, the better advocate he is. It is not easy for him to drop the trappings of the advocate and assume the judicial role. It requires time to season him. He slowly acquires the judicial temperament. As the years pass it improves. But in the passing of these years he loses two important assets—his ability as an advocate, and his clients.

The lawyer considering a position on the bench knows this. He knows that if he elects to go on, he should, and probably will, make it his career. The State benefits most if he does.

In contemplating the bench, the financial angle must be considered and reckoned with. If the bench is to draw from the better practitioners, it will look among those who are earning $10,000 and more, per year. Such a person has adopted his standard of living and his program of saving. Is he able to, and will he, drop all this and take a position paying $5,000 gross per year on the district bench, and $6,000 per year on the Supreme Court? I say gross because income taxes have to be paid out of these amounts.

The lawyer who hasn't accumulated money or property cannot, in fairness to himself and his family, reduce them to this position. He has spent large sums in education. He has gone through trying years getting started and getting experience. He has built up a clientele. His future looks bright. His wife is looking forward to many of the things she has denied herself. His children are thinking of college. Judicial salaries at the present levels won't permit more than a most economical living, if it will do even that.

If he *has* accumulated savings or property, it would be necessary to draw upon them to live in his accustomed manner. How far can he go along this path—what of emergencies and unforeseen expenses?

Now, we should probably reflect that the lawyer who is thus pondering is giving up something. He is a high type man, experienced, able, and honest. Heaven forbid that we should be talking about the man who feels he can further himself financially by getting on the bench. Or the man who hasn't been able to make a living and wants the job because he feels it is a financial advancement.

To bring home the point I am trying to make, I want to ask a third question. This one I direct to each of you individually. It is a rather long one. But, if you will bear with me, apply it to yourself in such fashion that at the end of the question, you can answer it yes or no, and then be bound by your answer:

> If you had offered to you a place on the District bench of your District, without the necessity of making a campaign for your election, and if you were assured that you would be re-elected for the next 12 years, again without the necessity of running the gauntlet of re-election, would you give up your practice and your present income, and the income you would receive from the clients and business that you now have, in exchange for this judgeship?

In calculating your answer to this question, you would look at the wills you had in your safe. You would consider your many valued clients whom you have nursed along. You would recall your net income as shown by your tax returns of the past years. You would recall what your living expenses have been, other than office expenses which reached a total that made you scratch your head, and while you can't account for that total, it is there, and it was spent. On all these things, you have figures.

The Supreme Court isn't any better. The salary is $1,000 more, but the Justices on that Court must leave home and live at Boise. Conceivably, it costs more than this amount to live away from home, whether the Justice supports two places, one at home and one at Boise, or moves his family to Boise to live.

And then, of course, you *will* have to face an election, and re-election every four years. Your answer is liable to be, "Well, I appreciate the offer, but I don't feel I will be able to accept it." Secretly, the position would appeal. There is a certain honor that rests well with our ego. But the honor isn't high enough and the ego isn't sufficiently impressed, to make the personal sacrifice required.

That the bench *will* attract capable men is demonstrated by the rush of applicants whenever there is a vacancy in the Federal Judgeship. And of those who do not apply, very few there are who would not accept if the position were offered them. This demonstrates forcibly that an adequate salary and retirement are among the vital considerations.

We recently passed a retirement bill. When the age of 70 is reached, the man, judge or practitioner, is ineligible for election. In two years, 60% of our Supreme Court, and 50% of our District Courts will be vacated by reason of age limits. In north Idaho, four out of five District Judges will be ineligible for re-election. Thus we are faced with a real and an immediate problem. And if you have answered my third question in the negative—if you have concluded that you couldn't afford to take the position at $5,000, or $6,000, a year, and assuming that you are representative of the Idaho Bar, then by whom will the benches be filled? The prospect is frightening, isn't it?

This question has been answered by the Clearwater Bar Association, which comprises the five northern counties of Nez Perce, Lewis, Idaho, Latah and Clearwater. Last January, the Clearwater Bar Association passed a resolution that the salaries of our judges, District and Supreme, be raised and raised considerably. And it asked that the State Bar throw its influence in that direction. It was felt that if the judicial salaries were in an amount suffiffcient to pay a comfortable living—if they were in an amount to enable the jurist to live on his salary without using up such reserve as he had accumulated—that qualified members of the bar would then accept the position.

This question was further answered by the Idaho Prosecuting Attorneys Association. It felt that judicial salaries should be increased to a point where the bench would at least be made as attractive as it was back about 1905, when the salaries were last set by the Legislature, excluding of course the $1,000 raise given recently. The Prosecuting Attorneys' Association specifically recommended, at their last midwinter meeting, that judicial salaries be increased to a minimum of $8,000 for District Judges and $10,000 for the Supreme Court.

Now those figures are undoubtedly the minimum that should be considered. In 1905, $4,000 and $5,000 would go a long way, perhaps three times as far as the same amount would go now. If that be true, then our judges, who are certainly as valuable today as they were then, should receive $12,000, District, and $15,000, Supreme. And while I will not have the time to give you statistics of the judicial salaries paid in other states, I can tell you that such salaries are now being paid. I can't, however, quote you a state paying as little as the State of Idaho.

I will not go into protracted detail on the cost of potatoes, butter, clothing, rents, building, medical and other costs. Nor will I recount to you that day laborers, workers by the hour, artisans and skilled craftsmen, are receiving compensation that is many times greater than that paid them when the judicial salaries were set in 1905.

We know that it is a fact that in 1939 and 1940, costs of living, and salaries paid, were higher than in 1905. And we are told, by the statisticians and we know of our own knowledge, than since 1939 - 1940, costs have more than doubled. Consequently, if $4,000 and $5,000 were compensatory for the positions in 1905, then it would require doubling to tripling to bring them up to standard today.

There is an economic factor that demonstrates that, from the citizen's, the voter's, standpoint, it is unwise to let present conditions continue. Important positions usually command salaries that attract proficient men. Farmers, merchants, businessmen of all types, have valuable interests at stake. They pay good salaries to the heads of departments and to all employees who are in a position to make decisions that affect their operations, whether from a profit or a functional standpoint. No head of any enterprise of any consequence, agricultural or business, would think of asking for or obtaining a man in a controlling position at a salary now paid our judges.

And when it is brought home to any of the foregoing—when they realize the far reaching effect that judicial determinations may have on their businesses, their salaries, their savings, their safety, their very liberty and all the rights and privileges of which they are so proud and which they so dearly treasure as Americans, they, too, will agree that the stated minimums of $8,000 and $10,000 are indeed modest.

These salaries can't be brought up to par too soon. For future office holders as well as incumbents, the raise should be put into effect at the earliest possible date. Perhaps a study of the Supreme Court decision on salaries will disclose that salaries for all judges, District as well as Supreme, can be made while the person is in office.

Earlier I stated that the subject of judicial salaries had been assigned to me. That is not a correct statement. As much as seven months ago, I requested the officers of this Bar to allow me some small part in the discussion of this subject. I was apprehensive. I *am* concerned. In my opinion, we are sliding into dangerous waters.

If this short discussion has resulted in a recognition of the importance of correcting the present condition, and we become fired with a resolve to do something about it, but with the press of our private matters on our return home get distracted from our purpose, little will have been accomplished. It will take affirmative effort to bring these facts home to the people and, most important, to our legislators.

If you will pardon a reference to the Prosecuting Attorneys' Association, Mr. President, I'd like to tell you what we did about our salaries when the Legislature met in 1947. We wanted raises. We worked on the necessary committees and obtained an arrangement whereby we each had the job of selling the delegation from our own county on the amount of raise that we wanted. Each delegation, at the proper time, stated the amount they requested for their county. There was no argument. There was no discussion. The bills passed.

I have never attempted to crusade on a state-wide question before. I am now here with spear, but no armor or horse. I do not wish to let my enthusiasm lead me into making suggestions that should not properly come from me. I hope I am not presuming too much, Mr. President, when I suggest that a committee of this Bar be appointed, whose office it shall be to appoint local committees, directly or through the local bars, to conduct such educational program in their respective localities as shall be found effective, and particularly to impress on the legislators from the respective counties, the necessity for making an adequate increase in the judicial salaries of this State.

And I think we should not overlook that other important factor—retirement pay. We now stop a man at 70 from running. If he has been on the bench any length

of time, he hasn't accumulated anything on which to live after retirement. The present retirement act is a start, but it is in no way suffiffcient. I don't believe it was considered adequate at the time it was passed, any more than the $1,000 raise was felt to be compensatory. Couldn't we consider a more equitable retirement based on the salary earned during tenure? It would provide an added incentive for the man who hereafter considers the position; it would, in a small way, compensate those men who are now on the bench for the services they have so well performed. We have a good judiciary. They have stayed on rendering loyal and effective service at a miserable compensation. I would be proud, if my Bar had a part in obtaining this benefit for them.

PRES. SMITH: The next speaker will be J. F. Martin on the subject of Selection and Tenure of Judges.

MR. MARTIN: Mr. President and ladies and gentlemen of the Bar:

The ill and confused patient, with a faith which will aid him, follows the advice of his physician and goes to the hospital. He has confidence in bis physician because of his ability, his training and his reputation. He has confidence in the hospital because he knows that his physician or others of equal standing had much to do with its creation, equipment and management. He knows that it is as efficient as the combined knowledge and experience of able physicians can make it.

The court room is the lawyers' hospital into which he takes his bewildered clients in the hope that their failing and faltering rights of person and of property may be respected and enforced, may again become vital, living things. But in the creation, the equipment and the management of that hospital the lawyers, although best qualified to speak, have had no controlling or influential voice and both the lawyer and his client know it. It is a workshop manned and equipped by those who are in fact aliens to the task before them.

The Bar of Idaho has for a long time been dissatisfied with the machinery provided by the legislature for the selection of the managing heads of these hospitals of the law. The members of the Bar have complained long and bitterly of a situation which places in the incompetent and inexperienced hands of others the control of the facilities with which they work, but like Mark Twain's famous reference to the weather, they all complained of it but did nothing about it. But the condition of which lawyers complain, unlike the weather, is capable of improvement and correction. The state of affairs is inexcusable and the lawyers of the state have but themselves to blame. Political leaders have relinquished hope of regaining the judiciary as political offices to be filled. The legislature is not opposed to lawyers' measures. It may examine with care but not with hostility. The legislature has not been informed and advised. No suggestions have been made by concerted effort of the Bar. If the lawyers had really tried, the condition of which we complain undoubtedly would bave been corrected. We complain of a condition our own lethargy fathered and nurtured.

At the 1946 convention of the Bar held in Boise two ex-district judges discussed the question of Judicial Selection and Tenure. What they had to say appears in full in the published report of that convention. Accepting and following the recommendations made by them the convention resolved:

> "That the legislative committee of the Idaho State Bar be, and it is hereby, directed to invite representatives of other organizations interested in promoting the welfare of the residents of the State to conference with a view of agreeing upon plans for the improvement of the laws of this State relating to the judiciary and to use its best efforts to bring about the enactment of such legislation as may be agreed upon."

At the 1947 convention we listened with interest and profit to ourselves to an able discussion of the subject of Judicial Selection and Tenure by Glenn R. Winters, Secretary of the American Judicature Society and also secretary of the Judicial Selection and Tenure Committee of the American Bar Association. By resolution adopted here the complaints of the manner of selection of judges and filling of vacancies on the supreme and district courts were again voiced and provision was made for the appointment of two committees, one to investigate methods adopted and proposed for the selection of judges and the other to prepare legislative and constitutional changes to be considered at this convention. We are now reporting for the two committees.

While no preference has been expressed by the Bar of this State for any of the various plans proposed for the selection of judges, it is fair to assume from what has been said and from favoring resolutions adopted that the Bar hopes to attain the following ends:

1. Preserve in letter, spirit and operation the principle of nonpartisan selection of judges; free and keep them free from political pressure and obligations in appearance as well as in fact; make ability, experience and temperament the tests of the right to acquire judicial office.

2. Equalize or compensate for the loss of party aid and sponsorship brought about by our nonpartisan judicial constitutional provision by giving to the capable and satisfactory judge some assurance that he may continue, within limits fixed by retirement statute, to hold office as long as he desires and remains capable and thus give to him the prospect of indefinite tenure but with reservation of the right of displacement if it appears warranted.

3. Assure the attainment and continuance of these desirable ends through committing into the hands of those best qualified to know and to judge at least influential voices in the selection and retention of capable judges and the retirement from the bench of those who do not measure up; and

4. Accomplish these purposes by legislative enactment if possible and resort to constitutional amendment only to the extent necessary.

The attainment of purposes 1 and 2 has for many years been the aim of the members of the legal profession and to the study of the involved questions able men have given of their best. Various means have been proposed.

The plans most thoroughly publicized are what are known as the Missouri plan and the California plan by both of which judges first acquire office by appointment only, never by election. In Missouri the appointment is limited to selection from a panel approved by a commission of judicial officers, members of the Bar and laymen appointed for that purpose alone for a period of years and, except as to judicial officer members, without other official position. In California the appointment is made with the approval of or confirmation by the attorney general and two judicial officers. Under both plans the appointment is made by the governor and for a definite period. If the judge desires to succeed himself he is a candidate for re-election without opposition.

A recent survey made of the attorneys in those states indicates definite improvement over party convention nominations and partisan elections and that the plans operating in those states would be continued, not unanimously but by clear or heavy majorities, if left to the vote of the lawyers in those states.

The California plan was, in operation, for a time disappointing but during recent years has accomplished all that was hoped for it. Attorneys answering the questions submitted to them complained of its operation under administrations preceding that of the present governor. The approving or confirming officers, themselves elected or appointed as partisans, appeared to remain partisan when confirming. Evidently several incompetent men were appointed to the bench in that state. The success of the plan during the present governor's administration is attributed to an additional requirement voluntarily fixed by the governor. He has adopted and followed the invariable practice of submitting to the governing board of the Bar of that state the names of men under consideration, of asking the board to rate and to approve or disapprove each name submitted and of appointing none who did not obtain the board's approval. Men of the highest type have been appointed without regard to their political affiliations. The recent successful operation of California's plan has been due not to the law itself but to the efforts of the governor to make it certain that competent men fill judicial positions. However, a few California attorneys, fearing the removal of the voluntary limitation, preferred the adoption of the Missouri plan and a much smaller number favored the return to party nominations and elections.

The Missouri attorneys with the exception of a very small minority favored the continuance of that system of selection and re-election of judges although in operation the plan has not quite fulfilled the high hopes of its advocates. Some incompetent judges in Missouri were not displaced at the elections. The attorneys believe that in time these incompetents, through the enactment of mandatory retirement statutes, will leave the bench and will be succeeded by more capable men. While it was, of course, hoped to make appointments non-political and fully non-partisan, neither of the two Missouri governors—one Democrat and one Republican—has appointed a man who was a member of another political party although the names of members of other political faiths appeared on the approved panels. It is admitted, however, that the appointments have generally heen satisfactory due to the fact that only qualified men were approved and were of higher type than the judge elected on a partisan ticket.

Under both plans retention in office is dependent upon election or re-election. No publicity or advertising attends the election of judicial candidates, their work, particularly on appellate courts, does not keep their names before the public and they become forgotten men. The result is that a smaller proportion of the electors vote the judicial ballot at succeeding elections and re-elections are made by diminished minorities. While the road to success may be longer, these conditions favor the defeat of capable judges by small but well organized minorities. It was pointed out by Missouri attorneys that the Kansas City Star alone could bring about the defeat of any judge in Missouri.

The Missouri Bar has recognized the possibilities inherent in the Missouri plan and has recently been quite active. The 1946 election disclosed that capable judges could not at all times safely rely upon the assurance they believed they had that re-election would follow and how easy it would be to defeat. In that year two highly satisfactory judges on different appellate courts in Missouri were candidates to succeed themselves and of course no candidate appeared in opposition. A minority of electors voted the judicial ballot and more than one-third of the votes cast were against each of the candidates. To the attorneys in Missouri the election meant that in future they must take a greater interest in judicial elections and agree upon and vigorously prosecute some procedure more fully to advise the voters and to stimulate an interest on their part in judicial elections. The plan now suggested is that the Bar of the State hold a Bar primary and by the result the lawyers be bound actively

to support or vigorously to oppose candidates. Some attorneys will and others will not oppose a judge seeking re-election and thus another situation not to be encouraged develops. Under the proposed plan if a judge, in spite of unfavorable Bar primary, continues his candidacy another Bar primary is held calling for answers by lawyers to specific questions as to the judge's fitness. If the Bar vote is again unfavorable, the lawyers are obliged not only to oppose but to point out the objections to him. That digs a deeper hole into which the attorney is supposed to crawl. The proposal also involves the appropriation of sums of Bar funds to cover advertising and other campaign expenses. It is proposed also that the president of the Bar appoint in each judicial district a campaign committee to publicize the findings of the Bar and to stimulate voter interest in judicial elections. Thus it appears that the Bar of Missouri must undertake the performance of a heavy and tremendously important task but can recommend only. In Missouri it seems the cost of preserving the popular idea of election of judges will be great.

While both the California and Missouri plans are in principle based upon a plan proposed by Albert M. Kales to the Miunesota Bar Association more than 30 years ago, both plans in one respect depart from it. His proposal was that the appointment be made by the head of the judicial department of the state, usually if not always, the Chief Justice of the highest appellate court. The California and Missouri plans call for the appointment of judges by the governor. Perhaps the departure is responsible for the criticisms.

Both the California and Missouri plans in their operations establish three things: 1. It is exceedingly difficult to interest more than a minority of the voters in a nonpartisan judicial election; 2. If capable judges are to have some assurance of extended tenure, the loss of sponsorship sustained through nonpartisan election laws must be compensated in some way. Judicial officers are now orphans. Upon some organized and functioning nonpolitical body must be imposed the obligation of aiding the capable and opposing the incompetent. The plans fail of their purpose and improvement is indeed slight if judges are placed entirely on their own; and 3. Upon the lawyers ultimately rests the heavy responsibility of selecting and sponsoring judicial candidates and of managing campaigns.

If the responsibility of determining what judges should be re-elected and what judges should be retired from office is to be placed upon the lawyers, they should be given a controlling voice in original selections. The great majority of judges acquire their office by appointment. If the right to continue in office is to be dependent upon the vote and work of the lawyers, the right to acquire office should also be dependent upon their vote and work. The lawyers should be permitted to initiate, not veto merely.

The third suggested plan fully recognizes lawyer qualifications and interest in selecting judicial offices and candidates and places the entire matter largely in their hands. That plan is known as the Richards plan and was recommended by Judge Bothwell at the 1946 convention. It may be accomplished by legislative act and imperfections can be more easily corrected than if covered by constitutional provision.

The basis of the plan was proposed by Charles W. Richards of the Indianapolis Bar. His proposal deals only with election or re-election; it does not apply to appointments to fill vacancies. By that plan if an incumbent judge desires to succeed himself a declaration to that effect will insure his place on the primary ballot. Other names may appear by petition. The Bar of the State then votes. If the incumbent ranks third or higher in the Bar primary, his name and the names of the one or two receiving greater number of votes, go on the ballot; if he is first he and No. 2 are the candidates. If the incumbent ranks fourth or lower he is eliminated and the

two candidates receiving the highest vote at the bar primary become the candidates to be voted upon at the general election. Under this plan the incumbent always has opposition at the election, always faces the prospect of defeat despite an excellent record.

All plans in their fundamentals have recognized the wisdom, or by their operations have demonstrated the necessity, of greater Bar participation and responsibility if we are to get or retain judges of satisfactory quality.

The committees believe that we should profit from the experiences of others and that to the lawyers of the State should be given the right to select, and the responsibility for the selection of candidates for judicial office and of continuing them or of supplanting them. The committees also believe: That only lawyers are qualified to determine the character of the work of incumbents and the fitness of aspirants; that lawyers will continue to subordinate political and religious beliefs and all other collateral questions to the proper test of judicial ability and will, as in the past, support and will nominate qualified men with no other rule in mind. Judges will have more definite assurance than by any other plan suggested that honest and satisfactory judicial service, coupled with physical fitness actual or presumed, will constitute the measure by which their right to continue office will be determined.

The committees therefor submit to you, recommend that you approve and that you direct the legislative committee of the Bar and every member of it to use its and his best efforts to bring about the enactment of a bill giving to the Bar of the State the exclusive right to nominate candidates for the Supreme Court and to the Bar of each judicial district the same right to nominate candidates for the district benches.

Thus the responsibility for satisfactory judicial offfficers will be placed where all recognize it should be and the Bar will in truth and in fact be functioning. Lawyers will then be rendering for their clients a service comparable to that rendered by physicians for their patients. We believe the legislature will, if its members are fully and frankly advised, approve the plans.

PRES. SMITH: Do you have any ideas on the judges' retirement that you want to present, Mr. Hawley?

JESSE B. HAWLEY: Mr. Paine and I have painstakingly, for the past few months, prepared slightly on this subject. At the last meeting of the Judicial Council, I now recall, the subject of retirement of judges was assigned to me.

The particular subject that I am to be learned about involves an amendment to the 1947 laws which provide for retirement of judges, and, of course, the payment of an annuity to them. The original Act provides that any justice who serves for an aggregate period of 10 years and then reaches the retirement age of 70 years, is entitled to one-half the amount of his regular salary which is to be paid out of the retirement fund. Seventy years is entirely too young, Mr. President, because we have men who are close to their 70's who are in their prime mentally and who could retain places on the District and Supreme Benches with honor to themselves and with great service to be rendered to the state and to the people.

We believe that law should be amended so that every person now serving or who shall hereafter serve as a judge or justice for an aggregate period of not less than 16 years, continuous or otherwise, who shall retire by expiration of his term or by voluntary retirement before attaining the age of 70, shall draw his full pension. The matter of the 10 year period is still retained. We did not seek an amendment to that particular portion of the Act, because we rather assumed that we shouldn't ask too much at this time.

But we know from history and experience, certainly the judges know, that a man who takes a judicial position is caught in the current of financial necessity. And that current is just as swift and just as hard to breast as the flow of the Salmon in the impassible canyon, The River of No Return. A man who has served for any length of time has lost, as you have heard better experts than I today say, his practice. He has lost his touch with the people. He has lost a great deal of that fighting spirit which court advocates must have or not be successful advocates. It is true that he can do office work, examine abstracts, draw contracts, and to that extent he can reenter the practice, but it is very difficult to build up that sort of a practice. Consider the men who have retired from the District or Supreme Bench. What has happened to them? We have one who stands out almost alone. He retired from the Supreme Court to the private practice and made a great financial success and engaged in quite important practice. But for that one we can think of many, many others who couldn't recover what they had given up prior to entering the Bench. One of the men, a man who possessed probably the greatest literary skill outside of Justice T. Bailey Lee, Justice Houston, wound up as the police magistrate of the City of Boise. Others have become, whether by name or not, practically nothing but law clerks. In short, the loss of practice and what I think is even a greater loss, the loss of identity as a lawyer is a tremendous loss, and it can't be compensated by the meager annuity which the Legislature finally let us have for our judges.

Sixteen years destroys the practice and also clouds the identity, but 10 years is sufficient in many instances for that purpose. So I conclude that you will not oppose this amendment which will come before you properly from the Resolutions Committee.

I think I am addressing the wrong body for accomplishment, unless you have a Legislative Committee that functions, a Legislative Committee that is on the job and works steadily. That means, of course, the President and Secretary of that committee and members from outside the capital city will take interest—interest enough at least that they will talk to the candidates for the House of Representatives and the Senate before nominations and also to the two who will be seeking election to each House prior to the general election. A lot of us know how these things are done. I am not going to carry any coals to Newcastle here and make any suggestions, but you pretty well know that if you contact the men before they are nominated and explain what you want, they have minds that are open and they have a feeling that they want your support and that they will get it if they listen with friendly ears to what you have to say. So it is necessary to have a strong committee, at least a strong Chairman and Secretary, and the committee should work hand in hand with the committees from Clearwater and various other districts of the state. In short, somebody has to do some work, and we sit here and talk—rather you sit and listen and some of the rest of us take your valuable time in talking—but that doesn't accomplish the purpose. And you know as well as I that accomplishment can't be had unless there is contact with the men who have the rule temporarily, who have the voice temporarily and who have the authority temporarily to heed our request.

One other matter which I think is of great importance in getting the retirement bill through—and what I say applies to all of the other resolutions where we instruct our Bar Commission to go out and get something done by the Legislature while we go back and practice law—is the importance of bringing to the man on the farm, in the shops and stores knowledge of what the profession of law encompasses. We must give to him, through mediums that are recognized, the press, the radio, a comprehensive, intelligent and common view of what our profession stands for, the education and training and so forth required. We must show them the responsibility and the importance of the judiciary, which Mr. Morgan very well accentuated in the beginning of his remarks today.

Now, who is going to get that type of publicity for us? Who are you going to

have? Sam? E. B. Smith or some of the other Commissioners? No! They are not competent to do that work. They are not publicists. That is a profession or calling at least, which requires specific skills, understanding, and the ability to open doors. So I think that we fail miserably and have failed time after time because we have not given to our Bar Commissioners and the Legislative Committee the power to employ a publicist. Whether he be a full time or part time employee is a matter of judgment. But we need such a person to bring our case to the public. That is necessary. That is needed, and unless it be done, I am doubtful that we will have very easy going through the Legislature. In fact it is more than that. I know we will have a tough time.

PRES. SMITH: The next topic will he covered by Judge Charles E. Winstead, the Judicial Council.

JUDGE WINSTEAD: Mr. President and members of the Bar: It is very apparent that there are weaknesses in our judicial system due to lack of coordination of the Courts, lack of cooperation between the Courts and in the cooperation between the Courts and this organization. I have prepared a resolution for the current Judicial Council which I think covers briefly the matters that I have in mind. I will submit this resolution to the Resolutions Committee, but I will read it at this time.

(See Resolution No. 9, at page 95 hereinafter)

For the first time in 58 years since the adoption of the Constitution, the various District Judges of the state met together in Boise in February. Twelve of the 16 judges were present. They were brought together at the request of the Board of Corrections to cousider certain matters in connection with the new Board of Corrections and administration of criminal law. At my instigation the Governor directed these judges to appear at state expense.

Up to 1937 we had, as a part of this Bar, a so called Judicial Section. Up to that time I don't think that out of the 16 judges there ever were over five or six of the District Judges and possibly one or two of the Justices of the Supreme Court present at any of these Judicial Sessions. At Idaho Falls, in 1937, I moved, and Justice William Morgan seconded, that we disband the Judicial Section and that we substitute a request to the Supreme Court that the Supreme Court should annually call together the District Judges of the state for the purpose of securing closer cooperation between the various judges of the state and possibly create uniform practice and rules with regard to matters of the trial, juries and so forth in the Districts of the state.

That matter was handled by the Supreme Court in the same manner in which the rules were handled. The Supreme Court never acted and hasn't acted to this date.

We have had two Judicial Councils. The first Judicial Council made its report back about 1932 and died a natural death. The current Judicial Council is more or less a voluntary council appointed by the Commissioners of the Bar. We have attempted, during this past year, to make recommendations to increase the efficiency of the Courts, the coordination of the Courts of the state and generally to improve the conditions of practice for the members of the Bar.

I believe, gentlemen, that the present codification will demonstrate further the need for a permanent Judicial Council. Our present statutes provide that the District Judges shall recommend to the Chief Justice of the Supreme Court any defects in laws that they may find during the course of the year. These recommendations are sometimes made. But when made, they disappear. I don't know whether they disappear entirely in the Chief Justice's office or the Governor's office, but I do not

ıer of any of these recommendations every being brought to the floor of the ıure.

ey have the same trouble over in Oregon. I am still a member of the State Oregon, and when I got my last copy of the State Bar Bulletin, I found a on of their code revision over there. A comment was made which I think is ble to our own situation.

t was emphasized that in the revision it was not proposed to check the sub- of the law, only the form. In Minnesota it was stated the revision resulted in nination of 5,000 obsolete or duplicate laws or laws which had been repealed ared unconstitutional. In addition, parts of 1,000 other Acts were eliminated , and there were 30,000 editing changes made."

don't know whether you have checked through your statutes recently, but we ıve criminal laws from the "greenback" days under which one who is in charge of public funds commits a felony whenever he changes a $20.00 bill from currency into cash or cash into currency. There are numerous statutes which affect the horse and buggy days, stage coach days, toll roads and matters of that kind. A Judicial Council and the judges of the state, called together annually to eliminate these laws, can eliminate at least one of the 12 volumes of the proposed codification before the time comes for another codification. What we needed before this codification was a revision. If we don't get at the revision now, we are going to pile up and keep piling up these obsolete laws and these laws which need to be modified or portions eliminated.

I think we will find the same condition in Idaho which was found in Minnesota when the latter attempted its revision.

PRES. SMITH: From here on out the meeting is yours. Mr. Whitla, will you lead the discussion?

EZRA R. WHITLA: First let me say that I thoroughly agree with Jess Hawley that this limitation on retiring judges at 70 years is entirely too young, and it is going to lead to serious complicatious in which it will do great injustice to some of the men who have sacrificed to take these positions. I think it is a bad mistake in the law to limit it to 70 years, because 70 years at the present time is not too old. If a man is still capable and competent, he should he allowed to carry on. Certainly our record in Idaho has demonstrated that some of the men who have reached and passed 70 years a long way back have been the grandest judges and the best jurors we have ever had in the state. I think some provision should be made to the effect that if a man is under a physical or mental disability and has become in such condition that he cannot carry on he may retire voluntarily, or by some proceedings he can be retired and placed on a pension. That would be a very much better law than we have.

As has been said, it isn't a question of what we are going to talk about here today. It is a question of what we are going to do about it and arrange to organize to proceed in the coming election campaign to get support. That is what is going to count and not our talk.

There is a great deal that could be said as to how to select your judges. In various places judges are selected in different ways. In some places it works well one way, and in some places another way is better. I happen to know a good deal about the Missouri condition. Racketeers got control of the State of Missouri, and were so strong they even controlled the judiciary and elected judges. The prime movers in the racketeering business got into an insurance proposition and used the

mails to defraud and the federal government took a band, and succeeded in placing the parties who were heading this fraudulent proposition and heading the racketeers in Missouri where they couldn't interfere too much with the state elections. The Kansas City Star, referred to here, did take a very active band in trying to clear up that situation. Missouri passed a law, not as a general proposition, although it appeared that way on the surface, but for the specific purpose of cleaning up the specific situation. It was a special law built especially to cover the thing they had to do, and they did do a very good job of it. They got some good men in judicial positions, and they got where the other fellows couldn't control the situation, and for a time it worked. They have had some trouble with it, and altogether it hasn't been so successful that I would say we should take it as a pattern.

Across the line into Canada they think we are all wet about this proposition. They have had some very successful judges in those counties who were appointed by the government, not for years but for life, or good behavior. As a whole their judicial system has been a very fine thing for anybody to use as a pattern. Our own federal system in this country is the same way. There is much to be said about that.

I doubt if the electorate of the State of Idaho will sanction any bill that is going to take from them the right to vote for the judges that are going to pass in judgment upon their civil or personal rights and liberties. It is a question, however, to be worked out, and I don't think it is fundamental as far as the plan that is involved is concerned. I think that any way you handle it, if you get good judges and follow through with the program that has been submitted, the matter can be properly taken care of.

Mr. Morgan struck one of the most responsive chords in this judicial proposition when he called attention to the fact that here we are going along worse than in the old horse and buggy days. We pay our Supreme Court and District judges a wage that is a mere pittance for the work they are doing. In all other branches of public life and industry, labor and capital as well, everything has increased at least double what it was in those days. Just a few years ago we hired a fellow on a ranch to work putting up hay for one or two dollars a day, and he worked 10 hours, and he did a good job. Now, if you go out to hire one, they want from one to two dollars an hour, and they work eight hours a day, and they won't do as much in a day as they used to do in a couple of hours when they were only getting a small wage. In the factories it is exactly the same. Go to the store to buy your provisions and you pay two to three times as much. Everything has increased. Lawyers' fees have increased. Doctors' fees have increased. The fees and wages and compensation of everybody and practically everything have increased except the judges' salaries. We go before these judges practically daily. We lawyers prepare our claims, and we ask them to allow us fees that are not the same as they were 20 years ago. And we lawyers are not overly greedy either compared to the way other people have been doing. We ask for an increase of 50% to 100%, and if you have a case to justify it, I have yet to find a judge who hasn't allowed it. Yet he sits there and very often allows us as much in one case as he is going to get as a whole year's salary.

Can we expect him to continue, raising everything except his income, and expect to get the best men we have to carry on? We haven't been fair to them. That is the sum and substance of the whole thing. It is time we got busy and paid these men who are willing to sacrifice and go on acting as our judges, both in the District Courts and the Supreme Court, a reasonable living salary. As has been said here, once they get on the Bench and serve a term or two, they are practically out of the practice of law for the rest of their lives. They have lost their clients. They have lost their touch with business. They are getting pretty old by that time to try and get a new practice. It is, practically speaking, impossible for them to do so.

To me the most unjust thing of all is that after they have reached the age of 70 you drop them out on the street with just a mere pittance of an allowance for them to carry on. The Bar as a whole should take these matters in hand, and do something about it.

I have just recently been in Pennsylvania. I visited with a Circuit Judge there. What do you suppose they paid him when he first went on the Circuit? $15,000 a year! And he gets an increase every year he stays on, and he is serving his second term now. He lives close to Pittsburgh. They send him to Pittsburgh to assist in the work, very often for long periods of time, and they allow him $25.00 a day extra for compensation in addition to his expense while he is serving in that City. It is no wonder that in states like that they can get men of high quality who are willing to take those positions on the Bench.

In Idaho we are not in position to pay salaries of that kind. But we can at least raise these salaries to where they will be reasonably comparable to living conditions in the State of Idaho.

The plan that Mr. Chapman has suggested goes a long way towards solving the question.

Whether we are going to be able to get rid of Probate Courts presents a very serious question. I find that in many of these outlying counties, the smaller counties, particularly, they are very loath to part with their Probate Courts. They think they are, practically speaking, a part of their local institutions. It is going to take a lot of educational work to get them to allow their Probate Courts to be taken away from them. Yet I think in the states adjoining us, where they have done that and have set up an adequate system, as they have done, they are better satisfied with the system they have than they were before that time. If we could eliminate the Probate Courts, it would go a long way towards giving us that extra money that we need to pay the judges with. That would go a long way in taking care of the increased compensation which we will have to pay our judges in order to continue getting good judges. By the elimination of judges, we will get a little along that line. But the elimination is not going to be enough to pay all of the additional compensation. But if we could work out a plan to make the elimination and then to eliminate the Probate Courts, I think those two things alone would probably secure enough extra allowance that would pay the additional amount that you would be required to pay the judges in order to pay them a fair salary and to give them a condition where young fellows could afford to go on and to make a life on the Bench their life's work.

There is another thing about this I am pleased to see, and that is the fact that I haven't seen one single bit of politics enter into this question that we have up here today. I think the Bar of the state, as a whole, has met this question without regard to any politics being mixed up in it and just simply as members of the Bar trying to do the best we can. It is not for our profession alone, because as far as the lawyers are concerned, they have been getting along pretty well, but we are working it out so we will have a better judicial system in the State of Idaho to give the people a better administration of our law and to build up that particular branch of our government. I know of no one that I have talked to, no matter what party he belonged to, that has even mentioned the fact that any politics could or would be mixed up in this question. It has been, so far as I know, entirely and absolutely eliminated.

There is one other thing I want to suggest. Some of us are going to lose judges in our districts. There is going to be some little question about a judge coming from one county and going to another. They are going to feel that they don't like to lose

that office, but we have got to educate the people to the fact that we are not working for the interest of the local county, for the local man or for any local situation, but we are trying to set up a system in the State of Idaho which will build up the judicial branch of the government and make it the best and most outstanding system that is possible to get in the State of Idaho so as to make it one of the coordinated branches of government—really outstanding and efficient. To do that we have got to pay a reasonable salary. To do that the Bar of the State of Idaho, and not part of us but all of us, have got to go out and see the members of the Legislature who are going to be elected. We have to work with them. We have to bring every argument that we have to get people generally to understand that we are not trying to work out something for some selfish motive.

In this matter I can't see where we, as lawyers, are going to make a single cent more for ourselves. I can see where we lawyers, if we do a good job of reorganizing the courts, will have done something for the people of the State of Idaho. I for one am willing to spend my time, whatever is necessary, to do everything and anything I can to help it along.

PRES. SMITH: Is there any further discussion?

PHIL J. EVANS: Mr. President and members of the Bar: I cannot resist this opportunity of saying a few words on the very important questions that have been raised by the very able gentlemen who have addressed this convention. And at the outset I want to make it clear that I am entirely in harmony and in sympathy with the objective that they have in mind. I am fully as convinced as any member of the State Bar of the necessity of raising the standard of the judiciary of the State of Idaho. I also think it is a shame and a scandal that men of the caliber who have served the State of Idaho in the capacity of judges for so many years should have served for the pittance that they have received for passing upon some of the most important questions that have affected the well-being of the people of the State of Idaho.

I am fully persuaded that a learned and an independent and a self respecting judiciary is one of the greatest assets of any state, and I want to assure you that I would not willingly do or say anything that would reflect adversely upon the standards of our judicial offices in the State of Idaho.

I have no desire to discuss political philosophies at this time however much I may disagree with the political philosophies of some of my learned brethren of the Bar. But there are a few things that have been urged in support of this proposition designed to raise the standards of the judiciary of the State of Idaho that I believe touch at the very roots of our American philosophy of government. For one, I am not willing to go along with those who want to make a fundamental change in the principles of our government in order to extend any higher standard to a certain class of the population.

I am willing to agree that the salaries of our judges should be doubled at least in order to get the caliber of men we must necessarily have in order to lend dignity to the office and to perform the duties of those offices in the manner in which they should be performed, in order to protect the well being of our American citizens. But I am not willing to concede that the judiciary is entitled to any greater consideration than any of our other fundamental departments of government.

I believe that our Legislative and Executive branches of government are fully as important as the Judicial branch. I believe in the principle of responsibility to the American people. I do not believe in life-time tenure of office. The American Revolution, in my mind, was fought to assert the right of the American people to

control the administration of the government of this country. I do not believe that the people of this country should he denied an opportunity to determine for themselves, at suitable periods, who they should select to administer the affairs of their government—whether it is the Legislative, Executive or Judicial branch.

It is my humble opinion that this government was formed for the benefit of the people and not for the benefit of the judiciary, and I will not willingly lend my support to create any more masters in our national life which would be created, in my opinion, in making the tenure of the office of a judge for a lifetime.

After the American people in the Revolution got rid of that principle, and in view of the fact that our present institutions have worked so effectively, I believe that some of the propositions that have been urged here today would bave the effect of sapping some of the most fundamental institutions of our democratic form of government.

Take, for instance, the suggestion that was made—after telling us at length about the importance and necessity of baving an independent judiciary—that the District Judges should be given the power to appoint, if you please, justices of the peace in the various counties. I think that is one of the most disastrous and undemocratic propositions that could be submitted to an assembly of American citizens. I think it is as important that we should have an independent judiciary at the bottom of our judicial structure as it is we should have one at the top, and I would be thoroughly opposed to the idea of giving any District Judge the power to appoint or to remove Judges of courts lower than their own. I think that proposition should be rejected by the State Bar.

I have one suggestion to offer in connection with Mr. Chapman's address in regard to the retirement of judges at full pay. That is a principle with which I am in entire sympathy, but I believe that there should be attached to that suggestion a plan similar to that in use in our federal courts. I agree with what bas been said by the distinguished members of the Bar who have addressed us here today that very often a man is in the prime of life, able to render the most effective service to the people in his whole existence at the age of 70 years. And I believe that those judges who are retired, in case they are called on because of the pressure of business in the different sections of the state, should be subject to call to serve in holding terms of court wherever needed as now is the practice in the federal system. I think that is one thing that should be attached to the suggestion made by Mr. Chapman. If that was done it would give many more years of useful service to those who may be retired under the system suggested and would enable them to round out their lifetime in the performance of the duties that they are so well fitted to perform.

One more thing and I am through. I believe we have too many pressure groups in this country already. I believe that we have a duty, not ouly as lawyers but also as American citizens, and I am not so conceited as to believe that we members of the legal profession are so superior intellectually to the rest of the people that the right to select judges who should pass on the rights of the American people should be confined to those recommended by the Bar. I for one am not prepared to place that power in the hands of the Idaho State Bar. I believe that our system of electing judges has worked very well since the adoption of our Idaho State Constitution. I believe that the people of this state have demonstrated that they possess enough intelligence to recognize faithful service on the part of their judicial employees. It has been proven by the fact that so many of them have been re-elected to office time after time until they have been able to devote the whole of their active lifetime to the performance of those judicial duties that experience has taught them how to perform so effectively.

We have, in this country, thonsands and thousands of pressure groups. There isn't a branch of the American people but what are organizing some pressure group in order to give them greater control of the government of this country. We have our farm organizations—thousands of them. We have our veterans' associations seeking specific privileges from the government. We have our manufacturers' associations, our business men's associations, our service clubs, and we have our unions and other organizations all seeking specific privileges. And I want to tell you that I am alarmed at the tendency that is developing in this country to split our population up into factional groups, all organizing specific pressure associations to promote the particular interest of some particular group and secure greater privileges for that group from the government.

For that reason, my friends, I think that we members of the Idaho State Bar should take the lead as representatives of the people as a whole and not as members of the State Bar, not as an association seeking to curry favor with judges by leading them to believe that we were the ones who were responsible for enlarging and improving their status. Because, as I said in the beginning, I yield to no man in my respect to the judiciary of the state, and I would cooperate to any extent necessary to improve the conditions, to enlarge the respect and to improve the status of the members of the judiciary, but I am not willing to abandon the principles upon which this government was founded and to take from the American people the right of selecting those who shall serve them in any of the three departments of government.

PRES. SMITH: I would like to hear further discussion.

J. H. ANDERSON: I call attention to one matter that would make it easier to dispense with Probate Judges. If some provisions were made in the programs suggested for the juvenile court, which is handled entirely by the Probate Judges, it would aid the situation. It is necessary that they have some officer or forum in the various counties to attend to this very important matter, so I would suggest that in passing the duties and office of the probate jurisdiction to the District Courts that the Justice of the Peace be required to be a competent person, and that the juvenile court be transferred to its jurisdiction.

I also wish to take issue with my good friend Phil Evans with respect to taking away from the people their right to select judges as being undemocratic. I think the country was founded, after the Revolutionary War, by the ones who fought that war, and they very wisely made life tenure for the judges over which they had jurisdiction —that is, the federal judges—and they have continued that to the present day with very good results. I think the checks and balances in the three divisions of government require that the judiciary not be beholden to the vote of the people who tend to the election of the other two branches. I think it was a very wise thing that these judges were provided for by appointment and not by election. However, I did not understand the program here to eliminate the election but rather the selection of the candidates. That, if I am not mistaken, was to be made by the Bar, and the people would still have their rights to select between possibly two or three candidates who would be placed on the ballot. If I am wrong, I stand corrected.

MR. CHAPMAN: Mr. President, with respect to one suggestion made by Judge Anderson, I think it was an oversight, probably by reason of the piecemeal rendition of the Judicial Council's report. It was recommended, Judge Anderson, that by having an appointive justice court, that the juvenile work of the Probate Court should be transferred to the justice court, and each county was to have one justice court so they would have both a juvenile court and a committing magistrate.

And I wish, Mr. President, that the report of the Judicial Council, in so far as the record is concerned, be amended to show that recommendation.

PRES. SMITH: Yes, Mr. Chapman. Is there any further discussion, gentlemen?

E. E. HUNT: Was it not the intention of the Judicial Council to prepare a bill to increase the compensation of justices of the peace as well as to increase their jurisdiction in civil matters?

MR. CHAPMAN: It was my understanding that Mr. A. L. Merrill of Pocatello was to report with respect to this part of the work of the Judicial Council, and it was the opinion of the Judicial Council that the J. P's. be put on a salary basis rather than a fee basis which is now in vogue. I think Judge Winstead will verify that as being the opinion of the Judicial Council. And also to increase their jurisdiction, and it was left open as to whether or not some of the larger counties, instead of having a justice court, would have a county court with an enlarged civil jurisdiction with the qualification that the judge of that court be a lawyer. Of course, the compensation would have to be accordingly higher.

PRES. SMITH: Mr. Hunt, would you read the suggestions which John Jackson, the Probate Judge of Ada County, sent over?

July 14, 1948

MR. E. B. SMITH,
President Idaho State Bar,
Boise, Idaho

Dear Mr. Smith:

I have been very much interested in the proposed revision of the judicial system, and particularly in regard to probate matters and other matters now handled by the probate courts, and particularly in the suggestion that probate matters be placed in the District Courts.

I have given this matter considerable thought and would like to point out some of the difficulties, as I see them, from a practical standpoint. First, take the matter of confirmation of sales. As you know, brokers will not bid on stocks sold on the market for delivery a week or 10 days later, but require delivery of the stock immediately. It was to meet this difficulty, largely, that Chapter 56, Session Laws 1945 was passed.

If probate matters were placed in the District Court it would mean that the attorneys and their clients in outlying Counties would have to come to the Court in such cases as required immediate attention and could not wait for the Court to come to their County seats. This would mean, in many instances, a full day's time for the attorney and client. For instance, attorneys in Bear Lake County would have to go to Pocatello, which would mean a trip of about 100 miles each way. In the Third District, those living in out-lying Counties would have to come to Boise, and in the Seventh District those in Valley and Gem Counties, would have go to Caldwell, and other districts would be similarly situated. This would all mean much additional time and expense for both attorney and client.

I merely use this as an illustration as there are a number of other instances in which action in estate matters could not be delayed. This would all add additional cost and expense in probate matters.

Other matters now handled by the Probate Court should also be given careful attention. Take juvenile matters, for instance. Our present juvenile law is based upon a guardianship proceeding. If you get away from guardianship jurisdiction, you run into the question of jury trials if juvenile cases should be classed as

criminal matters and this would be contrary to the whole intention of the juvenile law.

I am giving you the above for such use as you may wish to make of it.

Very truly yours,
John Jackson, *Probate Judge*

PRES. SMITH: Is there any further discussion?

ANDREW F. JAMES: I am concerned with any unification of judicial districts. I believe sometimes that lawyers forget just what they are here for. As a profession, we are here for the purpose of doing a service to the communities. The smaller communities in the State of Idaho need lawyers. They need our help and our services. And any reorganization or unification of the judiciary which will make our larger cities even more attractive then they are now will take away the legal services that the smaller communities have.

We have counties in the State of Idaho now which do not have even one lawyer. We bave counties in the state now which do not have prosecuting attorneys, and those people are required to drive many miles in order to obtain legal service. The idea of setting up one day a month for the judge to be in a certain community is not going to satisfy the legal requirements of that community.

I believe the only thing behind the unification of districts and consolidation of districts is a desire to better pay the judges of the State of Idaho. That part I am in accord with. They are trying to effect a savings by reducing the number of judges in order to better pay those that are retained. And yet I bave heard no discussion today as to the pay of County Attorneys. Yet many of the County Attorneys put in only two or three days a month on county work. I say that to suggest that there may be other ways of effecting a savings by which the judiciary and judges may be better paid.

I do not know where the judges will reside in our Fourth District and the Eleventh District. When Judge Porter goes to the Supreme Court, Judge Sutphen will be residing at Gooding and Judge Baker at Rupert. Will they be required to go to the District's center? Will they go to Twin Falls or Jerome or whatever is established as the District's center?

We had a case the other day in Jerome. A Twin Falls attorney was on the other side. The Twin Falls attorney kept us busy for three weeks appearing before the Twin Falls judge in chambers arguing motions and so forth, and if our client had not had sufficient money, I believe that he would have worn us out and we would have given up and eventually would have lost the matter. But that is an example of what may happen if lawyers are going to have to go these great distances in order to have the judges hear their legal matters.

I am in accord with practically all that has been said this afternoon. But I am not in accord with the unification and consolidation of judicial districts.

JOHN C. HERNDON: Mr. Chairman, I was interested in the remarks Mr. James made, since I too, even more so than Mr. James, reside in one of these outlying orphan communities in the State of Idaho. Gentlemen, we have a lot of them in this state. It is big, and our 44 counties are pretty well split up, and most of us who practice in the outlying communities realize the difficulty of appearing before the District Courts due to the difficulty involved in the distances and expenses. On about three or possibly four occasions during the year the Court comes to our community. I am very much in favor of handling probate matters by a lawyer or someone qualified who is on the Bench. Too often we have difficulty in probate practice through inexperience and inability on the part of those who preside over our Probate Courts. But when we put probate matters into the hands of the District Courts, it is going to mean that the District Court which handles probate matters has a tremendous additional amount of work thrust upon it, and for the outlying counties it is going to mean a considerable burden in order to get our matters before the Court.

Mr. Chapman suggests, with respect to juvenile matters, that they be handled in the county court. Would that take care of matters satisfactorily?

We are all in accord with the idea of increasing the salaries of the judiciary. And if that is the principal reason why we want this reorganization, then it seems to me we should work out to a greater extent the problems involved in doing away with our Probate Courts and in the reorganization of our judicial districts. I, for one, would hate to see a reorganization which would make it more difficult for the lawyers in the small communities of this state to appear before the courts of the state.

On the other hand, I should hate to put any obstacle in the way of increasing the salaries of our District and Supreme Court Judges.

R. D. MERRILL: I realize the difficulty of those who practice law in some of the counties where the population is not as large as it is Boise, Pocatello, and the larger centers. However, it seems to me that the report that Mr. Chapman made would remedy this difficulty rather than aggravate it.

How many times a year does the District Court meet at Salmon or Malad, or any of these outlying counties? Probably two, three or four times a year. Under the plan Mr. Chapman presented, that court would as a matter of law have to meet there at least once a month. And under the unified system, if necessary, the presiding judge of that district would require one of the judges to be present in those counties oftener than once a month.

The idea Mr. Chapman presented solves the difficulty that you are having in the outlying counties rather than aggravating it.

One other thought I want to mention—the age of retirement. I realize that those at 70 or near 70 think that they are quite young, think that they are quite capable, and perhaps they are, as a rule. But there are situations where, at the age of 70, a man should be through with the responsibility of being a judge. To take that age limit away, it seems to me, would destroy the entire retirement act. I don't see why the age of 70 or 71 or 72 isn't o. k., if the judges are retired at full pay, and if they will follow the suggestion that was made by Mr. Evans whereby the presiding judge or the Chief Justice of the Supreme Court can call these gentlemen in for active service as they do in the federal system. So it seems to me we shouldn't have to fool around with age limits, but we should leave it at 70. It has to be some age. If we leave it without an arbitrary figure, then some of the judges would not retire and we would defeat the purpose of the retirement act. It seems to me we should leave that age alone, but we should provide, as Mr. Evans suggested, that they be eligible for service upon the call of the presiding judge. Of course they should be retired at full pay rather than at the present figure.

A. F. JAMES: It was brought out that the money saved in paying probate judges would help the District Judges. Our probate judge is getting now, I think, around $135.00 a month. Incidentally he is a qualified judge and admitted to the Bar. The District Court would probably have to hire two deputies to do that work. You have to pay $135.00 for stenographers now days. You can't save money on that.

I don't know just where these figures came from, but I don't think they are right.

MR. CHAPMAN: The figures cover an 18-year period of the counties where the clerks cooperated with the Judicial Council in furnishing the data. Your county is one of those where the clerk of the district court did not cooperate with the Council. The only data available for Gooding County—we had to use the data secured over a 10-year period previously by the former Judicial Council. In other words, that was all the data available.

A. F. JAMES: Well, most of those figures go back to '29 and '30?

MR. CHAPMAN: I think the judicial survey originally was made from 1920 to 1931, and the present survey was made from 1931 up to 1947.

A. F. JAMES: Now, as I remember from that report, the average number of cases for the entire Fourth Judicial District was 141. I think you said something along that line. I called up the clerk in Gooding a few days ago and in Gooding County alone last year there were 320 cases filed. The year before there were 340. That is for one county alone. Manifestly you can't go way back to 1929 or 1930 and attempt to build a new system on those figures.

My objection to this plan is this: You are destroying your home rule. You are going back to the time of Abraham Lincoln when the judges rode the circuit. That is what it means to these outlying counties. In my judgment, outside of Pocatello and Boise, there shouldn't be a district in the state with more than one judge. I think you could get along better with one judge for every district. You would then have your local home rule. The people would know the judge and would know how to work for him.

I am against the plan. As a matter of fact, this plan has been before this Bar year in and year out. I have a file that goes back to 1932, and it has the same thing in it.

I say, as far as the outlying communities are concerned, we are against it. We don't want to go to Twin Falls very time we have a little default and every time we get a court order. Look at the problem the Hailey people would have and Camas Prairie. All would have to go to Twin Falls. It works the same way for all these outlying communities.

Give the people their home rule and let them elect their own judges.

PRES. SMITH: Mr. James, this illustrates what I spoke about in my opening report. In about 10 instances we couldn't get anyplace. The clerks pleaded that they were too busy. We had no system of control where we could direct the clerks to give us data. By telling us to go to hell, so to speak, and they did that in at least one instance, and they also told the Supreme Court to go to hell, under the directive—and that includes your county—we got absolutely nothing.

MR. CHAPMAN: Mr. Chairman, for the purpose of clarification, Mr. Evans suggested that after the judges retire they should still be subject to call. In that connection, I believe the present retirement act has that provision, and the only amendment to the present retirement act, as I understood from Mr. Hawley, was to increase the retirement pay which would leave in the act the present provision with respect to the judges being subject to call. Is that correct, Mr. Hawley?

JESSE B. HAWLEY: That is correct.

MR. CHAPMAN: As far as the data before the council, of course, we could use only the data available. I was court reporter in Mr. James' district for 14 years. I now have an active practice in the Fourth Judicial District. If there have been 300

and some cases filed in Gooding County, it means that they are bringing from Ada County and other counties divorce cases in Gooding County—default divorce cases. I say to you men that this is above what might be your own selfish interest in the matter. If a district in this state cannot be financially justified, can we go to the Legislature and say that the judge of the Fourth Judicial District should be on a glorified retirement without sufficient work and have Judge Taylor in the Ninth District working day and night trying to take care of the business of six counties? I say, gentlemen, that this matter is above personal consideration, and if any given county in this state needs more than one motion day, the presiding judge of that district can so fix it. If there is a congestion in any county, the presiding judge can go to that county.

I say further to you that in the Fourth District, for instance, if the judge was required to have a fixed day each month where matters are heard without motion, that even though that district has a small amount of business, it would be dispatched with more expediency than it is today.

And I say further that so far as the residences of the judges are concerned, there has been no suggestions as to where they reside, and the judge would have the right to select his residence chambers from the many counties of the district. We take it that under this plan the residence of the judge is not important, because the plan is designed to bring the judge into the small counties where the attorney there will not have to travel miles to dispatch his business. But the outside lawyer, having business in that county, will have to go to the county seat of that county instead of the resident attorney going elsewhere.

MR. JAMES: As long as this was handed to me, I think I will make a comment on it. This is the Fourth Judicial District. There are no figures at all given for Blaine County, Camas County or Gooding County for any period of time from 1930 to 1947. Now that information is easily available. Anyone can call the clerk and find out or write a letter and have him furnish it.

PRES. SMITH: That is what you think. I sent out, at the instance of a directive of the Supreme Court directed to the Bar Commissioners requiring us mandatorily to obtain that information, and I sent those letters out to every county in the state, and I repeated those letters and repeated them again.

MR. JAMES: Have you written to Bert Bowler?

PRES. SMITH: I did, and I wrote him again, and I wrote him again.

M. JAMES: I can't understand it.

PRES. SMITH: That is what I say. You have no system in this state whatsoever. And I say that we have the most damnable system that I ever saw in this state with reference to any unification system whatever and—

MR. JAMES: That is true in all three counties?

PRES. SMITH: That is correct. We maintain that we can go back and strike an arithmetical average, which we did in order to try and obey the Supreme Court in this instance—incidentally we didn't have to obey the Supreme Court in this instance, but we didn't want to take the attitude of some of your clerks of the court—

MR. JAMES: Well, this is my experience. I called Bert Bowler. I asked how many cases were filed last year. In 15 minutes he called back 315 civil and seven criminal.

I want to say this to the Chairman and rest of you: I am in favor of increasing

the salaries of the judges, but in my opinion the way to get it is to go up there and have Mr. Whitla say what he said a while ago—the cost of living has increased. Let's not go up there and say what Marshall Chapman said—that our judges are not doing anything.

PRES. SMITH: What I have said, Mr. James, is in no way personal to you or the clerk of the district court. I am merely pointing out that it is a fault of the system we are trying to remedy. I am duty bound, I believe, to place before the association some views here which have not been brought out but which have been brought to my attention.

Phil Evans very strenuously objected to the right of the selection of judges being taken away from the public. In other words, placed in other groups he called pressure groups or attorneys. In this case, as I understand the situation, under the statistics of this state, the great majority of your District and Supreme Court Judges were selected in the first instance by appointment and were appointed by your Chief Executive. Then they have offered themselves to the electorate time after time, and the wisdom of those original appointments have been proven almost 100% in this state. As I understand it—and my memory goes back to about 1920 to the selection of Judge Brinck in Ada County when the attorneys at that time got very forcefully into the picture with reference to the selection of the judge—it is not the intention of the proposal that the power to elect be taken out of the electorate. Isn't the idea that the attorneys in the first instance select and then the judge, at stated intervals, offers himself to the electorate and the electorate must in the first instance elect the judge?

MR. MARTIN: That is right.

PRES. SMITH: Another idea which we could have gotten through the Legislature last year, and we were urged to present it, but we did not because this Bar had not voted it, was a dual plan whereby the attorneys would make a selection to go upon the ballot, but the general electorate in no way being interfered with so far as their rights were concerned to also name any other candidate that they desired. That plan would have gone through the Legislature last time. And that is another plan for your committee to regard.

The suggestion has been turned in that perhaps the probate courts should be retained as either probate courts or as county courts regardless of what you want to call them, hut to increase their civil jurisdiction to $1,000.00 and perhaps increase the criminal jurisdiction somewhat. That in turn would tend to eliminate the smaller cases from your District Courts and thus justify, perhaps, cutting down the number of District Judges. The argument that has been advanced against that is that you cannot get trained men, attorneys, to be probate judges except in a few counties, and you could not require, by virtue of that fact, a probate judge to be an attorney.

Here is another point that somebody wanted brought before the meeting. Assume we do cut down the number of judges to 12. Your Constitution is very highly elastic with reference to the Districts and to the number of District Judges. I think originally it was designed for five districts, and I have forgotten the number of judges, but I know it was way under 16, and there is the power to enlarge. Of course, if the power to enlarge is there, the power of taking away is there. If you need more judges, for instance, it would be quite easy to indicate the needs of the community and perhaps enlarge the number of your District Judges.

Another question that was also presented to me for presentation here was, why cut down the District Judges? Put it squarely up to the Legislature. If you need 16 they will probably give you 16.

This idea is at least worthy of being brought up in this discussion. We have had considerahle sickness and the elements of age creeping upon some of our District Judges here and there about the state. If we made a careful survey of the health conditions, the age situation—I think it was made before Judge Lee passed away—we find that we have in manpower about 10 judges in the state instead of 16.

Now, is there any other discussion?

ANDREW C. SATHRE: As to the matter of Probate Judges, you speak about enlarging the amount that can be brought in civil actions before the Probate Courts. Before you can do anything with the Probate Court, it being a Constitutional office, there will have to be a Constitutional amendment.

PRES. SMITH: That is admitted, Mr. Sathre.

MR. SATHRE: Take Idaho County. It is larger than the State of Connecticut. If you have a client at Pollock and have to take him to Lewiston, you travel something like 136 miles. If you submit something like that to the people or to the Legislature, I think you are going to have some time doing away with the Probate Courts as far as those counties are concerned.

You say we shouldn't be influenced by selfish reasons. Well, we are in the Tenth Judicial District.

Up to the present time we have had one sitting of the District Court at Grangeville, and I have been making a trip to Lewiston on the average of two or three times a month, and if we should have to take our probate matters over there, we would spend months of our time on the road. Today we have in Idaho County one probate judge and a justice of the peace, and that is all we have, and we won't have a sitting of the District Court until this fall.

PRES. SMITH: Is the Canvassing Committee ready with its report?

SIDNEY SMITH: There were 95 ballots cast. Five ballots were disqualified for failure on the part of the person sending in the ballot to endorse properly upon the envelope as was required and as was stated upon the ballot. There were 40 ballots cast for Marshall Chapman of Twin Falls. There were 50 ballots cast for Claude V. Marcus of Boise. Therefore, there was a majority cast for Claude V. Marcus.

PRES. SMITH: Is there any objection to the report? I hear none. I declare that Claude V. Marcus of Boise is the duly appointed Commissioner of the Idaho State Bar for the Western Division for a term of three years.

The varions discussions we have had today have helped the Judicial Council and your Resolutions Committee. I have tried to make close notes on the various ideas which I will turn over to the Resolutions Committee. Tomorrow, when the resolutions come from the Resolutions Committee to the floor, you will again have your say, and we will see what happens. Whatever happens, it will be in accordance with the majority. The meeting will adjourn until tomorrow morning.

SATURDAY, JULY 17, 1948

PRES. SMITH: The morning session will please come to order. Mr. Merrill, I will have to leave after Mr. Inman's paper to work with the Resolutions Committee. Will you take charge this morning?

VICE PRESIDENT MERRILL: Gentlemen, the first item on our program this morning is "Underground Water in Idaho" by A. C. Inman.

MR. INMAN: Mr. Chairman, while it is quite apparent to me that there is a considerable interest on the part of this Association in the fluid resources of the State of Idaho, I doubt whether it extends at this hour of the morning to underground water. However, the paper which I have prepared is quite elementary, and I might say at the outset that it goes principally to the making of two points.

Whatever Idaho decides to do about its underground waters, it should go slowly, and it might well start by endeavoring to put the supervision and control of underground waters and appropriation, distribution and use, under the jurisdiction solely of the State Engineer and the Department of Reclamation. That cannot be done, under our Constitution, with surface waters, but the point that I am going to make is that I believe it could be done with underground waters without a Constitutional amendment—at least if the statute is carefully drawn and it is not too all inclusive. I am quite certain it could be done if the statute is limited to such water sources as artesian basins and similar sources of flowing underground water as distinguished from percolating waters.

The second point I would like to make is this: I hope that as our underground water law develops the Legislature and the Courts hold rather fast to the doctrine of prior appropriation and not experiment with the other doctrines of correlative rights and reasonable use which have been adopted to certain extents in other western states, and which I believe in every case has caused confusion, conflicting decisions by the courts and finally a return, or an attempted return after some damage has been done, to the doctrine of prior appropriation.

There are few lawyers who, at some time in the course of their practice, do not find themselves called upon to predict how the courts will hold, on a given state of facts, under existing law. The client, perhaps, never realizes that such a prediction (which may exist only in the lawyer's mind and judgment) is the actual basis for the legal opinion or advice that he receives. And so the lawyer, ordinarily, need not be too embarrassed if the courts eventually decide the other way—it may be in a case which does not even involve that particular lawyer and his particular client at all. The point is, that a prediction of this kind is ordinarily a private affair, at least between attorney and client, and I hope you will therefore appreciate my position this morning, in discussing a similar subject in so public a way. The law relating to underground waters is important enough to warrant some discussion, and the subject is timely because we are just coming to realize, in Idaho as in other parts of the Nation, that our subterranean waters constitute one of our most important resources; that the regulation of rights pertaining to such waters—as well as the distribution thereof—is essential to their conservation and beneficial use, and therefore to the agricultural economy of the state.

In support of this premise, let me give you a few statistics. A recent review of the records of the State Department of Reclamation shows that a total of 669 permits have been issued by the Department for appropriations of subterranean water for irrigation purposes. With some overlapping of ground, these permits are for irrigation on 377,559 acres of land. Together, they contemplate the use of a quantity of water

aggregating 4,378 cubic feet per second, equivalent to 3,196,000 acre-feet of water per year. That's nearly two reservoirs like American Falls, when it's full.

More than half of these 669 permits have been issued since January 1, 1944.

During the past four and one-half years alone, 240 underground water permits have been issued for the irrigation of 90,159 acres of new land, and 147 permits for supplemental water for 32,043 acres of land already irrigated.

In addition, there are numerous wells in actual use, with no permits applied for, and no records whatever in the Department of Reclamation. And some subterranean water has been deereed without having gone through the permit procedure.

One interesting development in the obtainment and use of underground water is the trend toward higher lifts. Fifteen years ago pumping lifts of more than 40 feet for general crops were looked upon as impractical or uneconomic, but lifts greater than 200 feet are now being considered. All these things add up to the fact that underground water is becoming increasingly important in Idaho, as a major source of supply of water for irrigation purposes; and the need of a more comprehensive and effective program for the conservation, control and regulation of such water is becoming recognized.

One of the most interesting phases of the problem is whether, or to what extent, this can be accomplished by statutory enactment, without an amendment to the Constitution. This is the question that I propose to discuss, rather briefly—as well as to draw attention to the importance of the doctrine of prior appropriation, as applied to underground waters, as distinguished from the doctrines of reasonable use and correlative rights, which have obtained legal sanction in some western states.

Subterranean or underground waters are generally divided into two classes: (1) percolating waters, and (2) flowing waters; and it is the general rule that underground waters are presumed to be percolating in the absence of proof to the contrary.

Percolating waters are those which permeate or seep through the ground without a definite channel, and such waters are usually held to be "private waters" and not subject to appropriation, at least while they remain within the boundaries of land held in private ownership. *(1)*

On the other hand, "public waters," which are subject to appropriation, in addition to surface waters, include natural springs, subterranean streams flowing in defined channel and other underground flowing waters, and the waters of artesian basins. *(2)* With respect to the waters of an artesian basin, which permeate horizontally throughout an area between impervious strata of earth or rock, it is generally held that such waters are not percolating waters in the common-law sense of the term, but are public waters subject to appropriation; *(3)* and that a statute declaring them to be such is not in violation of vested rights of owners of lands overlying such waters, since such a statute is merely declaratory of evisting law, *(4)* in the western states where the arid region doctrine of appropriation prevails. Idaho, along with many other states of the West, has rejected the old common-law doctrine of riparian rights and adopted instead the doctrine of prior appropriation, under which, as between appropriators, the first in time is first in right. *(5)*

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(1) 67 C.J. 833-4, 968; 56 Am. Jur. 585; 55 A.L.R. 1886 and 109 A.L.R. 397; and see Public Utilities Comm. v. Natatorium Co., 36 Ida. 287, 211 P. 533.
(2) 67 C.J. 834-6, 967; 30 Am. Jur. 610; Sec. 41-103, I.C.A. 1932, and cases cited.
(3) 67 C.J. 834-6; 56 Am. Jur. 594; Hinton v. Little, 50 Ida. 371, 296 P. 582.
(4) Yeo v. Tweedy (N.M.), 286 P. 970.
(5) Hillman v. Hardwich (1891), 3 Ida. 255, 28 P. 438; Secs. 41-106, 41-502 and 41-804, I.C.A. 1932.

In certain jurisdictions, however, the doctrine of prior appropriation has been qualified, in its application to artesian basins and other similar underground water sources, and the so-called "reasonable use doctrine" (sometimes referred to as the American common-law doctrine) has developed in some states, and an adaptation thereof, referred to as the "correlative rights doctrine," has been followed in others. Both these doctrines are modifications or outgrowths of the old common-law rule that the owner of the soil owns all waters beneath the surface,(6) which has been largely rejected in the semi-arid states of the West.

Courts have frequently failed to distinguish between the "reasonable use" and "correlative rights" theories of water distribution.(7) However, neither doctrine has received any definite acceptance by the Idaho court, which has quite consistently held that the prior appropriation rule of "first in time, first in right" applies generally to subterranean waters.(8)

Under the reasonable use doctrine, the right of a landowner to percolating water in and under his land is limited only to such an amount of water as may be necessary for some useful purpose, without restriction of his right to use any amount of such water for any useful purpose on his own land, and not even restricting his right to use it elsewhere in the absence of proof of injury to adjoining landowners.(9)

The correlative rights doctrine distributes the available supply of water among landowners entitled thereto, holding that the rights of all owners over a common underground water basin are correlative, and that one landowner caunot extract more than his share of the water, even for use on his own lands, where the rights of others are injured thereby, *and this regardless of any prior appropriation and beneficial use which may have been made.* (10) The correlative rights doctrine is obviously at variance with the doctrine of prior appropriation and, as applied particularly to artesian basins, has resulted in considerable confusion and litigation, as exemplified in our neighboring state of Utah.(11)

An artesian basin has been defined as "a body of water more or less compact, moving through soils with more or less resistance." Jestesen v. Olsen (Utah), 40 P. (2d) 802. In Kinney on Irrigation and Water Rights, the author states:

> "The waters of these artesian basins, although they are in a way percolating, being held under an impervious stratum of clay or rock and under pressure of itself from above, legally must be treated as a class by themselves. They differ from the ordinary percolations in that they are above the impervious stratum and are under no pressure. There is also a distinction between wells having a natural flow and those not so constituted. It is, therefore, obvious that different legislation and laws are required peculiar to those waters and wells from those of ordinary percolation."

Mr. Kinney's statement that artesian waters require separate legal treatment is consistent with the view expressed by Mr. Justice Givens in Hinton v. Little, 296 P., at page 583.

> "It would seem, therefore, that it is impossible to attempt to lay down one rule with regard to subterranean waters, existing more or less as a relatively stationary body of water under the ground, and subterranean waters in which there is a decided movement."

(6) Yeo v. Tweedy, supra; Justesen v. Olsen (Utah), 40 P. (2d) 802, at 805.
(7) See Bower v. Moorman, 27 Ida. 162, 147 P. 496 at 501; 56 Am. Jur. 598; 56 A.L.R. 596.
(8) Hinton v. Little, 50 Ida. 371, 296 P. 582; Bower v. Moorman, 27 Ida 162, 147 P. 496; LeQuime v. Chambers, 15 Ida. 405, 98 P. 415.
(9) 67 C.J. 838.
(10) 67 C.J. 839.
(11) Compare the Utah cases of Horne v. Utah Oil Refining Co., 202 P. 815; Glover v. Utah Oil Refining Co., 218 P. 915 (both of which cases are annotated in 31 A.L.R. 906); Justesen v. Olsen, supra; Wrathall v. Johnson (Utah), 40 P. (2d) 755.

The recent Utah case of Justesen v. Olsen, supra, involving artesian waters, is especially interesting, because it illustrates the confusion which exists in the Utah law relative to this subject, which is due, in part at least, to Utah's experiments with the doctrines of correlative rights and reasonable use. The Utah Supreme Court points out that the doctrine of correlative rights is nothing more than a modification of the old English rule that the owner of the surface of the land owns to the lowest depths, including the water percolating therein; points out the inconsistency between these doctrines and the doctrine of prior appropriation, and finally concludes:

> "It necessarily follows that it is impossible to apply the doctrine of reasonable use or correlative rights so as to give any assurance of permanency to men who may spend their money in developing sources of water supply, improving the country, and building their homes. Plaintiff in this case had lived for half a century upon his ranch, during which time he used, enjoyed, and depended upon the water supply he had developed and appropriated. Then the defendants, under claim of right to take what is in their own soil, drove wells and tapped the source of supply that had fed plaintiff's wells and springs. The only assurance that the defendants can have that someone else with more power or new devices or at a more favorable point will not in turn sink wells and deprive them of what they have spent years of toil and much treasure to develop lies in the application of the law of priority of appropriation. The law of correlative rights of necessity cannot do it. It varies only in degree from the maxim that the owner of the soil owns to the lowest depth including the water that percolates through it. * * *"

> "In our opinion it will cause strife and discord through the years. It will make people hesitate to invest their time and money in the development of properties depending for their value upon underground sources of supply. Without the expenditure of untold sums of money in testing the scope of a given underground water supply, they will be entirely without meaus of knowing how many acres will be entitled to participate in the use of the water. The evidence in this case demonstrates that the supply of underground water varies with the years as do the surface streams. In times of plenty, new developments may cause the use to be extended, and in periods of drouth it will necessarily follow that all will suffer. This we think should be avoided. To our minds the same rule should be applied to underground water as to surface streams. The law of priority of use has been the guide in this state from the beginning. After 50 years our people were so well pleased that they enacted an extensive Code for protection of the prior appropriations of the water of our streams, and, so far as we have learned, there is no one to complain. The law has proved beneficient and satisfactory. In our judgment the same results would follow if the same rules of law are applied to underground waters."

The above Utah case is thus quoted from at length because the foregoing is not only an excellent discussion of the subject of artesian waters and indicates the need for some general control of such waters by the state, but also illustrates the difficulties that result from departure from the doctrine of prior appropriation, and experimentation with the doctrines of reasonable use and correlative rights. The uncertainty of underground water law in Utah is indicated by this decision in which the Utah court

split 3 to 2, and by the companion case of Wrathall v. Johnson (Utah), 40 P. (2d) 755, which was decided at approximately the same time. These two cases take up 61 printed pages (40 P. (2d) 755-816), and in the two decisions, seven separate opinions were written by the five Utah Justices for the purpose of expressing their divergent views. The confusion which exists is indicative of the wisdom of strict adherence to the prior appropriation doctrine of "first in time, first in right," which the Idaho court has closely followed over the years, and which is the statutory requirement under Section 41-106, I.C.A. 1932.

Regardless of which of the doctrines of prior appropriation, reasonable use, or correlative rights is in effect, it is apparent that the control and regulation by the State of its underground waters presents a more difficult problem than the regulation of surface waters. The latter are open and obvious to all people, subject to exact measurement, subject to reasonably accurate seasonal prediction as to the quantity to be available in high, normal and low water years, and above all, subject to relative ease of division and distribution among water users in accordance with their respective rights.

With underground waters, an entirely different picture is apparent. Their source and quantity are usually unknown and difficult to determine. Even the location and boundaries of their basins or areas is hard to ascertain. A given well or group of wells may not only affect the supply in some other underground source or basin, but may even materially affect the flow available in our surface streams. A dry water year may not noticeably affect an underground water supply for a long period of time, whereas the effect of light precipitation upon our natural streams is immediately apparent.

These very difficulties, however, serve to illustrate the need of a sound policy and program of underground water regulation; and, it seems to me, point to the desirability of giving the Department of Reclamation exclusive jurisdiction and control over the obtainment of underground water rights. The question is, Can this be done, and if so, to what extent, without a Constitutional amendment?

For an understanding of the problems of underground water law in Idaho, certain provisions of the Constitution and of our statutes should be briefly mentioned. Section 3 of Article XV of the Constitution provides in part as follows:

> "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied,* * *."

Prior to 1903, the water appropriation laws of the state provided in substance for the posting and recording of a notice, and commencement and completion of diversion works within a reasonable time thereafter. In 1903, when our present water appropriation laws were passed, *(12)* they contained what is now Section 41-201, I.C.A. 1932, as follows:

> "41-201. *Water rights acquired under chapter.*—All rights to divert and use the waters of this state for beneficial purposes shall hereafter be acquired and confirmed under the provisions of this chapter. And after the passage of this title all the waters of this state shall be controlled and administered in the manner herein provided."

(12) Many aspects of the constitutionality of the 1903 water act were passed upon in Boise City Irr. & Land Co. v. Stewart, 10 Ida. 38, 77 P. 25 and 321. This decision has seldom been quoted on points of definitive water law which have arisen in subsequent cases. It contains some interesting discussions as to sufficiency of title, multiplicity of subject matter, etc., and also as to public and private waters, and (in the dissenting opinion, 77 P. 321-322) the power of the legislature to interfere with the owners of existing water rights by requiring them to provide evidence of such rights, at their own expense. In any study of proposed underground water legislation, this Idaho case should not be overlooked.

From the above language it is apparent that it was the intent of the legislature that, after passage of the 1903 act, no water rights should be acquired except under the statutory method provided in that act. In view of the above quoted constitutional provision, however, that "the right to divert and appropriate the unappropriated waters *of any natural stream* to beneficial uses, shall never be denied," it has been held, both under the former and 1903 acts, that the statutory method of acquiring a water right was merely an alternative, and that an actual right may be obtained by appropriation without following the statutory procedure. *(13)* This rule was specifically held to apply to subterranean waters from artesian wells in Silkey v. Tiegs, 51 Ida. 344, 5 P. (2d) 1049.

Not all underground waters, however, are subject to appropriation as public waters; and, although the rule is considerably restricted in most states, including Idaho, both court decisions and statutes recognize certain waters as being private waters, which belong wholly to the owner of the surface of the soil, and are not subject to appropriation, at least until they have passed beyond his boundaries. *(14)* Obviously, this rule is a hold-over from, or a reversion to, the theory of private water under the old common-law doctrines relating to underground waters and riparian rights, and is basically in conflict with the "first in time, first in right" doctrine of prior appropriation. As a rule of practical necessity, however, it is still recognized, although seldom applied where conflicting rights are involved. *(15)*

The leading Idaho case dealing with private underground waters is Public Utilities Comm. v. Natatorium Co., 36 Ida. 287, 211 P. 533. Here the question was as to the jurisdiction of the Commission over the Natatorium Company in Boise, which, as the majority opinion of the court state, depended upon whether the hot waters from certain wells, located upon the Company's land, were "public waters." It should be noted that the issue did not involve any question as to the right to appropriate the waters, or any conflicting rights with reference to such waters, but solely the question of regulatory jurisdiction over the Company, dependent upon whether or not it was a public utility. In a 3-to-2 decision, the majority of the court held that the waters were "private waters," that the Company had not in its business dedicated them to a public use, and the jurisdiction of the Commission over the Company was denied. The majority opinion states:

> "In my opinion the waters of these hot wells are not public waters, and were not when located by the original locators. Not being public waters, they are not subject to appropriation, except by the owners of the fee.
>
> "The evidence conclusively shows that the ground where these wells are now located was boggy or swampy, and at most the waters at that time were only seepage or percolating waters arising through the intervening soil.
>
> "In my opinion there is sufficient evidence to justify the conclusion that no natural springs, streams, or subterranean streams are cut off or interferred with by reason of the sinking of the wells and the gathering of the water at the depth found, into the pipes, or by reason of the use of pumps for the purpose of increasing the flow. This being percolating or seepage water,

(13) Nielson v. Parker, 19 Ida. 727, 115 P. 488; Youngs v. Regan, 20 Ida. 275, 118 P. 499; Furey v. Taylor, 22 Ida. 605, 127 P. 676.

(14) 67 C.J. 834-835, 968-969; Public Utilities Comm. v. Natatorium Co., 36 Ida. 287, 211 P. 533; King v. Chamberlain, 20 Ida. 504, 118 P. 1099.

(15) See Bower v. Moorman, 27 Ida. 162, 147 P. 496; Hinton v. Little, 50 Ida. 371, 296 P. 582; LeQuine v. Chambers, 15 Ida. 405, 98 P. 415.

merely, arising out of the earth, without an outlet through any definite channel, and no part of any natural spring or stream, or any subterranean stream or flow, was not subject to appropriation, except by the owner of the fee. It was the property of the owner of the land upon which it stood, and under the well-recognized doctrine that percolating water existing in the earth belongs to the soil as a part of the realty, it may be used and controlled to the same extent by the owner of the land as itself. Bruening v. Dorr, 23 Colo. 195, 7 Pac. 290, 292, 35 L.R.A. 60.

"The owner of the fee was the owner of the corpus of the water. The right to appropriate subterranean waters is not involved in this case, as disclosed by the record, and the cases cited in support of the right to appropriate subterranean waters have no application.

* * * *

"There is a clear distinction between the right to appropriate the waters of a subterranean stream and the right to appropriate percolating waters which form no part of a subterranean stream. Trustees, etc., of Village of Delhi v. Youmans, 50 Barb. (N.Y.) 316. I do not wish to be understood that the right to appropriate the waters of subterranean streams does not exist in this state, as well as the right to appropriate all waters of natural springs, streams, or lakes. My position is that mere percolating waters or waters gathered together in wells upon the lands of the owner of the fee are not subject to appropriation by a third party, either under the Constitution or statutes of this state."

Although often cited, the Natatorium Company case has been the basis for few, if any, like decisions with regard to underground waters. Where conflicting claims are involved, the general trend in Idaho, as in other western states, has been to hold such waters to be subject to appropriation (excepting small wells and water which is strictly percolating in nature). As a matter of fact, the court pointed out that this question was not involved in the Natatorium Company case, in which, on this particular question, the following is probably the most important sentence in the decision:

"The right to appropriate subterranean waters is not involved in this case, as disclosed by the record, and the cases cited in support of the right to appropriate subterranean waters have no application."

The statement in the decision that, "Not being public waters, they were not subject to appropriation, except by the owners of the fee," would seem to be a dictum, as this specific question was not before the court.(16)

Another Idaho case, where the right of appropriation depended entirely upon the question of ownership of the land (which had not been patented), and in which the public or private status of the waters is not apparent from the decision, is LeQuime v. Chambers, 15, Ida. 405, 98 P. 415, wherein the right to appropriate the waters of a spring located upon public land was upheld. The court said:

"It is next contended by respondent that, since the waters going to make up this spring are purely seepage and percolating waters and do not come from any well-defined subterranean stream, they are not subject to location under the laws of this state, and that their appropriation is therefore not protected under the act of Congress. In line with this contention it is argued that percolating and seepage waters are as much a part of the land itself as

(16) Cf. Hinton v. Little, 50 Ida. 371, 296 P. 582, at page 584.

the soil, the rock and stone found therein, and that such waters are not supject of appropriation or diversion. * * *

* * * *

"* * * whether the waters are from a well-defined subterranean stream or purely seepage and percolating waters, it nevertheless stands as an admitted fact in the case that they flow to and collect at a definite and certain place and there form what is called by all parties a spring. The fact that the water of this spring in its natural state, before any appropriation or diversion, was lost in the adjacent soil and did not flow off the land in a definite stream, can make no difference and in no way abridges the right of the first comer to locate and appropriate and develop the same for a useful or beneficial purpose. If the land on which this spring was located had already been patented before the location by appellants, then a different question would arise, because appellants would have been trespassers in entering upon the land for the purpose of locating, appropriating, and diverting the water unless they first had acquired a license or easement so to do. On the other hand, the government, by act of Congress, invites persons to enter upon the public domain for the purpose of locating, appropriating, and diverting any waters thereon found for such useful and beneficial purposes as are recognized by the laws of the state or jurisdiction within which the lands are located.* * *"

In several other Idaho cases, the waters of natural springs have been held subject to appropriation, although consent of the landowner is usually held to be a condition precedent to the right.(17) Whether such consent is required merely in order to obtain necessary rights of way and to avoid trespass on the land,(18) or by reason of the water (i.e.,—as being "private waters") is not always clear. In Idaho, the appropriation or diversion of springs and certain other specified waters is prohibited by statute, except with the consent of the owner of the land.(19) In the Natatorium Company case, this statutory enactment was said to have been a recognition by the legislature of the private ownership of such waters, and an express denial of the right of the state to control the same, but again, this specific question was not before the Court.

The classification and characteristics of water from artesian wells or basins have been passed by the Idaho courts in four principle decisions. In all these four cases the right to appropriate artesian waters has been assumed or directly decided, on the theory that they are public waters of the state. The first of these cases was Bower v. Moorman, 27 Ida. 162, 147 P. 496, which involved the right of one landowner having an artesian well to enjoin his neighbor from driving or maintaining a similar well on adjacent property which might interfere with the flow of the earlier well. The trial court granted the injunction. Upon appeal, the Supreme Court reversed the decision, but only on the ground that it had not been sufficiently proved that the second well would come in contact with the channel or artesian belt or basin which supplied water to the first well, and that, in the absence of proof of definite and permanent injury to the prior well, an injunction should not be granted. This case arose prior to the Natatorium decision, and the court was clearly of the opinion that artesian waters were subject to appropriation and that prior rights thereto would be protected under the prior appropriation doctrine of "first in time, first in right." The court said:

(17) Short v. Praisewater, 35 Ida. 891, 208 P. 844; Keiler v. McDonald, 37 Ida. 573, 218 P. 365; Harris v. Chapman, 51 Ida. 283, 5 P. (2d) 793.

(18) Cf. LeQuine v. Chambers, supra.

(19) I.C.A. 1932, Section 41-206; and see Jones v. McIntire, 60 Ida. 338, 91 P. (2d) 373.

"Where percolating water exists in a state of nature generally throughout a tract of land that has been subdivided, the ownership of which is held in different proprietors, it would seem to be an impossible rule to adopt, whereby each proprietor is given the absolute right to withdraw all of the percolating waters underneath the ground owned by each one, by the driving of wells and installing of power pumps, or the withdrawal of the waters in any other manner that might be possible by reason of recent inventions, and thus destroy the benefits made possible by the proper regulation of percolating waters, obtained by any of the above methods, for a beneficial use; and an injunction will issue to restrain any permanent interference by an adjacent landowner with the right to the use of subterranean waters acquired by a prior appropriator. * * *

"* * * A landowner may discover, by the use of modern appliances in driving wells, a flow of water sufficient in quantity to properly irrigate a considerable tract of land, and, relying upon his right to the use of the water discovered and brought under his control, expend a considerable amount of money in improvements, making his homestead attractive to his neighbor by reason of advanced development of his crops, fruit trees, and shrubbery. The neighbor thereupon undertakes to discover the same source of water supply, and in order to make assurance doubly sure begins the construction of his well as close as possible to the well of the first appropriator; and in digging this well a crevasse might be opened and the entire water supply lost, or an additional water supply found, ample for the needs of both. Thus the importance of the question as to what extent and under what conditions a junior appropriator of subterranean water may be permitted to prospect for said subterranean water is impressed upon us.

"* * * Any interference with a vested right to the use of water, whether from open streams, lakes, ponds, percolating or subterranean water, would entitle the party injured to damages, and an injunction would issue perpetually restraining any such interference."

In Jones v. Vanausdeln, 28 Ida. 743, 156 P. 615, the court again refused an injunction where the sinking of an artesian well was alleged to have interferred with the flow of a former well on neighboring property. Again, however, the decision was on the ground of insufficient proof, and there is nothing in the opinion which would indicate that the waters in question were not public waters subject to appropriation, or that prior appropriation rights would not be protected by injunction or otherwise in proper cases.

Subsequent to the decision in the Natatorium case, the question as to the public or private nature of artesian waters was squarely before the court in Hinton v. Little, 50 Ida. 371, 296 P. 582. This case, again, involved conflicting rights to appropriate underground artesian waters from a basin wherein the court said that there was evidently a lateral movement of water into the basin from the outside, and also within the basin between the different wells. After a discussion of the authorities in Idaho and other states, it was held, on the authority of Bower v. Moorman, that such subterranean waters were the subject of appropriation, and that an injunction would issue to protect prior rights thereto. The case is particularly interesting, in that it discusses both the English or common-law doctrine and also the American doctrine of correlative rights. The decision is based entirely upon the prior appropriation doctrine, the court pointing out that the case of Bower v. Moorman "clearly shows that the doctrine or rule of correlative use was not in any way being sanctioned" in that case. The court also refers to the Natatorium case, and points out

that, as mentioned above, the question of the right to appropriate subterranean waters was not involved in that case, even though the waters in question were there held to be private waters. The following statement in the decision is of particular interest in the present discnssion:

"* * * It appears to be now fairly well settled that all underground subterranean waters are percolating waters, that is, that there is more or less movement, both perpendicular and horizontal, through the earth and rocks. Therefore, whether underground waters move in a well-defined channel, either in a generally confined directions as to the points of the compass or spread out laterally, is merely a question of difference or degree.

"It would seem, therefore, that it is impossible to attempt to lay down one rule with regard to subterranean waters, existing more or less as a relatively stationary body of water under the ground, and subterranean waters in which there is a decided movement. In any event, the facts in the case at bar show that there is movement of the underground waters involved in this litigation, and we need pass herein on no other situation."

Under the facts involved (where movement or flow of the water in question was accepted as a fact), such statement goes a long way toward holding all such subterranean waters, including the waters of artesian wells and basins, to be subject to appropriation and, therefore, within the control of the state, regardless of whether they are flowing or percolating; although, again, it would be logical to except small lakes and springs on privately-owned land, and also subterranean waters which merely seep through the ground and are not gathered together in quantity in any pocket, channel or basin.

In Silkey v. Tiegs, supra, the question of the applicability of the two methods of appropriation of artesian waters was presented squarely to the court, and it was held that percolating subterranean waters may be appropriated either by the statutory permit method or by actual diversion and application to a beneficial use. The court points out, however, that the Constitution does not mention subterranean waters, and the basis for the decision is the statutory provision contained in Section 41-103, I.C.A. 1932, that "the right to the use of the waters of rivers, streams, lakes, springs, *and subterranean waters*, may be acquired by appropriation." Being a statute, this ,of course, is within the power of the legislature to change, if the constitutional provision is not violated.

In this connection, it should be noted that the constitutional guarantee, in Section 3 of Article XV, against the denial of the right to divert and appropriate waters is limited to "the unappropriated waters *of any natural stream.*" The questions arise as to (1) whether a subterranean stream of water would be held to come within the term "natural stream," as used in our Constitution, and if so, (2) whether the waters of an artesian basin, or other large underground source of water supply, would be held to be a subterranean "natural stream,' 'and therefore within the meaning of the constitutional restriction.

As to the first question—from the numerous definitions provided by the courts(20) a true underground flowing stream of water, with a known and defined channel, might be held to be a "natural stream;" but it is also the rule that:

"In order for ground water to be considered a subterranean stream, it must possess all the attributes of a surface body of water except location

(20) 67 C.J. 833-834, and cases cited; also see Words and Phrases, under the headings "Water Courses," "Stream," "Underground Stream" and "Subterranean Stream."

upon the surface. * * * Its channel or boundaries must be known and well defined. Its course or location must be traceable with an exactness comparable to that possible with respect to surface bodies of water."(21)

As to the second question—under the peculiar wording of the Idaho Constitution, even though the 1903 water act (which purported to require the statutory permit method for the appropriation of all waters of the state) was held not to eliminate the alternative constitutional method of actual diversion and application to beneficial use, it is not unreasonable to predict that the court would uphold a carefully drawn legislative enactment *making the statutory permit method mandatory and exclusive for the appropriation of underground waters not coming within the classification of a "natural stream,"* to which the aforementioned constitutional guarantee applies, *but to which it is also limited by its own wording.* Of interest on this specific point, is the statement of Mr. Justice Budge in the dissenting opinion in Hinton v. Little, 296 P., at page 587, where he said:

> "There appears in this case to be a common supply of water in a state of percolation underlying the lands of each of the parties to the action, and possibly others—not shown to be an underground or subterranean stream. It does not constitute 'waters of any natural stream' within the meaning of the Constitution, nor 'waters flowing in their natural channels,' within the meaning of the statute."

These questions concerning underground waters in Idaho are of particular interest at this time by reason of the fact that during past sessions of the legislature several bills have been introduced with respect thereto. The most recent was a bill in the 1945 legislature, providing what was intended to be a comprehensive act relating to this subject. It was largely patterned from the present Utah law regarding underground waters, and would seem to have been drawn by copying, almost verbatim, certain sections of the amendments to the Utah water code which were adopted in 1935, for the purpose of endeavoring to clarify the confused situation which existed with respect to underground water law in that state. It is apparent that the "lifting" of certain sections from the laws of one state for use in another is bound to result in conflicts and confusion. A preferable method would be to insert the required additions in the appropriate sections of the present Idaho law, making as little change as possible, and utilizing the practice and procedure already provided for, and with which water users generally, as well as attorneys and the courts, are now familiar.

It must not be overlooked that in Idaho we have some very unusual and perhaps unique underground water conditions, reference being made particularly to the subterranean waters which flow over underground strata of lava rock in the Lost River-Blue Lakes-Thousand Springs area, as well as elsewhere in the southern part of the state. Certain of these waters are undoubtedly "flowing" waters, and might well be held to be underground "natural streams;" if so, they would come within the constitutional guarantee, and any attempt to include them in an all-inclusive underground water law might well defeat the whole purpose of the legislation. This was what happened following the adoption, in 1903, of what is now Section 41-201, I.C.A. 1932, which was clearly intended to make the statutory permit method exclusive for all future water appropriations. The 1903 act did not distinguish between "natural streams" and other waters; and the Supreme Court has continued to hold, under

(21) Pasadena v. Alhambra (Cal.), 180 P. (2d) 699, 720. See also Maricopa County v. Southwest Cotton Co. (Ariz.), 4 P. (2d) 369, 376 et seq. The burden of proving the channel, course, and other essential characteristics of the subterraneau "stream" is upon the party asserting that such stream exists. Ibid.

existing statutes, that the constitutional method is still available for the appropriation of all public waters, regardless of their classification.

There is a need for additional legislation in Idaho with respect to underground waters, but it is believed that the major part of the problem in this state is due to artesian basins and other underground waters which may well be held not to be "natural streams" within the meaning of the Constitution; and that legislation limited to such waters would be sufficient to remedy the undesirable conditions which exist in some parts of the state, and at the same time bring the appropriation and use of such waters under proper supervision and control.

VICE PRES. MERRILL: Next we have the Idaho Code Commission Report by Oscar Worthwine.

OSCAR W. WORTHWINE: On June 28, 1947, this Commission reported to the Idaho Bar the status of the new Idaho Code as of that date. It is, therefore, not necessary to further review matters presented in that report. This report will be confined to advising the members of the Bar of the activities of the Commission since that time and the progress made in the publication of the Idaho Code, the name to be given the new publication.

We previously reported that the Code would consist of 11 volumes, including the index. Since that time the Commission has determined that it was more advisable that the Code be in 12 volumes, including the index; and to accomplish this the contract has been modified, which means that the sets consisting of 12 volumes will be sold to the state and to the public at a price of $80.50.

The Commission ever since it assumed its duties has been cognizant of the urgent necessity for the completion of the Code by the date agreed upon in the contract, that is, December 15, 1948, and has diligently endeavored to accomplish that objective. In every instance where there has been correspondence between the Commission and the publisher of the Code the Commission has repeatedly and forcefully brought to the attention of Bobbs-Merrill the necessity for having in the hands of the practicing attorneys and the state officials the complete Code prior to the convening of the 30th Session of the legislature. The last assurance given the Commission was on April 2nd, 1948, when it was advised by Mr. Sipe as follows:

> "With regard to the printing of the work, I have talked to Colonel Moorhead about this and he advises me that he hopes to have everything in type by October, except the Index volume. We will make every effort to produce as per contract."

On Wednesday of this week the Commission again reminded Mr. Sipe of the absolute necessity of having the Code delivered on time.

For your information the progress made toward that end is as follows:

> Volume 2 of the Code, consisting of Titles 1 through 13 with reference to Courts and Civil Procedure, has been completed and is in book form, samples of which the Commission has here for your inspection.
>
> The galleys and page proofs for Volume 3, which consists of Titles 14 through 17, referring to Probate Practice and Procedure, have been received, checked and returned and the samples of the printed volume should be delivered at any time.
>
> All galleys for Volume 5 have been received, checked and returned and page proofs for Volume 5 have been received, checked and returned up

to and including Title 25. Volume 5 will contain Titles 18 through 30, the subject matter covering Aeronautics through Corporations.

All galleys for Volume 6 have been received, checked and returned but the Commission has received no page proofs for this volume. This volume consists of Titles 31 through 34 which contain Counties through Elections.

The Commission has received only 27 galleys for Volume 7, which have been checked and returned. Volume 7 should contain Titles 35 through 41 which will cover Fences through Insurance.

We are advised that Volume 5 is being printed by another printer and the Commission expects to receive galleys and page proofs on that when the printing is completed.

At the suggestion of Bobbs-Merrill, in order to secure uniformity in the size of the volumes, the Commission has agreed that Volume 2 and Volume 12, which will be the largest volumes by number of pages, may be printed upon 30 lb. first grade English book paper as provided by the contract, and that the other volumes with lesser number of pages will be printed upon heavier paper.

The new Code will have 72 titles; the 1932 Code has 70.

Mr. Sipe estimated that the new Code would have 6,233 pages, exclusive of indices; the 1932 Code has 4,404 pages exclusive of tables of contents at the beginning of each volume and indices.

As to Mr. Sipe's estimate of 6,233 pages, we may make the following observation: His estimate for Volume 2, exclusive of the index, was 511 pages; as printed it has 820 without the index or 300 pages more than his estimate.

The financial condition of the 1947 Idaho Code Fund is as follows:

Both the 1943 and the 1947 Code Acts created a Code Fund which levied a charge of $2.50 on each civil complaint filed in the district courts.

The 1943 Code Commission sold treasury notes in the amount of $43,000.00 and expended $2,376.45, leaving $40,623.55 as the net cash proceeds of the sale of the 1943 treasury notes as at May 1, 1947, and which money was transferred to the 1947 Idaho Code Fund. Since that date the 1947 Idaho Code Commission has expended in connection with the new Code, $5,399.41, leaving a balance of $35,224.14 in the 1947 Idaho Code Fund as at June 30, 1948.

The Treasury notes issued and sold to procure the 1943 Code Fund are due at the rate of $6,000.00 a year, plus an average interest rate of $425.00.

Balance of proceeds of 1943 Code Fund (now 1947 Idaho Code Fund) on hand June 30, 1948	$ 35,224.14
1947 and 1943 Idaho Code Redemption Fund, from fees levied on civil actions filed as at June 30, 1948	37,666.65
Total	$ 72,890.79
Against which there are outstanding 1943 Idaho Code Fund treasury notes as at June 30, 1948	$ 22,000.00
Leaving a net cash balance in the 1947 Idaho Code Fund as at June 30, 1948	$ 50,890.79

The monthly income from the levy of $2.50 on each civil complaint filed is about $1,000.00. Consequently, the Commission does not believe that any additional treasury notes should be sold until about December, 1948, when approximately $30,000.00 will be required to pay for the new Code sets which the State of Idaho will receive.

VISE PRES. MERRILL: We certainly appreciate the work the Code Commission has done for the Bar.

The next item on the program is "Progress in Legal Education at the University of Idaho," by Edward S. Stimson, Dean of the College of Law at the University of Idaho. Mr. Stimson.

EDWARD S. STIMSON: Mr. President and members of the Idaho Bar. It is a privilege to be here. I appreciate the courtesy of the State Bar of Idaho in inviting the dean of the College of Law to speak. Since I have but recently come to Idaho, it seemed to me inadvisable to try to enlighten you on the Idaho law. You know more about that than I do, so I am going to talk about the College of Law and what we are trying to do there.

Our aim or purpose is to turn out graduates of such capacity and so well trained that we will not be concerned about their passing the bar examination in Idaho or any other state whose bar examination they may desire to take. We are concerned about Idaho clients and believe that they are entitled to have lawyers who are professionally competent to handle the important matters which are entrusted to them. Law School enrollments are high. There were 50,781 law students enrolled in Law Schools in the United States during the past year. This compares with 38,331 the previous year. We do not believe that the numbers should be added to by admitting unqualified people or graduating those who are not competent. We do not believe that distinguished lawyers and judges are serving the best interests of the state by writing letters to us, urging the admission of unqualified applicants.

The standards of the University of Idaho College of Law always have been high and the school is well and favorably known. Among our graduates are Supreme Court, District Court and Municipal Judges, a Congressman, a mayor, a law dean, a law professor, prosecuting attorneys, the senior partner of a leading law firm in New York City, partners in leading firms in Kansas City and Seattle, the Assistant Judge Advocate of the Sixth Army District in San Francisco. I am told that there are more Idaho Law graduates in the Judge Advocates' division of the Army than graduates of any other Law School.

My efforts during the past year have been to organize the law school so that faculty members will have a minimum teaching load and thus have an opportunity to do a superior job of teaching and research. Our staff is small, consisting of five men. Two have had a lot of experience in teaching; three are beginners in teaching. If God and the legislature are willing, we hope to have a staff of six in September, 1949

During the coming year we expect to have several additional classrooms and offices in the Administration building, so that we shall be fairly adequately housed. This situation will not last, however, because the library is expanding every year and overflowing into the hall and room 324. In a few years we will have to have additional space for the library. The only permanent solution is a law school building. How we are going to get such a building we do not know. A law school building is not included in the University's "Ten Year Plan" for the construction of needed buildings. Perhaps a building may ultimately be obtained from private donations. A gift of $5,000 towards such a building has already been received and we hope that others will contribute to this fund.

Recently there has been considerable discussion among law teachers of the need for training law students in the various skills which a practitioner must have. This was touched off by a paper by Carl Llewellyn, of Columbia Law School at a recent meeting of the Association of American Law Schools. The opinion is growing that law students are being graduated without many of the skills which a practitioner needs. While the analysis of cases develops a needed skill, it is felt that other skills are neglected. Thus graduates lack skill in drafting legal instruments and pleadings; they lack skill in carrying on legal research and in writing memoranda of law and briefs; they are lacking in skill in oral argument; and they do not have skill in gathering facts and in making decisions involving questions of policy. In the early days of legal education, when learners were apprentices, they received excellent training in these skills. There is no doubt that training in law schools using the case system is superior to apprentice training, but the pendulum has swung too far and too little attention is now being paid to the development of these skills.

In line with this thought we are making several changes in the curriculum at Idaho. A practice court was started last September. In this work students acquire skill in drafting pleadings and in orally arguing an appellate case. We are also requiring the drafting of simple legal instruments in connection with the courses to which they relate. In the course in Contracts students are asked to draft a contract; in Wills they draft a will; in Titles, a deed, and so on. We have also decided to require a research paper from each student as a requirement for graduation. Under the direction of a faculty member a student will be required to conduct original research on some point of law and write a paper on the results of his research. It is hoped that this program will better equip the graduate to engage in the practice of law.

I would also like to say a word about proposed future development of the Law School. We plan to reestablish the Idaho Law Journal. The Idaho Law Journal published in 1931, 1932 and 1933 was an excellent Law Review. However, it was financed by voluntary contributions and was obliged to discontinue for lack of funds. It is proposed that the new Journal will be published twice a year and will be financed by University funds as a contribution to Research and Service in the interest of the lawyers of the State. Subscriptions will be taken at about $2.00 per annum, which will be far below cost. Provision for the Journal is made in the University Budget for 1949-1951 which has still to be acted upon by the legislature.

If the Journal is reestablished all of the people of the state will benefit. It is proposed that student notes and notes and comments will deal chiefly with Idaho problems raised by recent decisions or legislation, and practitioners will have an added means of keeping abreast of current developments to the advantage of their clients. The students will be benefited by doing the research work and writing. They will become better acquainted with the means of finding the law which law libraries afford.

The placement of graduates is something we would like to do more about than we have been doing so far. Of course in Idaho most lawyers practice by themselves and if graduates are to do that, all they need do is to find a community which needs another lawyer and hang up a shingle. They will get a better start, however, if they are associated with an experienced lawyer for a year or so. Some do become associated with older lawyers, usually finding this connection for themselves. It seems to me that a lawyer who has more than he can do, and who wishes to associate a younger lawyer with himself, would be more likely to find the right man if he wrote to the dean of the Law School, told him the kind of man he was seeking, and asked him to recommend a graduate.

I desire very much to get better acquainted with our alumni and to keep in touch with them. While our list is fairly complete, we lack many addresses. One of these days we will send out a list of all alumni and ask you to send us present addresses where we lack them, and any other information you may have about former classmates.

I think that it might serve a purpose and be helpful to the Law School if the Law Alumni were organized with elected officers whom the Dean of the Law School could consult from time to time.

I have been looking into the possibility of arranging a luncheon for alumni of the Law School and Idaho lawyers at the American Bar Association meeting in Seattle. I have written to Olive Ricker of the American Bar Headquarters in Chicago to ask whether there is a time on the program when a luncheon could be scheduled. I have also written to J. Lael Simmons of Seattle who offers his cooperation. He writes, "Your letter of June 22 has been received and read with mounting interest." I am wondering what you think of the idea of such a luncheon.

Most of you know about our News Letter which we try to send to every lawyer in Idaho two or three times a year. It contains news of the Law School and of the alumni. The editor needs more news items about alumni and will be glad to receive them from you. If you are not getting the News Letter, send us your address.

I appreciate very much this opportunity to get better acquainted with you and hope that we shall know each other better as time goes on.

E. E. HUNT: Would you tell us the present, pre-legal requirements, and the proposed changes which I understand are to take place next year?

DEAN STIMSON: The requirements are 64 credits of college work of which no more than 10% may be in certain subjects.

JUDGE HUNT: Is that the equivalent of two full years?

DEAN STIMSON: That is two full years, yes. The only change that goes into effect next fall is that we add to that a specific requirement as to the content of those courses. We require that there be 10 semester credits of English and 15 semester credits of social science which is pretty broadly interpreted. It includes history, psychology, economics, philosophy and others.

JUDGE HUNT: Will that mean one more year pre-legal?

DEAN STIMSON: No, it will not, unless a student comes with two years of college work and he doesn't have these required courses. If he doesn't have the course requirement he can only get in if he has three years college work. That change will take effect September of '49.

J. H. FELTON: Dean Sstimson was talking about using these students with other lawyers. I think I have had as much experience using students in my work as any man in the state, and what I have done and what some of the lawyers in Lewiston have been doing is this: We have been using these fellows as law clerks while they are going to school, paying $1.00 an hour . We send them legal problems, and they do the legal research, or we cite them specific cases, and they run them through the digests. Some of you who can't get this type of work done could write to the Dean, and he could assign your problem to some law student, who would send you a full and complete paper. We have been doing that, and it is quite satisfactory.

DEAN STIMSON: We would be willing to cooperate in that way to any extent we could.

SAM S. GRIFFIN: May I ask, Dean, whether the peak load of veterans has gone through yet? What is your expectation as to that?

DEAN STIMSON: I don't think the peak of veterans has gone through, because the peak load of veterans in the United States is in the sophomore year. They will come to us next year for their first year in law school. The peak would possibly be reached about two years from now.

JUDGE HUNT: When will you discontinue summer school for GI lawyers?

DEAN STIMSON: We haven't reached any decision on that. For several summers now we have had a summer school. The GI's are interested in that, because if they go to summer school, they stay on the payroll. If there is no school in the summer, that is interrupted, and they have to find other work. It takes a little time for the government checks to start coming through again when they get back, so most of them are interested in staying on the government payroll. And many of them are also interested in going through in two and one-half years by taking two summer schools instead of stretching it out to three years. We are only committed to having one more summer school. After that we will decide what we ought to do. I am not too sold on the summer school, but as long as our graduates are almost 100% GI's, I think we will probably have to continue it.

VICE PRES. MERRILL: The Commission has been intensely interested in the law students and particularly in the law students at the University of Idaho. In order to promote that interest they have tried to cooperate with and have received the cooperation of, the Dean and the faculty of the University. During the past year we have admitted to the Bar, as you all know, many young members. Some of those are here today, and we want to welcome them, and we would suggest that the older members of the Bar get acquainted with these younger members of the Bar and try to make them welcome in our organization.

The next speaker will be Jess Hawley on "Illegal Practice." Mr. Hawley.

JESS HAWLEY: Mr. President and members of the Bar. The greatest newspaper publisher I knew was Calvin Cobb. Mr. Cobb once wrote that the legal profession is the second oldest profession in the world. (laughter). He was not attempting to compliment our profession but was simply expressing his opinion of it.

However, our profession is probably of equal antiquity with even the beginning of any manual profession. And there is much comfort in the thought that down through the ages and through our time people have realized the need of attorneys to advise them concerning their rights and to take their places in controversy. There is no profession, and I do not except the medical profession, where a man goes with his distressed mind to someone for advice and assistance more than he goes to our profession. We have the secrets in our keeping of sacred marital relationships and advise concerning them and offer assistance in bringing about better understanding between husband and wife and children and parents.

We also advise concerning the rights of people who have committed a crime—their right to trial including an excuse for the particular act which caused them to be placed before the bar of justice.

We advise men contemplating the creation of townsites, great building projects, manufacturing, irrigation, construction that will create values for land in the vicinity, and were that knowledge generally known, it would be a great detriment to promoters' interests.

We also go into the question of patents and know the secrets of inventors prior to the time they are made public.

Ours is peculiarly a profession where confidence is the base, where trust is necessary, where the client has no secrets and frankly lays before us his plans, his omissions and commissions, knowing that under our professional ethics, the bonds that tie us to our chosen calling, we must keep those disclosures absolutely inviolate.

It requires more and more knowledge. It calls for better education, better understanding of the law and a greater, deeper analysis of fact. Our standards have increased in practically every state in the union. We have an example of that in our own lives.

I starved my way through three years of afternoon and night school to get an LL. B. right out of high school—that is immediately after I graduated when I was but 17 years of age. I took the Bar examination, and the Clerk of the Court, Mr. Hasbrook, did what I thought was a very gracious thing. He told me that I had written out the examination in less time than any man who had ever taken it prior to that time—except one, his son—but he lowered the boom by saying, "Each of you would have done a great deal better if you had taken more time." He further took the conceit that he had already started growing in my mind and destroyed it by saying, "As a matter of fact, Jesse, I could not read your writing. But I knew that your father had been a practicing attorney, admitted in 1875, and that you had gone to law school, and I assumed that you would make a success in the profession. So I put my O. K. on your paper and recommended you for admission." (laughter)

That just couldn't happen now days, and it bespeaks a trend towards a broader basis, deeper knowledge, better preparation of young men entering into this great and noble profession.

In this preliminary let me also suggest that one important duty that seems to be ours is the study of government and participation in it. Most of the Presidents had law training and education, and most of the men who are interested in analyzing governmental problems and presenting them to the people are members, or were in their time, of our profession.

I therefore desire to emphasize to you, and particularly the younger members, the necessity of placing yourselves more and more in the position of fitness to be of service as an attorney at law. We call them lawyers now. Formerly they were attorneys at law, because lawyers were supposed to be those who had really arrived, and an attorney at law was merely one who has been admitted and was on his way. But times have changed, and we can, without offense, call ourselves lawyers.

Better service by experts has become a public demand and a public benefit, especially in trades, in professions and businesses. And it is responsible for the growth of the country and its people.

We have in this country and in other civilized countries, not even excluding Russia, engineers, accountants, plumbers, welders, dentists, barbers, lawyers, doctors, morticians, nurses, and the list is too long to carry beyond this illustrative statement. These occupations are important to the public as well as to the individual. It requires of applicants to enter them proof of adequate knowledge and skill for the protection and benefit of the public needing those services. Should you attempt to hold yourself out or claim the right to practice any of these occupations, and many others I could name, you would immediately be met with opposition from the plumbers or dentists or doctors based upon the law which defines these occupations and which limits their practice to people of skill and knowledge. Just try to do something else, and you will

find that ours is not the only occupation by any means which demands that prior to entrance, examinations be held to establish the qualifications necessary to carry on the occupation.

The practice of law,(I am proud to say, is a necessary part of the very essence of good government. Lawyers must be trained and be skilled to carry on controversies, civil and criminal, to draw contracts, prepare corporate structures and to give advice in relation to tax laws, regulations of labor, industry, investment and property uses. And more and more the need of our type of service and knowledge is necessary for the advancement, materially and socially, of any great people.

It is, of course, not common sense to allow the doctor to enter the domain of an expert engineer or the dentist to do accounting or the realtor to attempt to advise concerning the marital rights of husband and wife. It is an old saying that is still rather true—"A shoemaker should stick to his last." And a concomitant maxim is, "A Jack of all trades is master of none."

Litigation and laws result and time and wealth and progress waste when one not an expert tries to do the work which the people say, through Constitutional means or by laws, should be done by certain people who have certain expressed qualifications. Public convenience and good service require experts in practically every line and in every field.

The definition of practice of law came up when I was President of the Bar. We chose a formidable opponent, a rich corporation, one which could well defend itself, rather than a weakling, and it was my duty to file a petition against the Eastern Idaho Loan and Trust Company, because it was practicing law according to our notion. Mr. Johannesen, one of the ablest men we have ever had in our profession in Idaho, defended, and that is just what we wanted. We wanted the situation spread out intelligently and have a real good fight made out of it. The decision in the Eastern Idaho Loan and Trust Company is quite an important decision in the United States for all attorneys and Bar Associations. The case was reported, of course, in our Idaho and Pacific Reports and also reported in 73 ALR 1323 and there annotated. Justice T. Bailey Lee wrote the decision, and it was considered a classic and quite sufficient. But time has shown defects, or rather new ideas have arisen which were not completely covered or at least not in detail by that decision.

May I read briefly to you what was determined to be illegal practice of law? This decision was concurred in by very able men—Judge Budge, Judge Varian, Judge McNaughton and Judge Givens. Judge Lee said, "At this stage of our legislation, there can be no question that the statute is consciously levelled at the unadmitted and unlicenses practitioner functioning either within or without the courts. Defendants contend that their specially advertised activities do and did not constitute practicing law; that they but do and did what hordes of reputable insurance men, realtors, and bankers have been doing for years, and what chapter 192, section 2, of the Session Laws of 1929, authorizes them to do. Such work as the mere clerical filling out of skeleton blanks or drawing instruments of generally recognized and stereotyped form effectuating the conveyance or incumbrance of property, such as a simple deed or mortgage not involving the determination of the legal effect of special facts and conditions, is generally regarded as the legitimate right of any layman. It involves nothing more or less than the clerical operations of the now almost obsolete scrivener. But, where an instrument is to be shaped from a mass of facts and conditions, the legal effect of which must be carefully determined by a mind trained in the existing laws in order to insure a specific result and guard against others, more than the knowledge of layman is required; and a charge for such service brings it definitely within the term 'practice of the law'."

Later the Commission, of which I was a member, held that a probate judge, a layman, on his retirement, could not engage in probate practice. That decision is of interest. It is In re Brainard, 55 Idaho 153.

An excellent discussion of the Eastern Idaho Loan and Trust case, and one which probably goes more into detail than others, was prepared for the Ada County Committee on Illegal Practice, of which I was Chairman, and I am attaching it to, and it becomes a part of my remarks here.

It adds up to this: There is so much that is now indefinite in the decision of Judge Lee and the Court that further determination of what constitutes the practice of law is absolutely necessary.

Now, the practice of law before administrative offices has not been touched upon, at least by our courts. We have the Public Utilities Commission which holds long trials, contested cases, and I know that it is a law suit that I am trying when I am in one of those rate cases. The Idaho State Land Board has many questions presented to it where there is a contest. The Industrial Accident Board, of course, has many. The Income Tax Department, the Department of Finance in the matter of issuing permits to corporations, and other departments exist in Idaho before which contests are held and men appear who presume to be and should be experts in law, because questions are raised so often at these hearings. While the appearance of an attorney is not required, in the important cases you always find an attorney, and very often you will find an attorney from the outside who is not admitted in Idaho. Let me here say that you try to practice before the Railroad Commission of California or Washington or in Oregon or in most of the other states, and you would find out that you can't do it, because you are Idaho lawyers. You are not admitted there.

I took this matter up with two of the departments, and they could not give me any answers, but they referred it to the Attorney General. He wrote to me after he had consulted with the various boards and officers. I will not read his letter at length, but I will have the portion of it that is material attached to this as a part of my address here. He is satisfied that the practice of law is engaged in in many cases and many situations but that the courts themselves are rather in doubt about the applicability of law to many of the more or less informal hearings that they have. He suggests that what we need to clarify the situation is an Administrative Procedure Act somewhat along the lines of the federal act. That, I think, will be the subject of a resolution. I know that we can depend upon the assistance of Mr. Smylie, the Attorney General.

There is one quotation that I would like to give you from the notes in 73 ALR 1330. It is a case which was tried in Washington. The court said, "The practice of law is a personal right, and, that the public may not be imposed upon by the unworthy, the law requires that those engaged in practice shall be men of good moral character and with certain qualifications and a degree of learning to be ascertained by the agents, not of the courts, but of the whole people, speaking through the legislative body. The right to practice law attaches to the individual and dies with him. It cannot be made a subject of business to be sheltered under the cloak of a corporation having marketable shares desendible under the laws of inheritance. One engaged in the practice of the law is subject to personal discipline for misconduct, and to penalties for violating the ethics of the profession that could not possibly attach to a corporate body."

Justice Roscoe Pound's statement was made in a New York case in an opinion wherein he concurred, and the question was the practice of law by a corporation. "The lawyer's profession or calling does not cover the preparation of all papers of

legal significance, such as promissory notes, for which lawyers are not as a rule resorted to; but it does, I think, cover the preparation of bills of sale and chattel mortgages. If such services as were rendered in this case are customarily rendered, I think that they should be characterized as legal services. This does not imply that a real estate broker may not prepare leases, mortgages, and deeds, or that an instalment house may not prepare conditional bills of sale, in connection with the business and as a part thereof. The preparation of the legal papers may be ancillary to the daily business of the actor, or it may be the business itself. The emphasis may be upon the services of the broker or the business of the trader, or it may be upon the practice of law."

One more subject along this line. During the past few years the Idaho Title Insurance Company has bought up most of the abstract companies and now writes insurance. Whether the company is engaged in the practice of law is a question that ought to be settled. In this connection I ask that there be inserted the report of a serious minded and careful attorney in the Third District, Mr. Bruce Bowler of Boise, who has gone into it in detail, and likewise a report of Mr. Burke who is Chairman of the Committee which was to investigate the Idaho Title and Insurance Company. I am inclined to think that the corporation itself is in the insurance business, but that the men who are employed by them, who pass upon titles, are practicing law and that they must be Idaho lawyers. I think that in view of the importance of titles and the elimination of lawyers from the picture in passing upon these titles, that the Legislature should provide rules, safeguards and fair practice regulations so that the public would know from the policy itself that the defects, if any in the chain of title, are not corrected by the corporation or by the policy, but that they are merely insuring it in the amount fixed, and they should not be under any cloud of doubt as to just how much they may lose. The amount of loss which one of these corporations, this one in particular, might incur through some bad judgment in passing titles could probably be great, and a few such losses might eat up the capital of the corporation.

The Committee on Unlawful Practice of Law agrees with me in many of the observations I have made in this paper.

To the Commissioners of the Idaho State Bar:

Your Committee on Illegal Practice of Law reports as follows:

The Commissioners of the Idaho State Bar should be fully authorized and also directed by the Idaho State Bar in official session:

(a) To provide promptly for submission to the Idaho Supreme Court of the need of further and more particular definition and clarification of the practice of law applicable to laymen, including realtors, bankers, trust and title insurance companies and officers and employees in the preparation of instruments, and advice thereon, affecting titles to property rights and obligations of signatory parties;

(b) To petition the Supreme Court of Idaho to free from doubt the exclusive rights of attorneys to draw instruments and to advise as to their legal status as affecting titles and contractual duties, rights and obligations. Appropriate Court proceedings should be had at once to accomplish the purposes set forth in paragraph (a) and (b) hereof.

(c) To seek legislative enactments to further protect the public from laymen drawing, and advising concerning, instruments which require analysis of law or legal conclusions from facts.

(d) To promptly seek cooperation of realtors, trust companies, bankers and

others, whose dealings with the public impinge upon the practice of law, in order to determine the questions involved in a more particular definition of illegal practice of law, and the limitations which should be recognized in the use of forms.

(e) To establish that the practice of law includes contested trials and hearings before administrative boards of Idaho such as the Public Utilities Commission, Industrial Accident Board, State Land Board, Commissioner of Finance, State Board of Pardons and the Director of Insurance; that appropriate rules be presented to these commissions and boards and officials for their early adoption; that recourse be had to the Courts, if necessary, to establish the scope and limitations of law practice before said boards and officials.

(f) That the Commissioners of the Idaho State Bar are fully authorized and directed to promptly appoint committees and make all expenditures necessary to carry out the purposes of the report.

Respectfully submitted,

JESS HAWLEY, *Chairman*

JESS HAWLEY: Mr. President, I move the adoption of this report formally—the report I just read.

Whereupon the motion was duly seconded, put to a vote, and carried.

MEMORANDUM

Query: Would an attorney examining abstracts of title and county and abstracted records for the purpose of determining insurability for title insurance on real estate in Idaho by the Idaho Title Insurance Co., while residing and employed in Idaho, be guilty of unlawful practice of law, if he was not a member of the Idaho State Bar?

I.C.A. 3-420, provides: *3-420. "Unlawful practice of law—Penalty.—If any person shall, without having become duly admitted and licensed to practice law within this state* or whose right or license to practice therein shall have terminated either by disbarment, suspension, failure to pay his license or otherwise, *practice or assume to act or hold himself out to the public as a person qualified to practice or carry on the calling of a lawyer within this state,* he shall be guilty of an offense under this act, and on conviction thereof be fined not to exceed five hundred dollars, or be imprisoned for a period of not to exceed six months, or both, and if he shall have been admitted to practice law he shall in addition be subject to suspension under proceedings provided by this act."

I.C.A. 3-409, provides: *3-409. License fees and appropriation.—"Every person practicing, or holding himself out as practicing, law within this state,* or holding himself out to the public as a person qualified to practice or carry on the calling of a lawyer within this State, except state and United States judges of the courts of record within this state, shall, prior to so doing and prior to the first day of March of each year, pay into the state treasury as a license fee the sum of ten dollars," * * *

The rendering of opinions as to the validity or invalidity of title to real property has been deemed to constitute the practice of law. 111 ALR 31.

In Boykin v. Hopkins (1932) Ga. 162 SE 796, it was held that:

"Preparing and advising in relations to conveyances and other papers

pertaining to real estate transactions for the benefit of others, are acts falling within the practice of law."

" 'The practice of law is not confined to the practice in courts of the state, but it includes the preparation of pleadings and other papers incident to any action or special proceeding in any court or other judicial body, conveyancing, the preparation of all legal instruments of all kinds whereby a legal right is secured, the rendering of opinions as to the validity or invalidity of the title to real estate or personal property, the giving of legal advice in any action taken for others in any matter connected with the law.' Grand Rapids Bar Assoc. v. Donkema (1939) 290 Mich. 36, 287 NW 377." (126 ALR 1174).

"In People v. Lawyers Title Corp. (1940) 262 NY 513, 27 NE (2d) 30, the court considered that a corporation whose business was and whose charter empowered it to engage in the examination of titles to real property, procure and furnish information relative thereto, make the guarantee the correctness of searches for all encumbrances, liens, or charges affecting the same, and *guarantee or insure the owners thereof and others interested against loss by reason of defective titles and encumbrances, exceeded its authority and engaged in the practice of law where, through a lay employee, it supervised and carried through many if not all real-estate transactions involved in extensive property developments embracing the sale of homes, with purchase-money mortgages* guaranteed by the Federal Housing Administration, including the passing upon the regularity and legality of papers, preparing and causing legal documents to be executed in accordance with the requirements of the parties, and necessarily involving questions relative to conformity or nonconformity with the provisions of law and of the Federal Housing Act, observed and provided against violations of the provisions of the act imposing a penalty for false representations in connection with the Federal Housing Act guaranty, handled all moneys involved, and attended the closing of the separate transactions, receiving a compensation for each transaction in addition to the *fee charged for each title insurance policy.*" (151 ALR 787).

"It seems now definitely established that an abstract and title insurance company cannot, upon the claim that its regular business includes the correction of defects in title and ultimate establishment of an insuranble title, prepare or execute papers affecting title to property offered for insurance, or give advice concerning the legal effect of those thought necessary at least beyond information of such a character as to comprise a specification of the objections which may be deemed to constitute an ohstacle to insuring title. People v. Lawyers Title Corp (1940) 280 NY 513, 27 NE (2d) 30; Hexter Title & Abstract Co. v. Grievance Committee (1944)—Tex—179 SW (2d) 946." (151 ALR 786).

The usage and comity privilege of an attorney admitted in another state to appear in a particular action in a sister state does not authorize a general license to practice, or to act as such in a state while unlicensed. 7 CJS 724.

In State ex rel v. Perkins, Kan. 1934 28 Pac. (2d) 765, the defendant Perkins was an attorney admitted in Missouri, and the action was brought by the Kansas attorney general to prohibit him from practicing law in Kansas where he was not admitted, his practice in Kansas was mainly advice and he associated Kansas lawyers with him in court matters. The could in holding against the defendant said:

"This brings us to the question of what is "practicing law." The general

meaning of the term is of common knowledge, although the boundaries of its definition may be indefinite as to some transactions. We shall not bother with boundary line distinctions here, for this is not a boundary line case. A general definition of the term frequently quoted with approval is given in Elcy v. Miller, 7 Ind. App. 529, 34 N. E. 836, as follows: 'As the term is generally understood, the 'practice' of the law is the doing or performing services in a court of justice, in any matter depending therein, throughout its various stages, and in conformity to the adopted rules of procedure. But in a larger sense it includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured, although such matter may or may not be depending in a court.'

In People v. People's Stock Yards Bank, supra, it was said: 'In litigated matters it involves not only the actual representation of the client in court, but also services rendered in advising a client as to his cause of action or defense. The practice of law also includes the giving of advice or rendering services requiring the use of legal skill or knowledge. * * * Where a will, contract, or other instrument is to be shaped from facts and conditions the legal effect of which must be carefully determined by a mind trained in the existing laws in order to insure a specific result and guard against others, more than the knowledge of the layman is required, and a charge for such service brings it definitely within the term 'practice of law.'

Other definitions may be found in National Savings Bank v. Ward, 100 U.S. 195, 25 L. Ed. 621; In re Duncan, 83 S.C. 186, 65 S.R. 210, 24 L.R.A. (N.S.) 750, 18 Ann. Cas. 657; State Bar of California v. Superior Court, 207 Cal. 325, 278 P. 432; In re Eastern Idaho Loan & Trust Co., supra; Unger v. Landlonds' Management Corporation, supra. *One who confers with clients, advises them as to their legal rights, and then takes the business to an attorney and arranges with him to look after it in court is engaged in the practice of law.*" (28 Pac. (2d) 769).

In People v. Thomas, Colorado 1930, 290 Pac. 283, held:

"That usage and comity do not permit a resident of this state, although an attorney of another state, to accept employment as an attorney at law or to act as such in this state while unlicensed by this court, and that by accepting such employment and acting thereon as in this case he holds himself out as an attorney at law in this state, as charged in the information." (290 Pac. 285).

The defendant Thomas was an attorney admitted in Missouri and had only practiced for a single client in Colorado, and the action was on contempt.

Thus it appears that our question should be answered in the affirmative.
DATED: February 12, 1948.

W. B. BOWLER

UNAUTHORIZED PRACTICE OF LAW BY REALTORS

A perfect example of the adage that the law is not what a statute says it is, but what a court of last resort says that the statute says, may be found in its application to real estate dealers who are practicing law.

The general conception of attorneys, I believe, is that a realtor who prepares deeds, mortgages, assignments, satisfactions and other instruments of this character

is practicing law. The Supreme Court has decided, in the case In re Eastern Idaho Loan & Trust Co., 49 Idaho 280, to the contrary. The following is an excerpt from this opinion:

> "At this stage of our legislation, there can be no question that the statute is consciously leveled at the unadmitted and unlicensed practitioner functioning either within or without the courts. Defendants contend that their specially advertised activities do and did not constitute practicing law; that they but do and did what hordes of reputable insurance men, realtors and bankers have been doing for years, and what chapter 192, section 2, of the Session Laws of 1929 authorizes them to do. Such work as the mere clerical filling out of skeleton blanks or drawing instruments of generally recognized and stereotyped form effectuating the conveyance or incumbrance of property, such a simple deed or mortgage not involving the determination of the legal effect of special facts and conditions, is generally regarded as the legitimate right of any layman. It involves nothing more or less than the clerical operations of the now almost obsolete scrivener. But, where an instrument is to be shaped from a mass of facts and conditions, the legal effect of which must be carefully determined by a mind trained in the existing laws in order to insure a specific result and guard against others, more than the knowledge of the layman is required; and a charge for such service brings it definitely within the term, 'practice of the law'."

Under the above interpretation, any layman, which, of course, includes realtors, may fill out the usual so-called "skeleton" blanks, such as mortgages, satisfactions, assignments, deeds, leases and contracts, or other form or blank "effectuating the conveyance or incumbrance of property," provided that the instruments are "not involving the determination of the legal effect of special facts and conditions." This the Supreme Court has said is the legitimate right of any layman.

The Supreme Court tries to justify this position by saying that where the instrument "is to be shaped from a mass of facts and conditions," and the "legal effect" must be determined by "a mind trained in the existing laws in order to insure a specific result and guard against others," then more than a layman's knowledge is required, and that in this instance, one would be practicing law.

I fail to see how there can be much distinction; and certainly never a conviction, for the illegal practice of law by realtors who follow and use the recognized blanks such as many lawyers use. I can conceive of practically no deed which does not require knowledge in excess of what most laymen have; in the first instance, the grantor's marriage status, and in the second, the grantee's marriage status to be shown, and the question of whether the land should be subject to certain restrictions, a mortgage, or taxes and assessments. Even the choice of a blank form of deed, that is, a warranty deed, gift deed, or bargain and sale deed, involves legal training and knowledge, and certainly passing on this question is practicing law. There are rarely any deeds or instruments of this character where a "mass of facts and conditions" is available, but the importance of having it done right, and the legal effect and liability, are still there. This has been approved in the case of In re Brainard, 55 Idaho 153.

The case of In re Matthews, 62 Pac. 2d 578 lays down the following rule in regard to what is generally understood to be the practice of law:

> "The practice of law as generally understood is the doing or performing services in a court of justice, in any matter depending therein, throughout its various stages, and in conformity with the adopted rules of procedure.

> *But in a larger sense,* it includes legal advice and counsel, and the *preparation of instruments and contracts by which legal rights are secured, although such matter may or may not be depending in a court.* 49 C. J. Sec. 5, p. 1313. See, also, People v. Alfani, 227 N.Y. 334, 125 N.E. 671; in re Opinion of the Justices (Mass.) 194 N.E. 313, 317; In re Duncan 82 S.C. 186, 65 S.E. 210, 24 L.R.A. (N.S.) 750, 18 Ann. Cas. 657; People v. People's Stock Yards State Bank, 344 Ill. 462, 176 N.E. 901, 907; Eley v. Miller, 7 Ind. App. 529, 34 N.E. 836; Boykin v. Hopkins, 174 Ga. 511, 162 S.E. 796, 799, 800."

This case involves passing on a demurrer, and the case was finally decided in 79 Pac. 2d 535. In this case, Matthews was charged with practicing law by advertising and using the words, "correct legal conveyances," and it appeared that he was a notary public and also engaged in abstract, insurance and real estate business, and that "at the request of certain persons and individuals (he) filled out forms of deeds, mortgages, contracts, leases, and bills of sale . . . and thereafter took the acknowledgments of such persons and for such services received compensation"; this follows the citation given for the first case.

The case goes on to discuss the matter and attempt to justify the position in regard to drawing a fine distinction between being a scrivener and practicing law. It quotes, however, the following case:

> "In Boykin v. Hopkins, 174 Ga. 511, 162 S.E. 796, 799, it is said: 'The New York court fully adopted and approved the definition of what constitutes the practice of law as laid down by the Supreme Court of South Carolina. "The practice of law,' as the term is now commonly used, embraces much more than the conduct of litigation. The greater, more responsible, and delicate part of a lawyer's work is in other directions. *Drafting instruments,* creating trusts,*formulating* contracts, *drawing* wills and negotiations, all require legal knowledge and power of adaption of the highest order. Besides these employments, mere skill in trying lawsuits where ready wit and natural resources often prevail against profound knowledge of the law, is a relatively unimportant part of the lawyer's work." People v. Title Guarantee, etc., Co., 1800 App. Div. 648, 168, N.Y.S. 278, 280. (Italics inserted.)

The case finally holds, "The acts of Matthews as stipulated did not constitute the practice of law or of holding one's self out as qualified to practice law and were not a violation of sections 3-104 and 3-420, I.C.A."

Thus, the final pronouncement of the law in this case in regard to realtors is as follows:

1. They may carry an advertisement, "Correct Legal Conveyances."

2. They may fill out forms of deeds, mortgages, contracts, leases, bills of sales, and wills.

3. They may fill out other "skeleton" blanks or draw instruments of generally recognized and stereotyped form effectuating the conveyance or incumbrance of property.

Sections 2 and 3 above have this exception, however: these instruments, where they must be shaped from a mass of facts and conditions, with special knowledge of the legal effect of these facts and conditions, should not be drawn or filled out by realtors, nor should they give "legal" advice thereon.

The Supreme Court of this State seems to attempt to distinguish "a simple deed or mortgage not involving the determination of the legal effect of special facts and conditions" as being proper for a layman to draw, and one involving a mass of facts or the legal effect of the instrument. I am at a loss to understand how the determination of the character of the deed to be used, that is, whether it should be a gift deed, separate property conveyance, a warranty deed, bargain and sale deed, or even a quitclaim deed, is not practicing law, for making the choice is a legal determination of the effect of the instrument to be used. I am at a loss also to understand just how many facts make a "mass of facts." The purpose of the statute, I assume, was to protect the public against someone who is not qualified to perform acts which were in fact only within the knowledge of someone "learned in the law."

The usual example of this is the use of a gift deed, drawn by a realtor, with a money consideration expressed. If the party desiring the deed tells the realtor the facts from which he must decide that a gift deed is to be used rather than a warranty deed, isn't that a legal determination, and practicing law?

It should be borne in mind that it is not only the acting upon facts given on which the deed is prepared, but it may require the knowing of what questions to ask and what facts to obtain. These facts may not be a mass of facts but a few very pertinent facts which determine the character of the instrument to be used and what the instrument should contain, and that certainly would seem to be practicing law.

I wish to cite the case of Paul v. Stanley, 168 Wash. 371, 12 P. 2d 401. The Supreme Court of Washington enjoined the defendant from drafting deeds, mortgages, community property agreements, etc., and any other documents requiring the use of knowledge of law in their preparation, *but* (he) *was permitted to draw simple deeds, simple mortgages and simple contracts and similar simple instruments on appeal,* from which the members of the bar had endeavored to enjoin the layman, a real estate agent, and in discussing the case, the Supreme Court holds as follows:

> " 'Rem. Comp. Stat., Sec. 139-R, provides it shall be unlawful for any person not admitted to practice law "to do work of a legal nature for compensation." A consideration of the statute persuades us it was not the purpose of the legislature to protect the individual who pays nothing for work of a legal nature against incompetency on the part of the person doing the work. The portion of the decree from which respondent has cross-appealed should be amended to read as follows:
>
> "° ° ° from preparing or drawing for others, for reward, present or prospective, deeds, mortgages, leases, agreements, contracts, bills of sale, chattel mortgages, wills, notes, conditional sales contracts, relating to either real or personal property, options, powers of attorney, community property agreements, liens, bonds, mortgage assignments, mortgage releases, chattel mortgage satisfactions, creditors' claims in probate, notices to vacate premises, notices to quit or pay rent, vendors' statements of creditors under the Bulk Sales Law, articles of incorporation, and any other documents requiring the use of knowledge of law in their preparation."
>
> " 'As above set forth, appellants appeal because of the refusal of the court to enjoin respondent from drawing 'simple deeds, simple mortgages, simple contracts and similar simple instruments.' Webster's New International Dictionary of the English language defines the word 'similar' as 'having a general likeness.' In other words, the court expressly permitted respondent to draw simple instruments 'having a general likeness' to simple deeds, simple mortgages and simple contracts. Deeds, mortgages, contracts, and instruments 'having a general likeness,' either define, set forth, limit, terminate, specify, claim or grant legal rights. *The evil from which Rem. Comp. Stat., Sec. 139-4, is designed to protect the public is not done away with by permitting the respondent to draw simple instruments which either define, set forth, limit, terminate, specify, claim or grant legal rights.*
>
> " 'In the case of People v. Title Guarantee & Trust Co., 227 N.Y. 366, 125 N.E. 666, Judge Pound, in a concurring opinion said:
>
> *"I am unable to rest any satisfactory test on the distinction between simple and complex instruments. The most complex are simple to the skilled and the simplest often trouble the inexperienced."*
>
> " 'In view of the proof that respondent was giving legal advice, the trial court erred in holding that the decree should be without prejudice to respondent's right to draw simple deeds, simple mortgages, simple contracts and similar simple instruments. That portion of the decree from which appellants have appealed was erroneous, and should not have been embodied therein.' "

I cite the above case to show what other courts have said about a similar situation, but we are controlled by our interpretation of our own Supreme Court.

RECOMMENDATIONS:

I recommend the following action:

1. That the Bar endeavor to cause the enactment of a new statute or to add to the present one, defining practice of law so as to prevent this encroachment in the drawing of instruments, which the Supreme Court has said was not practicing law.

2. That the Bar attempt, if possible ,to upset this line of authorities.

3. That the realtors *not* be advised of their ability to draw these instruments and make a charge therefor!

4. That the realtors be advised, however, of the necessity of advising their customers, in the sale of real estate, that an opinion should be had from an attorney, the same as on an abstract, to protect the purchaser on a sale, where title insurance is secured.

5. That lawyers adopt a uniform base charge on real estate transactions, that is, such as sales, the same as real estate dealers, on a percentage basis, and, of course, additional charges as the nature and character of the work may require.

6. That a closer and friendlier relationship between real estate dealers and lawyers be inculcated and encouraged, so that a better understanding can be had and the real estate dealers can appreciate the need of a lawyer to complete their sales and thus have more satisfied customers, to their mutual advantage.

In a feeble way, we are now attempting to resurrect a dead horse, in the examination of title insurance, after the barn is burned, and to keep up our office practice when we have given it away to notary publics, real estate dealers, and insurance men, and if it keeps on, with government and bureau encroachments in the field of

law, and our own acts in giving away law practice, it will not be long until we are relegated to being ourselves merely scriveners. Apparently we can regulate everybody else's business but our own!

Respectfully submitted,

THORNTON D. WYMAN

MEMORANDUM

I have been asked to report to the Committee with respect to whether or not title insurance companies might be engaged in the unlawful practice of law in the Third Judicial District. The Idaho Title Insurance Company, which is doing business in Ada County, is authorized to do business under Chapter 117 of the 1945 Session Laws. This statute authorizes certain domestic or foreign companies organized or with authority to insure or guarantee the owners or encumbrancers of property within this state against loss by reason of any incorrect statement in the guaranteed certificate of title or policy of title insurance or other guarantee of title issued thereon, etc.

Nowhere does the act authorize the company to engage in matters that are normally considered to be practising law.

I have not had the opportunity of examining the Articles of Incorporation of this company to ascertain what its purposes are, if any, in addition to issuing title insurance and guaranteeing titles. Assuming, however, that the corporation was formed strictly for the purpose of guaranteeing titles by way of title insurance, the general rule is as follows:

> "A contract guaranteeing a title to real estate is one of insurance rather than of suretyship, as a consequence, organizations guaranteeing such titles are conducting insurance businesses within constitutional and statutory provisions regulating insurance companies."
>
> 29 Am. Jur. 55, Sec. 1.

The law is well settled that corporations may not practise law.

> See Re Eastern Idaho Loan and Trust Company et al., Jess Hawley, Petitioner, 44 Idaho 280, 288 Pac. 157, 73 ALR 1323, and the annotation commencing on page 1327.

From my limited investigation I do not find that the Idaho Title Insurance Company is practicing law in the manner described in the foregoing authorities.

Most of the cases involving title companies are cases where the corporation was organized to do business as a trust company or title company and purported to examine, certify and guarantee titles to real estate, to prepare any and all papers in connection with the conveyance of real and personal property that it may be requested to prepare by any customer, or in cases where fees have been charged and collected by such companies for the preparation of bills of sale, chattel mortgages, powers of attorney, releases, etc., and in such cases, of course, the companies were held to be practising law unlawfully.

> Atlanta Title & Trust Company v. Bokyin, 172 Ga. 437, 157 SE 455.
>
> People v. Title Guaranty & Trust Company, 180 App. Div. 648, 168 NYS 278.
>
> The court in this case held the statute does not apply to a corporation lawfully engaged in the examination and insuring of titles to real estate. This merely means that the statute does not apply while the Defendant is examining and insuring titles, but does apply while doing work ultra vires to its charter and no corporation has chartered power to practise law.
>
> People v. Title Guarantee and Trust Company 227 NY 366, 125 NE 666,
>
> Reversing the case above where an employee of the Defendant drew a bill of sale and chattel mortgage for a person who had no other business with the Defendant. The conviction was reversed because of its being an isolated case.
>
> U. S. Title and Guarantee Company vs. Brown, 166 App. Div. 688, 152 NYS 476.

In Ohio a title company was authorized by statute to prepare and furnish abstracts and certificates of title to real estate. In Dworkin v. Guarantee and Trust Company et al., 37 Ohio Law Reports 79, it was held that this statute merely authorizes abstract companies to prepare a certificate stating that a search has been made and that certain entries and claims have been found in the records. However, Defendants will be enjoined from including a statement that the title is good in a certain person. Whether or not a title is good is a legal opinion depending upon the legality of certain transfers. The statute does not authorize title companies to give legal opinions.

There are numerous other citations. I call your attention to the publication "Unauthorized Practise of Law" issued by the American Bar Association, and to "Unauthorized Practise Decisions" issued by the Detroit Bar Association, 1937.

At the present time it is my opinion that further investigation should be made with respect to the Articles of Incorporation of the Idaho Title Insurance Company and a further investigation of the case law since I have not exhausted the subject. I do not feel inclined at the present time to recommend to the committee that any action be taken toward a resolution involving title insurance companies as being engaged in an unlawful practise of the law. I would like to report further on this matter at a later date.

CARL BURKE

Jess B. Hawley, Esq., Chairman
Committee on Unauthorized Practice of Law
Idaho State Bar
Boise, Idaho

Dear Mr. Hawley:

Reference is made to our correspondence concerning practice before the Public Utilities Commission, the Industrial Accident Board, the various other Boards, Commissions and Commissioners in the executive branch of the State government. Your committee has raised the problem pursuant to the resolution of the State Bar at its last convention, which directed that an inquiry be made into various forms of unauthorized practice.

A reading of the practice act would appear to indicate a first impression that all of this type of representation was the practice of law and thus prohibited to unlicensed persons. However, the decisions of our Court which interpret the statute seem to vary in some measure the net purport of this statute. None of the decisions in our Court has direct bearing on the problems implicit in practice before the administrative agencies.

I have taken the liberty of discussing this problem with some of the agencies involved. It would be fair to state that some of the agencies have distinct doubt as to whether all of the activities involved in appearance before them can be said to be the practice of law. It has occurred to me that the agencies might be encouraged to prescribe rules of practice which in terms specified the persons who might appear before them. In the case of the Public Utilities Commission, the validity of the rule could probably be tested by appeal from the final order of adoption. The authorities seem pretty generally to hold that where an administrative body has power to prescribe its procedure, it may regulate, discipline and prescribe the qualifications of persons who appear before it in a representative capacity. The various agencies would, of course, be bound by the limitations in the practice act insofar as such appearances involve the practice of law. If the agencies were to promulgate regulations on this question, the matter of resident representation could be treated as an integral part of such a regulation.

A review of the cases would indicate that practice before the Industrial Accident Board is such that it amounts to the practice of law and should, therefore, be conducted by licensed personnel. The problem as it relates to the Public Utilities Commission and the other agencies seems to me to present a slightly different and somewhat more complex problem.

Consideration of this problem and the conferences incidental thereto has borne home to my associates and myself the increasingly important need for giving attention to the enactment of an administrative procedure act. The number of agencies in State government which now possess administrative authority of a quasi-judicial or quasi-legislative character is much greater than most members of our profession now realize. I think at least one hundred statutes could be cited which confer power to make regulations having the force of law or which prescribe the conduct of hearings of one kind or another in the course of the agencies' business which can have effect on private matters. Many of these statutes contain no precautionary safeguards requiring the administration of these powers or the conduct of these hearings in accord with the basic principles of due process. In fact, many of the statutes prescribe no mode of procedure at all as a guide for the administrative authority in the performance of its statutory duty.

For these reasons, I desire to suggest to your committee that consideration be given to recommending to the Bar that the need for an administrative practice and procedure act be studied. The drafting of a satisfactory statute would be most laborious. Any such statute would propose questions upon which the views of the Bar should be heard and considered. The Federal Administrative Procedure Act (5 USCA 1005 (a), et seq.) is a fair example of the type of legislation that seems to me to be needed. The Federal Act is more cumbersome than would be needed here but it does illustrate an attempt to meet the problems that I have discussed above.

We should deem it a privilege to be of all possible assistance to your committee in connection with this problem and with the problem of unauthorized practice. I will report further the progress that I am able to make with the agencies concerning practice before them.

With kindest regards, I am sincerely yours,

ROBERT E. SMYLIE

VICE PRES. MERRILL: Ladies and gentlemen: The first item on our program this afternoon is a report by Robert M. Kerr on the Prosecuting Attorneys' Section of the Idaho State Bar.

MR. KERR: Mr. President and Members of the Idaho Bar:

As a member of the Prosecuting Attorney's Section of the Idaho State Bar, I appreciate the opportunity to make a brief report of the work being accomplished by that group. With a member in each county of the State, they represent a good cross-section of the State Bar, and the results of their work, not only as members of the Section itself, but also as active members of the Bar, will be as generally felt throughout the State as that of any group in the Bar.

This section reorganized two years ago under the leadership of President Earle W. Morgan, of Lewiston; vice-president, T. E. McDonald, of Idaho City; Secretary, Howard E. Adkins, of Shoshone, and Treasurer, Joe McFadden, of Hailey. Under the leadership of these men, they have adopted and carried out an active program distinctly helpful, not only to me and other prosecutors new at that work, but also tending to substantially improve the administration of justice generally throughout the State. We hold two meetings each year; one just before this convention and a mid-winter meeting. Both are working meetings, during which we analyze specific problems arising in our work, exchange ideas and develop uniform procedures along the lines that, from the collective experiences of the group, seem most effective.

Between meetings various committees are active and problems are handled through a clearing house arrangement. If a problem arises in one county which the attorney believes may have been solved in another, the prosecutor submits his problem to the Secretary, who sends out a questionaire to all the prosecutors in the State. Their replies and suggestions are then mimeographed for the benefit not only of the attorney who submitted the problem, but for the cousideration of all the prosecutors, who thus build up a valuable file of the collective experience of the various prosecutors throughout the State.

During our meetings, we have been fortunate in having the opportunity to discuss our mutual problems with representatives of the Judge's Association, the Attorney General's office, the Board of Pardons and Corrections, the Judicial Council and the Department of Law Enforcement. Between meetings various committees have continued the study and investigation of these problems.

Briefly, some of the problems which have been considered during the past year have been the following: Executive and Judicial salaries and their relationship to public administration; the development of a uniform policy and interpretation in the matter of tax exemptions; a study of paroles, probations and suspended sentences under the recent constitutional amendments and the legislation in connection therewith; correlation between the office of the Attorney General and the Prosecuting Attorney in the matter of the presentation of criminal appeals; a development of a uniform procedure and the use of standard forms in the various counties; the publication and distribution of rules, regulations and pamphlets by various departments and agencies of the State; the treatment of juveniles; procedures involved in the plea of insanity in criminal matters; and recommendatious regarding changes in the criminal procedure and laws in this State.

Time will not permit a full report of the proceedings and accomplishments of the Prosecuting Attorney's Section in regard to these items, but I would like to call your attention to some of the work that has been accomplished and the recommendations which have been made for future action.

One of the outstanding pieces of work was accomplished by James Blaine, of Ada County, and his staff. They have prepared for all of the County Attorneys in the State a collection of forms of criminal procedure. Not only is this the most complete collection which has come to my attention, but it is keyed to our Idaho statutes

and decisions. This work will be very helpful to all of the Prosecuting Attorneys throughout the State.

As members of the bar, you have all been confronted with the problem of securing reliable information regarding rules and regulations of various departments of the State of Idaho, such as the Fish & Game Department, the Board of Education, Department of Law Enforcement, Department of Agriculture, and others. Occasionally you may have desired to rely upon some rule or regulation in some matter which you have pending in the Court. The Section has therefore proposed that all rules, regulation and pamphlets and instructions shall be filed with the Secretary of state; that all copies thereof distributed or circulated shall be certified by the Secretary of State to be true copies of the original and that such certification shall be prima facie evidence that due notice of such rules and regulations has been given as required by any statute pertaining thereto. It was further recommended that the Secretary of State should furnish copies thereof to all Prosecuting Attorneys and other public officers who might be concerned. This would make available to every attorney in each county in the State the copies of these rules, regulations and pamphlets, as I am sure every Prosecuting Attorney would be happy to have you make use of this information. A committee, headed by Phil Evans, was assigned the responsibility of preparing and submitting any necessary legislation to carry out these recommendations.

There has been some talk of transferring the handling of the criminal appeals from the Attorney General's office to the office of the Prosecuting Attorney who has handled the trial of the matter in the District Court. While we recognize that the trial attorney can make a very valuable contribution to the proper presentation of the appeal, we also feel that most of the county attorueys do not have access to adeqnate library facilities and are not sufficiently experienced in the preparation of briefs and the presentation of appellate matters to present these appeals as effectively as the office of the Attorney General, where a member of the staff may specialize in that work. As a group we are opposed to the transfer of these appeals from the office of the Attorney General to the Prosecuting Attorney, but we propose as a group and as individuals to cooperate as much as possible with the office of the Attorney General in their presentation.

This is also, I believe, an appropriate time to mention a related matter which may arise more frequently in the future. In connection with various forms of social legislation, the states are more frequently becoming creditors and are seeking to collect judgments against individuals. In many cases, these individuals move to another state. Some of them have come into Idaho and the creditor state has attempted to make collection within this state. We believe that any state bringing suit in this state should retain council the same as any private litigant and that it is not a duty of either the Attorney General nor the Prosecuting Attorney to represent such foreign state.

A committee on paroles and probation was appointed to work with the representatives of the Board of Correction to develop better cooperation and understanding between the Board and the various Prosecuting Attorneys.

A committee was appointed to review present methods and procedures used in connection with bad checks and to recommend any changes in statutes or procedures which would be considered advisable.

Committees were also appointed to work with other groups interested in the procedures involving juveniles and insane persons.

During the past year, a committee of this section was requested to submit to the

Judicial Council appointed by this bar, recommendations regarding the criminal procedure in this state. It is my understanding that those recommendations are to be included as a part of this report.

I would like to propose for consideration the following changes in our criminal procedure. Some of these, I believe, have already been under consideration, particularly those relating to the handling of juveniles, and I hope very much that some work will be accomplished before the meeting of the next legislature so that our handling of the juveniles, in some respects at least, will be improved.

1. Fixing sentence. It appears to be the opinion of some of the judges that unless in their *discretion they commute the sentence, suspend execution, or withhold judgment* (under the provisions of Section 19-2501, as amended by Chapter 79 of the 1947 Session Laws), they are bound (under the indeterminate sentence law, Section 19-2415, as amended by Chapter 46 of the 1947 Session Laws), to impose "the maximum term of imprisonment provided by law therefor." Lacking any power to exercise some discretion in fixing the maximum sentence, I believe there is an increasing tendency to commute the sentence for serious offenses to a period of imprisonment in the County jail. While I appreciate the advantages of the new law placing upon the new parole board the responsibility of determining the minimum sentence, it is my opinion that the discretion of the trial court should be enlarged to provide for the determination of the maximum sentence at any period within the limits provided by law.

2. Charging Several Counts. While I have had limited criminal experience, I believe that the provisions of the statute requiring that an information or indictment charge but one offense, Sections 19-1203, 18-1313, etc., restrict the prosecution of criminal cases and that a change could be made without prejudice to the rights of the defendant. I am not familiar with the present Federal practice but understand that there is provision for charging in several counts, not only included offenses, but related offenses. I observe that under Section 18-612 of the old prohibition law, provision was made for trying at one time all of the offenses for which a defendant was held to answer relating to the sale of intoxicating liquors. I have recently had two cases to consider in which I believe the present practice defeated justice.

The first was the case of the larceny of an automobile. The question arose whether it was larceny or joy riding. The joy riding was not included within the offense of larceny and the distinction depended upon the intent of the defendant to return the automobile. As I understand the present procedure, I was forced to elect between trying the defendant on the charge of larceny or joy riding. Being uncertain, I charged the defendant with joy riding and he pleaded guilty. By coincidence the same defendant was later involved in the second situation with another mau. They entered a stockman's cabin early this spring while the owner was away for the winter. After staying there for several days, they left, taking with them a substantial quantity of groceries, but not of sufficient value to amount to grand larceny. The question arose whether they were guilty of burglary or larceny. With the distinction depending upon the question of whether or not intent to commit the larceny had existed at the time of the original entry, I felt that from the circumstances and the record of the individuals that the defendants should be charged with the crime of burglary, rather than the crime of petty larceny.

A somewhat similar problem is presented in determining whether or not the charge a defendant with the crime of drunken driving or the crime of reckless driving. It is therefore my opinion that the ends of justice would be served by providing that convictions could be secured not only for included offenses, but related offenses arising out of the same transaction. I believe, furthermore, that by allowing the

defendant greater latitude and entering pleas to the various possible charges arising out of the transaction, many cases might be disposed of satisfactorily on the defendant's plea, which now go to trial on the particular theory which the State may have elected as the explanation of the transaction.

Our statute was taken from California and I believe we might well adopt the amendments which they have found very satisfactory. Their statute 954 of the Penal Code now reads as follows:

> "Charging More Than One Offense.--An indictment, information, or complaint may charge two or more different offenses connected together in their commissions, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more indictments or informations are filed in such cases the court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the indictment or information, but the defendant may be convicted of any number of the offenses charged, and each offense upon which the defendant is convicted must be stated in the verdict; provided, that the court in the interest of justice and for good cause shown, may, in its discretion, order that the different offenses or counts set forth in the indictment or information be tried separately, or divided into two or more groups and each of said groups tried separately. A verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other count."

I believe that since magistrates in Justice and Probate Courts are usually laymen, the procedure for suspending the execution or withholding judgment and parole, should be prescribed in greater detail.

Plea of Nolo Contendere. There seems to be some difference of opinion among the attorneys and judges of the State as to the propriety of this plea. It was recently presented to a justice court in Bingham County. From my investigation of the authorities at the time, it appears that the State courts of the different states have adopted rather widely divergent theories in regard to its use. Some decisions held that the pleas mentioned in the statute are exclusive, while others, including particularly Wyoming, State v. McNabb, 295 Pac. 278, and an annotation at 152 A.L.R. 253, held that this common law plea was not inconsistent with the pleas provided by the code. While I realize that the plea under common law was subject to considerable abuse, it is reported to me that it has worked rather satisfactorily in the federal courts, particularly in those cases where the offense consists in the violation of some technical statute which may be distinguished from those offenses considered criminal per se. It is my opinion that many cases now tried wonld be satisfactorily disposed of on such a plea, whereas, under the present procedure, the defendant feels inclined to plead not guilty, rather than enter a plea of guilty which might prejudice some civil right or be used against him in a subsequent action for damages.

At the risk of being misunderstood, it seems to me that the spirit of compromise might well be, and in actual practice is, being, carried into the practice of criminal law. In civil matters, we are inclining more and more to the theory that a bad settlement is better than a good law suit. The citizens of our counties do not particularly appreciate being called as jurors and witnesses in somewhat trivial misdemeanor cases and it is almost impossible for the county to recover the costs involved. Thus many defendants escape who might otherwise be brought to justice of some kind and be made to feel that they caunot flaunt the law with impunity.

It is therefore the recommendation of the Prosecuting Attorneys' Section that

our statutes be amended to expressly provide for this plea to be received in the discretion of the Court.

Appeals from the Juvenile Court. Although Section 31-1314, I.C.A. provides that all orders or judgments made by any Probate Court, or the judge thereof, in juvenile cases may be reviewed on questions of law only, no procedure has been developed or provided for such review and several decisions of the Supreme Court have left the situation very much confused. The cases of In Re Sharp, 15 Idaho 120. 96 Pac. 563, and In Re Farnsworth, 46 Idaho 47, 266 Pac. 421, held that in spite of this statute, the parents or guardians of the child had a right of appeal under Section 11-401, I.C.A., at least from so much of the order as affected the minor's property rights or the position of his legal representative. I believe the practice has thus developed of providing for trial de novo, in these cases, but it would be much better if provision was either made to carry out the intent of Section 31-1314, establishing a procedure for review, or the statute should be repealed and the other procedure adopted. In either event, the question of a stay of proceedings pending the review should be provided for.

Health Requirement of Minors Committed to the Industrial Training School. I believe that the statute, Section 32-3101, and others, relating to the commitment of delinquents to the Idaho Industrial Training School should be amended to make a definite provision for such delinquents as are afflicted with disease or otherwise not in the desired state of bodily health. We recently had in custody a minor girl who was refused by the institution and were forced to release her from custody for lack of any other available place to put her. Although the school is authorized at the present time to maintain a quarantine ward, I believe it should be mandatory, as we are otherwise left without any effective means of disposing of the worst delinquents.

Fines for Juveniles. I believe that we have unduly restricted the juvenile court in withdrawing from the court the power to levy or assess fines in proper cases, particularly in those involving violation of the traffic laws. Under the present practice the court can only admonish the juvenile, place him under some probation, or commit the child to the Industrial Training School. While these alternatives provide adequately for many of the cases, in many others where the juveniles are employed and own and operate their own motor vehicle, a fine could be effectively assessed.

Exciting Lust of Child under the age of Fourteen. It is the feeling of the Prosecuting Attorney's Section that the present statutes defining the crime of contributing to the delinquency of a minor do not adequately cover the conduct of persons committing lewd conduct upon the person of young children. It is therefore recommended that we adopt the following statute from California, being Section 288 of their Penal Code, to-wit:

"Exciting Lust of Child Under Age of Fourteen.--Any person who shall wilfully and lewdly commit any lewd or lascivious act including any of the acts constituting other crimes provided for in part one of this code upon or with the body, or any part or member thereof, of a child under the age of fourteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child, shall be guilty of a felony and shall be imprisoned in the State prison for a term of from one year to life."

We hope that as members of the bar, many of whom have had experience as county prosecutors or as defense attorneys, you will give us the benefit of your suggestions, not only in regard to these proposals and the work that we have planned for the future, but also in regard to any other matters of interest which you feel should be considered by our section. President Morgan, the other officers and

committees of the Prosecuting Attorney's section, and the Prosecuting Attorney of your county, will all welcome these suggestions at any time.

VICE PRES. MERRILL: The next speaker will be introduced by Marshall Chapman.

MR. CHAPMAN: Mr. President and members of the Bar: The next speaker is a gentleman who came to Idaho this summer primarily to fish. It is our good fortune that the officers of our Association were able to impose upon his good disposition to be with us this afternoon.

In view of the radical changes in our federal income tax laws, I believe that his appearance here will be of great value to the members of the Bar. A number of members have had the opportunity to work with him. He is one of the outstanding tax attorneys of the west.

It gives me pleasure at this time to introduce to you Mr. G. S. Borden, chief tax consultant for the Standard Oil Company and several other companies, better known to his friends as "Rip" Borden. I now ask Mr. Borden to come forward.

MR. BORDEN: Mr. President, friends, potential friends, fellow members of a different Bar, if your Honors please: I thank you very much for this privilege and honor of being on your program.

My topic is a very interesting topic, extremely complex. It is pitched in a minor key, and it is tuned into a lullaby theme. Moreover I have none of the attributes of a public speaker. In fact, I may be as bad as the fellow who joined a bridge club recently. This bridge club was composed of a number of couples that played bridge every week. Between 10:00 and 10:30 they would tell stories. That was on the agenda every night that they played. Of course, these stories became well known to everybody, so they thought that if they would catalogue these stories by numbering them, they could tell more stories merely by reciting the numbers instead of the stories. In that way they could tell a lot more stories in half an hour. (laughter). This new member was attending the first session and the time came to tell the stories. The first fellow got up, and he said, "Number 17." Everyone laughter, all were convivial. The next fellow arose and said, "Number 3." And the same thing happened. And then the new member arose and said, "Number 13." There was no laughter, not even a smile. Later on in the evening the new member said to a close friend, "What did I do? Did I tell something off color? What happened?"

His friend said, "Well, the story was all right. It was just the way you told it."

I have a pretty complex story to tell you, but I am a little apprehensive about expounding on it clearly. So I carved the critter, and had the meat wrapped up in three Commerce Clearing House publications for you to take home. There are plenty of these publications at the door, so take as many as you want. You can take them home for your clients. In them you will find the answers to the every day run of questions. You will find answers to many of your problems. Of course, you will have to go to the law books and tax cases of the Tax Courts and the Federal Courts to find the answers to the more intricate ones, but in general there is a lot of good stuff in here to help you.

First I would like to talk a little about the history of this new Revenue Act. Along last February it became perfectly clear that for the fiscal year ending June 30, 1948, the government would take in about 46 billion dollars in revenue, and they would spend, according to the appropriations Congress had made, about 38 billions. They would wind up the fiscal year with a surplus of around eight billion dollars. They decided that all of the surplus should not be applied to reduction of the public

debt but that a part of it ought to be given back to the United States taxpayers in the form of tax reductions. The final figures settled on was a tax relief, according to estimates of the Senate Finance Committee, of about $4,773,000,000 of income, estate and gift tax relief. The bill came out of the Senate and passed by a great majority. The President vetoed the bill, but through a coalition the veto was overridden, and we have the Revenue Act of 1949, which is merely several amendments to the Internal Revenue Code.

This became effective at 3:15 p. m., April 2, 1948. Its purpose was three-fold. First and primary it is a tax relief to the United States taxpayer sharing the eight billion dollar surplus, which, as a matter of fact, turned out to be $8,650,000,000 for the fiscal year ending June 30, 1948. The remaining part was used to reduce the public debt down to 252 billion dollars. This leaves about five billion dollars as the annual interest charge to the American taxpayer for carrying the public debt. Of course, that five billion dollars has to be acquired through taxations every year as long as that debt remains the same, and we have to pay for it.

The second purpose of this bill was to rescind vicious amendments made in the Revenue Act of 1942. Those amendments prescribed in effect that community property would be treated as separate property for estate tax purposes. As you know, their constitutionality was upheld, in the Wiener Case, so that the entire community property had to be included in taxable gross estate except to the extent that the wife or surviving spouse could show a real contribution through personal efforts to that community. These amendments were repealed in the Revenue Act of 1948. That was a second of the objectives.

The third objective was the equalization throughout all the common law states and the community property states, as far as they could equalize it, of the law pertaining to taxable income, taxable estates and taxable gifts.

Those were the three purposes. Now, I would like to go back for just a few minutes into the history, which perhaps is very elementary, but I want to show you some of the things that have happened due to this disparity in the income tax situation between the community property states and the common law states.

Back in 1938 and 1942 and several other times, the Administration tried to have this community property benefit nullified by forcing every husband and wife in the country to file joint returns to the end that the combined incomes of husband and wife would be taxed at the highest rate. They failed in that. Under the Revenue Act of 1948 the problem of equalization was approached in a different way. In this law the husband and wife can file joint returns and taxes are computed upon the basis of half of the net income and then the tax, based on half of the income, is multiplied by two.

You will recall that through this inequality there has been created throughout the common law states many family partnerships with the husband and wife as partners. They were created so the business income could be divided in a partnership return. The governments have opposed these unless the wife maks a real contribution. The government has prevailed in many cases and the leading supreme court cases are the Towers and Lusthouse cases. Under the new law the incentive for husband and wife partnerships does not exist.

Just as an interesting sidelight, I will tell you about a partnership down in Utah. I have this from Judge Murddock of the United States Tax Court. He told it to me, and I presume it is true. Down in Logan, or somewhere near there, one of those prosperous ranchers brought his wife into partnership. And he also brought in all his seven kids. In fact every time there was a child, they would bring it in as a new

partner. This case was brought up on the question of the validity of this partnership —whether the tax should be computed on the entire amount of income or whether to divide it nine ways. His wife was on the stand, and the point was to determine how much she really contributed to the business of the partnership. Judge Murddock stated he would interrogate the lady, and he said, "Madam, will you please tell the Court just what contributions you made to this partnership?"

She looked at him and said, "Your Honor, I think my business was primarily raising new partners." (laughter).

There are six or seven points in this new bill which granted the relief of $4,773,000,000. The first point and the major point is that it grants to every tax payer and his spouse and every dependent an additional $100 exemption. It raised exemptions from $500 to $600, and that alone took up two billions of the $4,773,000,000, or 41.7%.

The next big item of relief comes in the percentage reductions of tax. That reduction is a specific percentage reduction in a tentative tax on the rates existing. You deduct 17% of the first $400 tax, and then you deduct 12% of the next portion of tax from $400 up to $100,000, and 9.5% on any amounts over $100,000. It is a very substantial reduction and amounts to about 7% in a reduction of your overall tax over the amount that was computed on the '47 returns. That accounts for $1,800,000,000 of the relief or about 38.9%.

Now, the third point was an additional exemption to all tax payers over 65 years old and to blind people. They get an additional $600, and that amounts to $164,000,000, or 3.4%.

And there was a standard deduction giving single people a right to take a $1,000 standard reduction or 10% of their net income, whichever was the lower. That is going to cost 57 million dollars, or 1.2% of the total.

Estate tax and gift tax amendments only amount to 200 million dollars out of the $4,773,000,000, and that amounts to about 4.2%.

Finally there is the relief feature that allows the splitting of income in all common law states and also in community property states on separate income. This relief item costs about $550,000,000, or about 11.7% of the total. These are the tax relief provisions which add up to $4,773,000 annually.

How do the people in Idaho share in that "divvy up"? They share in all of it except what they already had. In other words, they share in every one of these points except the community splitting point, which they have had for a long time.

Now, while the estate tax amendments are very important to your clients who have any estate property over $60,000, possibly you may not be interested unless it is $120,000. But very briefly I will tell you—and I recognize that this may be all elementary to you—what this legislation did.

It repealed those amendments of '42 so that now only one-half of the community property is included in the gross estate, and also, as far as separate property goes, allows marital deduction of the amount up to one-half of the estate which is transferred to the surviving spouse. Adversely it took away the five-year rule—you realive that under the prior law if one spouse dies and the other spouse dies within five years of the time of his or her death, there is an exemption on the property that is included in the surviving spouse's estate of the amount that is taxed in the deceased's estate. So the problem there, so far as estates of $60,000 to $120,000 are concerned, is merely one of the minimum tax that accrues on the death of the surviving spouse. There

are many technical points on this marital deduction, all of which are pretty well covered in those publications.

Now, the gift tax amendments are like the tax amendments. They tried to equalize the common law states by providing in effect that every taxable gift of separate property or community property is half hy the wife and half by the husband. That is very important because these gift tax rates are progressive. They are not on an annual basis. They run a ledger on every tax payer in the United States who makes a gift. If you give away half a million to avoid estate taxes or income taxes in 1945 and you give another one hundred thousand away this year, you are in the bracket above the five hundred thousand dollar tax bracket, and that is the tax rate to use in computing the tax on the last one hundred thousand dollar gift. Now if your wife has not used up her credit, or neither of you has used up your credit, you can draw the two up to the $30,000 exemption, and you can give $60,000 tax free. Moreover you can give $6,000 a year away tax free to anybody; under prior law it was $3,000.

As far as gifts between spouses go, under the estate tax law, there is no tax until the wife receives over half of the estate, and under the gift tax law there is a tax on one-half of any gift over the exemptions as half is hers already under the law.

Now, I would like to give you just a few suggestions on what to do when you get back home, if you haven't already done so. Look at these things for your clients. I presume you are all not as anxious to pay taxes as the fellow I heard about who paid his dog tax even though he didn't have any dog just because he held his wife in such ill repute. (laughter)

The first thing to do, when you go home, is to make sure your clients take all the advantages they can from these income tax relief provisions. You probably have all done that already. As far as your wealthy clients are concerned—I mean by that over $60,000—look to make sure of the effect of the overall tax—that is first on the estate tax upon the death of one spouse and then to the estate tax that will result upon the death of the surviving spouse. Presume that she will not dissipate the estate, or she will pass on a substantial part of the estate she will receive from her husband, or he will receive from his wife, as the case may be. Look at the picture as a whole. That is very important, because there is not much relief unless you do. This is so because as a rule the whole estate is taxed. The same number of dollars pass through the tax mill, but it is passed through twice in half the bracket.

If you have separate property involved, be sure that you see that your client derives the maximum marital deduction. That is technical. You can find it outlined in the booklets. You can't procure marital deductions on expectancies or estates for terminable periods, with complex exceptions to that exception. But when you get out a sharp pencil with a wealthy client, you can always solve that.

The third thing is to appraise your client's affairs and estates and then relate them with the new gift tax amendments which give these particular benefits and exemptions on gift taxes. You can pull the gift tax down into the lower brackets. Examine that withwith the idea of seeing whether or not you cannot make inter vivos gifts, lifetime gifts, to their children in order to save not only on income tax by shifting income to the children in lower brackets but also to avoid estate taxes upon the death of either spouse.

Now, these gifts are very important in large estates. As you know, the gift tax rates are three-quarters of the rates of estate taxes. To illustrate: I had an acquaintance in Texas. He had a twenty million dollar estate of ranch lands, and he had seven million dollars in the bank to pay his tax. Of course, there is a twenty-seven

million dollar estate, and the seven million dollars, the only liquid asset that he had there, was all in the top bracket, so when they got through with this fellow's estate, here was not enough liquid assets for the payment of the estate tax. If he had made a gift of that seven million dollars before he died, the seven million would only have been taxed at three-quarters of the rate of the estate tax, and the estate tax would have been figured on twenty million dollars instead of twenty-seven million dollars. There would have been money to pay the estate tax out of the gift, if he only had made the gift prior to the time he died.

I have one more point. Now, if you have wealthy clients who have property which is sure to appreciate, like the possibility of discovering a mine or oil or any factor affecting the appreciation, it would be wise to give that away before that appreciation is realized, or takes place. The converse is true, of course. If he has property that looks like it is going to diminish in value, it would be well not to give that away before he dies.

Now, there is one more point that hasn't anything to do with taxes, but I think it is a good suggestion. Look at your life insurance policies, particularly those you took out some 15 or 20 years ago. Most of those policies have options to take lump sum settlements or take instalments over periods of 10, 15 or 20 years, or take a life annuity. Those policies were written when the discount rates were around 3½%. To illustrate: I have $10,000. Aetna policy. It has those same options in it, and the discount rate is much lower today. My wife couldn't buy the life annuity that is granted by that policy under the third option for an amount less than $12,500. So if an adjustor came around and gave her a lump sum settlement check for $10,000, he would take $2,500 of value away from her. The same thing goes to the long term instalments. Instead of taking the cash value, elect the life annuity or instalment payments. You should examine your policies and the policies of your clients with this point in mind. Make notations on the policies so the beneficiaries can examine the relative values of the several options.

I have one more thing to talk about, and then I am through. I am going to talk about the tenure of this relief provision. How long are we going to have this relief? What are the chances of further relief? What are the chances of it being increased? Of course you all know as well as I do that this all hinges on the question of what security is going to cost. We all must have security. How much is it going to cost to stop this cold war, and if it gets hot, how much? All that tends to reduce this surplus and to put our federal fiscal affairs into a deficit. So the question of our taxes is tied in with this cost of security.

We hear about the horrible things such as how an enemy can bring submarines to our coast and let off atomic bombs which will kill every bit of animal organism within 250 miles, and there will be no life for 25,000 years. If these things are true an enemy can make this planet uninhabitable. This matter is paramount to everything. It is paramount to our tax rates, all economics, politics, national boundaries or any other affairs of our lives. Is it true or isn't it? We, as American people, ought to know whether it is true, because our whole destiny is involved. So when we talk about tax relief, federal economy, investments or any political or economic problem, let us start from the paramount problem of national, international and planetary security.

In conclusion I am going to tell you a little story. You know, ants are a great specie. They have their commanding generals, and they have their majors and lieutenants, and they are a highly organized society. They all work for one and one for all. The ants at this particular place had a colony, and had a highway which traversed man's highway. One day a horse passed by, and he caused an obstruction

on the ant's highway, and the commanding general of the ants waved his antenna this way (motioning) and all the colonels and majors and the millions of ants rushed to see what that meant. It doesn't mean much to us, but in ant language that means we have a big job on hand and we have got to remove this obstruction. So all the ants went to work, and they worked their shifts. I don't know what a shift is under the Wage-Hour Act of the ants but they all worked a shift. Then the commanding general waved his antenna that way (gesture). Now, fellows, that doesn't mean anything to you and me, but do you know what that means in ant language? It means this stuff has gone far enough. (laughter—applause).

VICE PRES. MERRILL: Are there any questions?

T. J. JONES: I would like to ask about those insurance policies. Will you explain that again?

MR. BORDEN: In the days when you took out the policy, the discount rates for money was 3½% It was written on a 3½% discount. That means when these options were put in the policy—lots of the policies have three options. You can take a cash surrender value of $1,000, or your beneficiary can take an instalment payment over 5, 10, 15, or 20 years, and it tells you how much she can get a month. It adds up to something over $1,000. It depends on the term and discount rate. Or the beneficiary can get a life annuity according to her age. She can have a life annuity of $10.00 or $15.00 a month as long as she lives, according to her age. Those policies were written when money was cheap and when this money would buy that kind of annuity or that kind of installment—that kind of interest. But today it wouldn't buy that. You couldn't buy the equivalent today for less than $1,250.00. So put a note on the policy to look into this, and don't let an adjustor give you a check for $1,000.00.

VICE PRES. MERRILL: Thank you, Mr. Borden.

PRES. SMITH: Is the Resolutions Committee now ready to report?

ROBERT N. ELDER: Mr. President and members of the Idaho State Bar, your committee on Resolutions consisting of the following attorneys:

R. N. Elder, Chairman; Laurel Elam, A. F. James, O. R. Baum,
David Doane, A. H. Nielson, H. R. Stinson

desires to submit the following report for your consideration:

RESOLUTION NO. 1

WHEREAS, the success of this, the 1948 State Bar Convention, is a tribute to the several excellent addresses and discussions by the members of the Bar and to the excellent services and entertainment provided by the management of Sun Valley.

NOW, THEREFORE, BE IT RESOLVED that the Idaho State Bar hereby says "thanks" to all those who have contributed to the success of this convention, and particularly to Honorable Alfred Budge, Justice of the Supreme Court of Idaho, Edward S. Stimson, Dean of the College of Law of the University of Idaho, and G. S. Borden, attorney and tax consultant, San Francisco, California. We hereby express our appreciation to the Commissioners of the Idaho State Bar and their Secretary for the generous contributions of time and talent in the interest of the Bar and for their accomplishments during the past year. (Adopted)

RESOLUTION NO. 2

It is the concensus of the Idaho State Bar that the present license fee assessed to each attorney of $10.00 is inadequate to pay the expenses of the Bar Commission in the light of present economic conditions and as reflected by he 1948 report of the Secretary of the Idaho State Bar Commission.

NOW, Therefore, Be It Resolved, that a new enactment be presented to the Legislature to increase the License Fee not to exceed $15.00. (Adopted)

RESOLUTION NO. 3

It is the concensus of opinion of the Idaho State Bar that consideration should be given by the Legislative Committee to submission of an Amendment to the Constitution designed and intended to provide for more than one Probate Judge in Counties where the need appears to exist therefor because of the overcrowded condition of certain of our Probate Courts; also that consideration should be given likewise to the submission of proper Legislative enactments designed to carry out the intent and purpose of any such Consitutional Amendment if adopted.

It is the further concensus of the Idaho State Bar that the Matter of any transfer of jurisdiction of the Probate Court or increase in the jurisdiction of such Courts must be given further study and consideration before any specific proposals with respect to such matters be made by the Idaho State Bar. (Postponed)

RESOLUTION NO. 4

BE IT RESOLVED, That the present system of appropriation of certain money from filing fees be continued in force to the end that the Idaho Code be kept up to date and that in the future, the session laws, as and when published, be published as supplements to such Code in such form as to keep the Code up to date and to carry out the uniformity as will be contained in said Code. (Adopted)

RESOLUTION NO. 5

WHEREAS, It is the consensus of the Idaho State Bar that the Judges' Retirement Act should be given thorough study to the end that improvements be made and inequalities be eliminated;

BE IT RESOLVED That such matter be referred to the Legislative Committee of the Idaho State Bar for appropriate action. (Postponed)

RESOLUTION NO. 6

It is the consensus of opinion of the Idaho State Bar that the Legislative Committee be directed to prepare and submit to the 30th Legislature proper legislation to coordinate the trial work of the District Courts by authorizing the Chief Justice of the Supreme Court to secure regular data on current litigation in the respective Counties of the State and in case of need to assign available district judges to other districts to help clear court calendars, and that any action as to reorganization of the district courts be deferred pending the procurement of adequate data and further study. (Postponed)

RESOLUTION NO. 7

It is the consensus of opinion of the Idaho State Bar that the salaries of all State Judges, both in the Supreme Court and in the District Courts, as well as the

Executive offices of our State Government, are grossly inadequate, and we therefore recommend that the State Bar Commission recommend to the Governor that he lay before the 30th Legislature a request for an increase in such salaries which will be commensurate with the duties of the offices, the high cost of living and the responsibility of such offices. (Adopted)

RESOLUTION NO. 8

BE IT RESOLVED That the Idaho State Bar does bereby recommend to the State Supreme Court that it amend its rule or rules so as to permit the filing of printed of typewritten briefs on appeal. (Adopted)

RESOLUTION NO. 9

WHEREAS, the current codification of the laws of Idaho has demonstrated the need of code revision for the purpose of elimination of obsolete and duplicate laws, the need for continuous study of the substantive law of the state, and the organization, rules, and methods of procedure and practice of the judicial system of the state, the work accomplished by that system and its various parts,

THEREFORE, BE IT RESOLVED by the State Bar of Idaho that the State Legislature be requested to establish a Judicial Council to be composed of all Justices of the State Supreme Court, all Judges of the various District Courts of the state, and three practicing lawyers of the state to be selected annually by the Commissioners of the Idaho State Bar, one from each Commissioner's District of the Idaho State Bar; that such Judicial Council shall meet annually, but shall provide an Executive Committee of not over seven members to conduct the affairs of the council between meetings, such Executive Committee to consist of the Chief Justice of the Supreme Court, one District Judge from each Commissioner's District, and also the three lawyer members of the council.

BE IT RESOLVED FURTHER that the office of the council shall be in the Supreme Court of the State of Idaho at Boise, Idaho, and that the Executive Secretary of the Council shall be the Clerk of the Supreme Court.

* * *

BE IT RESOLVED FURTHER that the Thirtieth Legislature be requested to appropriate the sum of $10,000.00 to effectuate such Council and to meet its expenses during the period from the effective date of the Act and until the end of the state fiscal year, June 30, 1951.

BE IT FURTHER RESOLVED that the Legislative Committee of the State Bar be directed to present a bill to the Legislature for consideration, such bill to embody the objectives herein expressed as nearly as may be deemd practicable. (Postponed).

RESOLUTION NO. 10

WHEREAS The 30th Canon of the Judicial Ethics of the American Bar Association which has been adopted by the Idaho State Bar as part of its Code of Ethics reads as follows:

"While holding a judicial position (a judge) should not become an active candidate either at a party primary or at a general election for any office other than a judicial office. If a judge should decide to become a candidate for any office not judicial, he should resign in order that it cannot

be said that he is using the power or prestige of his judicial position to promote his own candidacy or the success of his party."

AND WHEREAS, Justice Bert H. Miller has filed for a national partisan office without resigning from the Supreme Court of the State of Idaho;

THEREFORE, BE IT RESOLVED: That it is the consensus of the members of this Convention that the action of Justice Miller is in violation of such Canon of Ethics and moreover is in violation of the spirit of the laws and Constitution of the State of Idaho establishing the Judiciary on a non-partisan basis;

AND THAT the action of Justice Miller, unless he promptly bring his status into keeping with the canon above quoted and with the spirit of the non-partisan Judiciary Act, must be condemned;

AND THAT, to the end toward avoiding in the future situations similarly embarassing to the bar and the judiciary of the state, there be recommended for adoption by the 30th Legislature an Amendment of the judiciary Act to provide that any person holding a judicial position shall, on becoming a candidate for a partisan non-judicial public office thereby be deemed to have vacated his judicial office. (Adopted).

MR. ELDER: I might state that what Resolution No. 3 amounts to is that in counties where there is too much probate practice for one judge the Legislative Committee should consider the submission of an amendment to the Constitution to provide for more than one judge in those counties. And further, that as far as transferring any jurisdiction as was suggested in some of the papers that were read here, no action is to be taken at this time but would be deferred until further study had been made.

There is no resolution to the effect that there should be a redistricting of the District Courts of this state and that the Probate Court work be thrown into the District court. So far as the Committee was concerned, it would recommend to this convention that they have a more complete report before any redistricting is done of the courts of Idaho.

R. D. MERRILL: I wonder if you would explain resolution No. 3. I don't understand what counties, if any, are overcrowded in the Probate Court.

MR. ELDER: I am not too well informed, but members of the Bar appeared before the Resolutions Committee—Ada County, was one—and stated that they have a great deal of Probate work and that an additional Probate Judge there would be of great assistance. I assume the same situation exists in Pocatello. At least that was inferred at the committee meeting. The Committee did not intend that there be two Probate Judges in every county. Where the necessity exists, the Legislature should have the power to authorize the election of an additional judge.

J. H. FELTON: Adding to the Probate Court or perpetuating it is out of line with the recommendation of our Judicial Committee, the recommendation of Justice Budge, and it is certainly out of line with all of our experience in the practice of divided probate law in Idaho. I have taken a number of matters to the Supreme Court in reference to probate work simply because, under our probate system, we could not tell whether the jurisdiction of a particular matter was in the Probate Court or the District Court. I have also stepped across the line into the State of Washington where the probate jurisdiction is a part of the jurisdiction of the superior court, not like in Montana and California where it is a separate court but handled by the superior courts. In Washington you are able to walk into a Probate Court, and you can quiet title to your property. You can handle everything in it.

If I had the time I would have ready, as a substitute for that resolution, a resolution simply taking the jurisdiction of the Probate Court away and giving it to the District Court. That is the system that will bring some relief in our practice regarding questions of jurisdiction that are constantly raised every time we meet on an estate case. In other words, when we now go into the Probate Court, it is said we should be in the District Court, and when we do to the District Court, it is said we should be in the Probate Court. For example: Any trust that arises out of a will.

Any time that you help this Probate Court system, you are adding to your difficulties another question of jurisdiction which will be upon your heads as it has been upon mine.

Our Resolutions Committee has asked us to disregard the good advice which has been given us by a Judge who has grown old in the service of the judiciary and many committees of this Bar over the years and again to place our seal of approval on the Probate Court. For me, I will have none of it.

ALFRED C. CORDON: One of my principal reasons for my belief in the need for change is that sooner or later I believe all of us will be in favor of it. I believe we are in favor of it right now—the transfer of probate jurisdiction to the District Courts. There has been talk about District Courts not having enough work. If the probate jurisdiction is transferred to them, we would not have to eliminate any District Courts because they are not busy enough. Until we get around to the question of studying that problem, I believe we should leave the Probate Courts where they are, and for that reason I am opposed to this resolution No. 3.

MR. ELDER: I might explain that the Committee felt it did not have sufficient information with respect to the entire reorganization of the courts. If you are going to abolish the Probate Court, it should be done at the time you made your entire reorganization plan. The fact that perhaps one or two of the counties were overworked was the reason for this resolution.

MARSHALL CHAPMAN: In view of the fact that the Resolutions Committee states that the Idaho State Bar is not ready to meet the issues of the Judicial Reorganization, Selection of Judges and various other important questions which have been reported to this convention, and in view of the fact that if this Association does not take some action on these important matters prior to the 1949 Legislature—if it goes over now it goes over for another 10 or 20 years, and if it is going to be done, it must be done now—I move that a committee be appointed and instructed to report to a special session of the Idaho State Bar to be held at Boise, prior to the Legislative Session of 1949; that every lawyer in this state be notified; that there be no pleasure at such meeting but that we get down to business and thresh this important issue out; that no further discussion be had here on this matter.

If we can salvage this program, or any portion of it, we will not only have done ourselves some good but the people of Idaho. Rather than have the Resolutions Committee wreck the entire program, let us reconvene in December with another committee's report and thresh this out.

J. H. FELTON: I second that motion.

MARSHALL CHAPMAN: I mean not only the resolutions before the convention involving the Probate Courts, the matter of reorganization, the matter of the Judicial Council, salaries, retirement, but all of the inter-allied questions should be

referred to this special committee, and that committee should report to the Idaho State Bar in December.

O. R. BAUM: I move the motion be tabled.

The motion was duly seconded.

PRES. SMITH: Let's have a vote on the motion to table.

Whereupon a standing vote was taken and the motion to table was lost.

DAVID DOANE: Mr. President: It is a good idea for the State Bar to take some action on these very important matters and that it does it before the next Legislative Session. I am very sorry that these reports weren't adequate enough so that some crystallized action could be taken on these matters at this time. But I think many of the members will agree that there is not enough adequate and reliable information to do anything now.

However, Mr. Chapman did not separate some things that can be separated. I do not see any reason why we can't pass a resolution wherein we express our desire to increase the salaries of the Judges. I think there is 100% agreement on that. We can do that whether we have a redistricting or not. Would Mr. Chapman be willing to redraw his motion?

HOWARD R. STINSON: I think that for the information of all here, Mr. Chapman should go through these resolutions now to find which ones are included in his proposal. There are several along the line of Mr. Doane's.

MARSHALL CHAPMAN: The difficulty is that the Resolutions Committee failed to propose adequate resolutions covering the unification plan or adopt the reorganization plan. It was because of the lack of resolutions that I put it in that form.

MR. STINSON: I appreciate your problem, but I think most of the matters are there in resolutions before the convention. I think we are unable to identify them with your motion. There are others outside of the scope of the motion.

MR. CHAPMAN: I have no objection to clarifying the motion by designating resolutions 3, 5, 6 and 9. I think those include the ones that should come within my motion. The motion would refer the subject matter of those resolutions back to a committee for further study, and a definite, concrete plan would be presented at a special session of the Idaho State Bar prior to the 1949 Legislature. I did not eliminate the resolution for increased pay for the judges. That is still before the convention.

PRES. SMITH: I understand the motion now is that the subject matter of the proposed Resolutions 3, 5, 6 and 9 be postponed at this time, and that the same be referred to a special committee for further study. The committee is to be appointed by the Commissioners of the Idaho State Bar, and the subject matter then be presented at a special meeting of the Idaho State Bar to be called upon notice and held during early December, 1948.

MR. CHAPMAN: That is correct, except that the matters of reorganization and unification would be before that committee for a concrete plan to be reported at this meeting.

PRES. SMITH: Does the assembly understand the question?

Whereupon a vote was taken and the motion made by Mr. Chapman carried.

O. W. WORTHWINE: This may be a technical point, but there is one question

I am not satisfied about. It is about a member of the judiciary becoming a candidate for public office (Resolution No. 10). I understand it asks for enactment of legislation which will make the office vacant.

R. P. PARRY: In line with Mr. Worthwine's thought, I move we adopt all the resolutions except Resolution No. 10.

MR. WORTHWINE: I second the motion.

Whereupon the motion was put to a vote and carried.

PRES. SMITH: Mr. Chairman, will you read Resolution No. 10?

Whereupon Resolution No. 10 was read by Mr. Elder.

MR. ELDER: I move the adoption of Resolution No. 10.

T. J. JONES: I move the resolution be tabled.

A. G. SATHRE: I second the later motion.

Whereupon a standing vote was taken, and the motion to table was lost.

JAMES H. HAWLEY: I move for a division of the resolution into two questions. The latter part provides that the Legislative Committee be instructed to submit to the Legislature suggested legislation. That part I wish voted upon separately from the other.

The motion was seconded, put to a vote and carried.

JAMES H. HAWLEY: I move that in the submission of these two questions as they now are that the latter part be submitted to the convention first. Apparently it is not controversial.

MR. SATHRE: I second the motion.

PRES. SMITH: You have heard the motion, and it has been seconded. Is there any discussion?

Whereupon the motion was put to a vote and carried.

PRES. SMITH: Mr. Chairman, will you read the latter part first?

Whereupon Mr. Elder read the last half of Resolution No. 10.

JESS B. HAWLEY: I beg leave to submit a substitute for Resolution No. 10. I don't think separation has been made except for convenience and does not destroy the right to substitute for the whole resolution.

PRES. SMITH: We have under consideration at this time just the second portion of the proposed resolution in accordance with the proposition just carried.

MR. HAWLEY: I understand that, but I am trying to be helpful instead of being an obstructionist or being partisan in the matter. I have a resolution here which will be an entire substitute for Resolution No. 10, and I think it is proper to offer that resolution at this time, and the only time, before any part of Resolution No. 10 is discussed or voted upon—at least voted upon. I move to substitute the following:

That the customary method of examining and deciding charges of unethical and wrongful conduct of an Idaho attorney, followed since the organization of this Bar, be used in the situation involving Mr. Justice Miller, and

Further, that the Bar refrain from passing on the merits of such situation in the absence of Justice Miller or any written charges against him or served upon him or without hearing his defense, if any he has, and

Further, that we affirm our adherence to the American rule and right that no man is presumed guilty until he is proven guilty.

(The motion to substitute was seconded).

Now, I make that substitute because of the fact that there is a lot of feeling among us here. I personally have no feeling one way or the other in the matter. I know I have no defense of Justice Miller or anyone else in mind. But I do believe that we have a method under which over 50 trials and hearings have been held—the Secretary could tell you the number—concerning such charges. And you will find that there has been uniformity. They followed the pattern of a charge being sent into the Commission, and then the Commission orders or does not order, as it decides, a hearing on those charges, appoints a hearing committee, notifies the persons in charge, and when that committee meets it notifies the accused. He has an opportunity to present his defense. And then if he is found guilty, or if he is found innocent, the results are given to the Commission, and they agree or do not agree, and then they recommend what they believe should be done to the accused and pass it on to the Supreme Court which eventually passed on the subject.

That method bas been followed so often that everybody here knows about it. I can see no reason, because this matter has been put in public print or because Jnstice Miller is a member of the Supreme Court, or for any other reason, why that proceeding should not be followed.

It has prestige. It is fair. I don't believe that this is the right way to charge a man—all of us together, as a bar, charging the man. We will deprive ourselves of the right to try him, because we have already found him guilty, and he can make no defense against what we have done. That isn't fair, and it isn't right .

I am not saying for a moment that the Canon of Ethics is wrong. I try to adhere to them. I believe in them. And they are part of our rules of conduct, and there is absolutely no reason for putting them in a legislative enactment or making any further reference to them. You are but guilding the lily when you do that.

We already have sufficient power to try a man for a violation of ethics, and he ought to be tried. He ought to be accused. And if he is guilty, he ought to be disciplined for a violation of the ethics, whether he be a Justice of the Supreme Court or an ordinary humble lawyer. There should be no difference among them.

I don't believe that the merits of the case have been discussed except in the papers, and judging from what the papers have said, Mr. Justice Miller is guilty. But he may have some defense. He may plead ignorance (laughter). I don't know. I am not smart enough to know.

I call attention to the fact that it has always been a principle of American justice, and it has been applicable to the lowest man in the dirt as well as the highest man on the throne of officialdom, that when he is charged with a crime or charged with wrongdoing, he is presumed to be innocent until his guilt is established.

SAM S. GRIFFIN: Mr. Chairman, I want to support Mr. Hawley's substitute. It seems to me that as far as this convention can go would be to instruct either the Supreme Court or the Board or some committee, if it wants to form one, to file charges under our system of discipline—and this would be discipline. Any man may

make a charge of unprofessional conduct, and the Court or Bar Commission which has knowledge of the fact, on its own initiative, can institute proceedings.

No matter how we feel in the particular case or how we may feel about the necessary proof, the fact nevertheless remains, as Mr. Hawley has said, that we have no right to condemn Justice Miller or any other member of the Bar until he has had an opportunity to be heard.

I have heard it said casually at this meeting that you can't do anything to him anyhow, if you find him guilty. That isn't the question, as I see it. If there is nothing practical that can be done except find him guilty, then that is where we will have to end. My own feelings and your own feelings as to whether he has violated the Canon of Ethics, I think, have nothing to do with the procedure which we should adopt in determining this matter.

JAMES H. HAWLEY: I move that no further consideration of Resolution No. 10, both in its original form and as it has been divided for discussion be given.

PRES. SMITH: The substitute motion is before the house at this time. The motion is whether Mr. Jess Hawley's substitute motion shall be adopted. Are you ready for the question?

GEORGE VAN DE STEEG: I would make this observation. I am in sympathy with what Mr. Hawley said by reason of the fact that we single out individuals and, therefore, virtually make a charge against him. Certainly this convention doesn't want to go on record as not being in favor of that Canon which has been read. And whether or not the convention wants to have the legislation as provided for in the last paragraph of the resolution, I don't know. But I am just suggesting that in this resolution, as read, we delete all that portion which specifically refers to Justice Miller. Then, as I remember it, all we have left is a statement that we are in favor of the Canon as read, and we are going to ask the Legislature to adopt certain legislation. By deleting the reference to Justice Miller, it seems to me, we would be more apt to get on common ground and be able to be in favor of something. One thing I certainly would not desire to see this convention do, and that is virtually repudiate that Canon. I don't believe we can afford to do that. I don't believe we want to. We have ourselves in a parliamentary snarl here now, and I don't think another substitute motion from me would help very much.

O. R. BAUM: I don't believee, Mr. van de Steeg, you understood the motion. The motion before the convention had no reference to Justice Miller whatsoever. I ask that Mr. Elder read the latter part of Resolution No. 10, which caused the substitute motion to be made. I believe I am correct.

MR. VAN DE STEEG: But Mr. Hawley's motion covered the whole thing.

O. R. BAUM: I ask that the Chairman read the latter part of Resolution 10.

FROM THE FLOOR: Will you please announce what happened to the substitute motion that was voted on?

PRES. SMITH: I am still in doubt as to the vote. But we can get at this now. Mr. Chairman, will you read the latter part of Resolution No. 10? I am not trying to railroad anything through this meeting. It is going to be conducted to the end that it be fully heard.

Whereupon Mr. Elder read the latter part of Resolution No. 10.

PRES. SMITH: Mr. Hawley's motion is before the house for a rising vote.

DAVID DOANE: Have Mr. Hawley read his motion again.

JES HAWLEY: Resolved that the customary method of examining and deciding charges of unethical and wrongful conduct of an attorney, followed since the organization of this Bar, be used in the situation involving Mr. Justice Miller, and

Further, that the Bar refrain from passing on the merits of the situation in the absence of any written charges against Justice Miller and served upon him or without hearing his defense, and

Further, that we affirm our adherence to the American rule of right that no man is presumed guilty until he is proven guilty.

That is the substitute motion I made.

PRES. SMITH: The Chair is in doubt as to the results of the vote, and the Chair now asks for a rising vote. You are voting on the adoption of the substitute motion made by Mr. Hawley and reiterated by him just now. There was considerable discussion on Mr. Hawley's motion, but the Chair will throw it open for some more discussion. If you wish to say something, go ahead.

J. F. MARTIN: I see no occasion whatsoever to reaffirm our faith in Canon 30. We either have faith in it, or we do not. We have had faith in it all of these years or we have not. If there is any ambiguity in the second portion of Canon 30, I am unable to find it, nor have I heard a word from any man on this floor pointing it out.

This Canon says the holder of a non-partisan judicial office shall not become a candidate either at a party primary or at a party election. That seems to me to be plain, and if there is any ambiguity about it, then let's say that our Canon is ambiguous.

There seems to me to be no occasion for a reaffirmance of our faith unless we are going to white-wash somebody for a violation of it just because that somebody is someone before whom I must stand and argue the rights of my clients. And I am not going to white-wash him just because he is on the Supreme Bench. I will condemn him quicker because he is on the Supreme Bench than I would any youngster who had committed a more flagrant violation.

My good friend Mr. Hawley says that he is not here. That he has had no time and opportunity to defend himself. I am assuming that the Secretary did his duty I received a notice, and each of you received a notice. If he had wanted to be here, I would say that he would have been here.

Yesterday morning, in our President's address, he stated that Justice Miller had been advised of this Canon prior to the filing of his nomination. The President's message to us stated that Justice Miller had been told and had been shown that Canon. The morning press carried a two column headline "Miller violating ethics in keeping post; Bar Association head says Supreme Court Justice should have quit job on announcing candidacy for the Senate." The statement further says, "Asked if he had any comment, Justice Miller replied, 'None at all.'"

Now, for me, these facts are plain. If the Bar of the State of Idaho wants to swallow this, let's do it. I have no more faith in that substiute motion of yours than I have that I can fly right through this roof at this moment, nor do I have any more faith that anything will ever come of that motion, nor do I have any faith that no matter what motion is adopted here that anything will ever come of it.

The biggest argument that you have heard, and the only logical argument that

I have heard, is that the adoption of any resolution here is apt to make him more votes. And I think every one of you have heard the same argument. I don't care how many votes he gets. That I am not interested in. But I am vitally interested in knowing whether or not the Bar of the State of Idaho is going to put its stamp of approval upon a man whom we have elevated to the highest position, as far as the Bar is concerned, in the State of Idaho, and who has totally disregarded our Canon of Ethics.

I would say to you that Justice Miller must have read that paper this morning. He could have sent word here. He could, for all I know, have been here. He must have known the comment this calls for. He must have read in the press the statement of his associate, Justice Holden. Justice Holden said, "I would feel obligated to resign, if I were to file my declaration of candidacy." You can talk about the presumption of innocence all you please. You can talk of the American right to defend yourself. And I will defend him to the last ditch, because he has that right. And I will, as long as there is breath in me, defend his rights to defend himself, but I say to you, why isn't he doing it?

The only thing I am interested in and concerned about is that this Bar Association has the nerve to stand up on its hind legs, and, because he is a Judge of the Supreme Court, not attempt to white-wash him.

We have just gotten through voting a resolution to increase the salaries of that kind of element? Let me tell you that I have spent the last moment I will ever spend to get something for him. (Applause)

W. H. LANGROISE: We seem to have developed quite a bit of feeling on the subject. I quite agree with the sentiment here expressed that there is no reason for reaffirmance of any Canon. But on the other hand, it has been obvious throughout this meeting that our Canons are not sufficient to meet the situation that we are faced with. That is why I think that part of the resolution which was originally presented by the Chairman of the Resolutions Committee should be adopted. I do not believe that we should go ahead and reaffirm that which we all know and under which we are supposed to live and under which we may be disciplined by the Commission. I believe that it is the duty of the Commission to go ahead and take the normal course of disciplinary proceedings against anyone who violates those Canons.

But to obviate the possibility in the future of there ever being this question again, I think this convention should adopt a resolution requesting the Legislature to enact an Act requiring any man holding a non-political office to retire or resign from that office before he seeks a political office. If we don't do that, we are going to nullify everything we hoped to have when we created a non-political judiciary.

For that reason I am against any of the substitute motions. I believe that as lawyers we should accept that responsibility which is ours and not permit another situation such as we have to arise again. And I believe that our own Commissioners and our own organization will proceed to take the disciplinary action which they should.

PRES. SMITH: Is there any further discussion? If not, we have two substitute motions to dispose of here.

JESS HAWLEY: Mr. President, as the maker of the substitute motion, I would like to say that the actuating motive I have is the legal profession's reputation and the protection of this Bar. I am not interested in the fortunes of any man. It doesn't make any difference to me who he is. But I don't like to see us act in a disorderly way or be forced by public opinion or be forced by newspapers to depart from the usual

manner that has proven so satisfactory for years. I don't like to see us, without a hearing, find the man guilty. The next time it happens it might be you or it might be me or it might be someone else, and the Bar shouldn't find us guilty of some violation of a duty to a client without a hearing. It just doesn't seem to me to be good sense. It occurs to me that it will hurt the reputation of the Bar with the people —that we are afraid of what the newspapers will say, that we are mixing ourselves in a political situation, and I don't want any of those things to happen. We have worked too hard to build up the Bar. Let's not, by precipitate action or by a sudden whirl of passion, be brought to the point of abandoning what we have worked for so hard since 1919. That is my only purpose. And I think that my substitute motion might be amended. There might be some things taken out of it, towards the last, and I won't object to that.

I don't believe that in a separate resolution there would be any harm in calling attention to the Canon of Ethics but that ought to be by separate resolution, Mr. President. I beg of you to think of our profession and of our Bar first and to help us and not injure us in the eyes of the public, nor cause strife and dissention and split up our Bar Association. That is all I ask to do by this resolution.

FROM THE FLOOR: Mr. President, surely it does not take a resolution of this State Bar in annual session to bring necessary action against an individual who has violated the ethics of this Bar. For that reason I do not see the necessity of discussing this particular proposition. The President of the Association has charge of the violations of the Code of Ethics, and certainly the machinery is set up within the Association to bring the necessary proceedings without a motion in the annual session. Furthermore, the name has been given to the press, the charge has been made, and by passing the last half of Resolution No. 10 we certainly do rectify the situation that does exist without mentioning names. I think the machinery as it exists will take care of the situation without a motion that it be set in motion.

MR. SATHRE: I am not attempting to defend Justice Miller for one single moment. But the fact is that even though a man is on the Supreme Court or the District Court, he may be subject to disbarment. He might be subject to some sort of action. And as I understand the procedure of our Commission ever since it was organized, a man first has charges preferred against him. They are then presented to this Board or to this Commission. The Commission acts, and that action is presented to the Supreme Court.

Mr. Martin says that if Justice Miller wanted to defend himself on charges of an action of this kind, he has had plenty of time to be here. I don't know what President Smith has done as far as any presentation having been made to Justice Miller that he was charged with violating this Canon. He has undoubtedly said something, but I am talking about presenting it in a regular manner. I don't see anything in Canon 30 of the American Bar Association that permits this Association to condemn any member of the Bar other than in its regular way.

LAURAL E. ELAM: I hesitate very much to take up any time of the Association, but I feel that one member of the committee which gave so much consideration to this proposition should speak in behalf of the committee. This committee met last night and stayed together until 1:00 o'clock. We met again this morning at 8:00 o'clock and started out again on this proposition. We wanted to be fair to Miller. We wanted to be fair to the Association. When this committee met and we read Canon 30, there wasn't any question in our minds as to what Canon 30 meant. A second grader could go over that and know what that Canon meant. When we read Rule 51 of the Idaho Supreme Court, upon which Justice Miller sits, there wasn't any question in our minds as to what Rule 51 meant. And there isn't any

question in your minds. Canon 30 was adopted by the Rule of the Idaho Supreme Court, and this man has been sitting on the Idaho Supreme Court long enough so that he has certainly read that Rule.

Now, the thing had to be presented in a way that was fair to Justice Miller. I think you have overlooked, in reading this resolution and listening to it, one proposition. This resolution does not condemn Justice Miller. This resolution calls his attention to Canon 30. It calls his attention to Rule 51. It calls his attention to the fact that he has not resigned. Those facts are all known. It goes further, and it says that unless he does resign or unless he complies with Canon 30, then he is condemned by the Idaho State Bar. That is the resolution, the first part of it, which we are attempting to get rid of by the substitute motion.

It doesn't condemn him. If he does not comply with Canon 30, then we do condemn him. I think everything is plain. And I think the Idaho State Bar should have the guts to stand by what has been adopted by the American Bar Association and has been adopted by our own Idaho Supreme Court, and we should not back down just because the man involved in this case happens to be a member of the State Supreme Court.

DAVID DOANE: Mr. President, I would like to take just one moment to point out to Mr. Hawley and to those who might adhere to his proposal that there is nothing in this resolution, as just explained by Mr. Elam, which prevents the customary proceedings to take place. I certainly endorse everything that Mr. Elam has said and Mr. Langroise. I think that if this professional body does not take some very definite and forceful action such as espoused by that resolution we are going to receive much more contempt on the part of the public than if we just let things take their natural course.

T. J. JONES: I think that the rules and procedure have been outlined for proceedings of this type and kind. Why should the Bar Association in this particular case do any different than they do in any other case of disciplinary proceedings? I believe that is the rule that should be followed. Just because our ethics have been violated is no reason why we should subscribe to it.

HARRY POVEY: I move to table the substitute motion made by Jess Hawley.

Whereupon the motion was duly seconded from the floor, was put to a vote and carried.

PRES. SMITH: We will now vote on the original question, the second paragraph of Resolution No. 10.

Whereupon the matter was put to a vote and carried.

PRES. SMITH: We will now vote on the first paragraph of Resolution No. 10.

W. H. LANGROISE: Mr. President, I am opposed to this, and I am opposed to it for only one reason. If Mr. Smith or Mr. Jones of the Bar Association had violated any Canon of Ethics and were subject to disciplinary action, they would not receive the attention of this convention. In other words, the Commission would proceed against them in the normal manner and in the regular way. It seems unsound that you pick Justice Miller or any other individual. I think every member of this convention has every right to believe that our Commission will take the necessary disciplinary action. And I don't believe that just because he is running for a political office that we should come out as a body and give him any special attention.

PRES. SMITH: Are you ready for the question? I am calling for a rising vote.

Whereupon a rising vote was taken and Resolution 10 declared adopted.

MR. ELDER: Mr. President, that concludes the report of the Resolutions Committee.

PRES. SMITH: Thank you. Mr. Hunt, will you bring up Mr. Merrill?

E. E. HUNT: Mr. President, I present Mr. R. D. Merrill, selected by the Bar Commission as the new President of the Idaho State Bar.

PRES. SMITH: Mr. Merrill, I congratulate you. The coming year, perhaps, will be a more peaceful year than I have had.

Members of the Idaho State Bar, President Merrill. (Applause).

PRES. MERRILL: Thank you very much, gentlemen. During the coming year, with the help of the two able Commissioners, I assure you that we will endeavor to carry out your wishes.

Is there any further business?

We stand adjourned.

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