PROCEEDINGS

of the

IDAHO STATE BAR

VOLUME XXVIII, 1954

Twenty-Eighth Annual Meeting

SUN VALLEY, IDAHO

July 8, 9, 10, 1954

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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.
T. M. ROBERTSON, Twin Falls, 1951-1954

EASTERN DIVISION

N. D. JACKSON, St. Anthony, 1923-25.
A. L. MERRILL, Pocatello, 1925-28.
E. A. OWENS, 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.
RALPH LITTON, St. Anthony, 1949-52

NORTHERN DIVISION

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

Present Commissioners and Officers

L. F. RACINE, Jr., Pocatello, President
RUSSELL S. RANDALL, Lewiston, Vice-President
WILLIS E. SULLIVAN, Boise
PAUL B. ENNIS, Boise, Secretary

Local Bar Associations

Clearwater (2nd and 10th Judicial Districts) — Wynne M. Blake, President, Lewiston; Reed Clements, Secretary, Lewiston.

Third Judicial District — Don McClenahan, President, Boise; J. Charles Blanton, Secretary, Boise.

Southern Idaho (5th and 6th Judicial District) — Jayson C. Holladay, President, Pocatello; Archie Service, Secretary, Pocatello.

Seventh Distriet — Frank Meek, Caldwell, President; Dwaine Welch, Payette, Secretary.

Eighth Distriet — Eugene Miller, President, Coeur d'Alene; J. Ray Cox, Jr., Secretary, Coeur d'Alene.

Ninth District — Vern Kidwell, President, Idaho Falls; Edward W. Pike, Secretary, Idaho Falls.

Eleventh District (11th and 4th Judicial Districts) — Adonis Nielson, President; Burley; Herman Bedke, Secretary, Burley.

Shoshone County — John J. Peacock, President, Kellogg; Richard G. Magnuson, Secretary, Wallace.

PROCEEDINGS

Annual Meeting

IDAHO STATE BAR

Sun Valley, Idaho

July 8-9-10, 1954

Thursday, July 8, 1954, 1:30 p.m.

PRESIDENT ROBERTSON: The 28th annual meeting of the Idaho Bar is now in session. We have asked the Rev. Father O'Connor, Pastor of St. Charles Roman Catholic Church of Hailey to give the invocation.

FATHER O'CONNOR: We pray Thee, Oh God almighty, wisdom and justice to authorities rightly administered, laws enacted and judgments decreed. Assist with this Holy Spirit of counsel and fortitude, the President of the United States, that his administration may be conducted with righteousness and be eminently useful to Thy people over whom he presides by encouraging due respect for the virtue and religion, by faithful execution of the laws in justice and mercy, and by restraining vice and immorality. Let the light of Thy divine wisdom direct the deliberations of congress and shine forth in all the proceedings and laws framed in our rules in government so that they may tend to the preservation of peace and the promotion of national happiness, the increase of industry, sobriety and useful knowledge and may perpetuate in us the blessings of liberty.

We recommend likewise to Thy unbounded mercy all our brethren and fellow citizens throughout the United States, that they may be blessed in the knowledge and sanctified in the observance of Thy most holy law, and that they may be preserved in union and in that peace which the world cannot give, and after enjoying the blessings of this life, be admitted into eternal life. Amen.

PRESIDENT ROBERTSON: Thank you, Father O'Connor.

Returning to the business that we have on the agenda, I will at this time appoint the Resolutions Committee. From the Northern Division, I will appoint Mr. Robert Elder, Mr. Robert Brown, and Mr. J. Ward Arney from the Western Division, Mr. Jess Hawley, Mr. Oscar Worthwine and Mr. Frank Meek; and from the Eastern Division, Mr. John Herndon, Mr. Ralph Jones and Mr. Robert Kidwell. I will appoint Mr. Jess Hawley chairman of the committee. The committee will have room 233-A in the Lodge to conduct its meetings. Our secretary, Mr. Paul Ennis, will act as secretary of your committee and furnish you with stenographic services and such help as you need. The committee report will be made at the business meeting on Saturday morning.

The Canvassing Committee, which will count the ballots for the election of the new Commissioner from the Western Division, will be composed of Mr. Kent Naylor, Mr. Adonis Nielson and Mr. Ray McNichols. Mr. Naylor will be chairman of that committee. You may contact Mr. Ennis to arrange to get the ballots, and your report is, I believe, due tomorrow afternoon.

At this time we will receive the annual report of Mr. Ennis, our secretary.

SECRETARY'S REPORT

Mr. President, Members of the Board of Commissioners, Members of the Bar and Distinguished Guests:

If I may impose upon your patience, I will first give you the usual statistical information included in the Secretary's annual report with respect to the financial situation of the Idaho State Bar. You are aware that our sources of income are license fees, bar examination fees and sale of publications, all of which funds are deposited with the State Treasurer to the credit of the Idaho State Bar fund. All expenditures are upon state warrant after approval by the Board of Commissioners and the State Board of Examiners. The books of account maintained in my office are audited periodically by the State Auditor and the following receipts and expenditures are shown for the period June 1, 1953, to June 1, 1954:

EXPENDITURES—June 1, 1953, to June 1, 1954:

Personal Service	$ 3,383.06
Travel Expense	4,031.58
*Other Miscellaneous Expense	3,301.39
Refunds	150.00
Social Security Fund	57.56
	$10,923.59
RECEIPTS—June 1, 1953, to June 1, 1954:	$10,630.04
Balance, June 1, 1953	14,977.91
	25,607.95
Less Expense	10,923.59
Balance, June 1, 1954	**$14,684.36

* Pringting, Publications, Supplies and Other Miscellaneous Expense.

**This balance checks with the State Auditor's records.

A separate fund known as the Idaho State Bar Trust Fund is maintained for special purposes and the status of that account is as follows:

Assets:

	6/1/53	6/1/54
Accounts Receivable:		
State of Idaho	$ 13.42	$ 57.44
Washington State Bar	---.--	102.41
	13.42	159.85
Cash	.10	.10
Deposit in First National Bank	1,794.69	1,728.89
	$ 1,808.20	$ 1,888.84
Gain	80.64	
	$ 1,888.84	$ 1,888.84

Gain:

Unexpended Bar Registration Fee—1953 Meeting	$ 132.24

Expenses:

Interstate Bar Meeting	51.60
	$ 80.64

As to the membership in the Idaho State Bar, the following figures indicate membership within the three divisions of the Idaho State Bar as follows:

	1953	1954	Increase
Northern Division	131	137	4.3%
Western Division	312	323	3.4%
Eastern Division	141	145	2.6%
Military Service	*	12	-.-
Out of State Membership	29	29	-.-
Total	613	646	5.1%

*Accurate information is lacking as to the number of members in service at that time.

The distribution of the membership in local Bars and the basis for determining the voting power of each local Bar under Rule 185 at this meeting is:

Shoshone County Bar Association	24
Clearwater Bar Association	66
Third District Bar Association	164
Southern Idaho Bar Association	89
Seventh District Bar Association	66
Eighth District Bar Association	47
Ninth District Bar Association	56
Eleventh (And Fourth) Distriet Bar Association	93
	605
Military Service	12
Out of State	29
	646

Since the last annual meeting of the Bar, the following deaths have been reported:

Orson T. Soule, Salt Lake City, Utah
Lloyd A. Fenn, Kooskia, Idaho
Henry W. Soule, Idaho Falls, Idaho
S. L. Tipton, Boise, Idaho
William L. Dunn, Twin Falls, Idaho
Dana E. Brinck, Spokane, Washington
Hugh N. Caldwell, Caldwell, Idaho
William T. O'Connor, Long Beach, Cal.
Samuel F. Block, Chicago, Illinois
John D. Whitney, Hailey, Idaho
Rex Kimmell, Portland, Oregon
Lawrence E. Huff, Moscow, Idaho
Charles Cotant, American Falls, Idaho
Frank B. Kinnon, Boise, Idaho
S. T. Lowe, Burley, Idaho
S. T. Hamilton, Twin Falls, Idaho
Edward T. Hawley, Boise, Idaho

In respect to admission to the Bar, two examinations were administered during the past year, one in September, 1953, and the other in April, 1954. In the first examination there were a total of twenty seven applicants, twenty one of whom passed, six of whom failed. In the April examination, nine took it, five passed and four failed. Of the total of thirty-six applicants, twenty-six or 72.2%, successfully passed the examination.

During the past 31 years of its existence as an integrated bar, the Idaho State Bar, through the efforts of its members and officers, voluntarily and unselfishly contributed, has satisfactorily discharged its duties as prescribed by statute and rules of the Supreme Court.

The duties and responsibilities of the Idaho State Bar, as conceived by the Act passed in 1923 by the Idaho legislature making Idaho's Bar the second integrated bar in the nation, are primarily concerned with the granting of the privilege to practice law and its subsequent use, control and regulation to the end that the public shall be properly protected against unprofessional, improper and unauthorized practice of law and unprofressional conduct of members of the Bar. The Act contemplates the Bar's additional responsibility of making investigations, studies and recommendations to the Governor, the Supreme Court, and the legislature on matters relating to the Courts, practice and procedure therein, the practice of the law and the administration of justice in Idaho.

In a broader sense, it is our peculiar responsibility to advance the science of jurisprudence, to improve the administration of justice according to law, to promote legal reform, to elevate standards of integrity, education and public service among the members of the legal profession, to safeguard the proper interests of that profession, to promote friendly relations among its members, and otherwise to assist the Bar of this state in fulfilling its social and professional responsibilities.

Measured in the light of such goals, there is still much that needs to be done. Your Commissioners have asked that I mention some of the matters which they have considered in their efforts to formulate a long range program for the Bar of this state, subject, of course, to your approval. Briefly, my purpose is to bring these proposed projects to your attention so that you can assist the Board in determining its course during the coming year.

RULES OF CIVIL PROCEDURE

For several years the question of whether or not the Bar should favor revision of Idaho Rules of Civil Procedure to bring them into substantial conformity with Federal Rules of Civil Procedure has been the subject of discussion and debate. This activity has not been productive.

It must be recognized at the outset that without the agreement and support of a majority of the individual members of the Bar any efforts to procure a revision of procedural rules will be ineffective. We must also realize that a large segment of our Bar is more or less unfamiliar with the Federal rules, and, therefore, part of the project will be an educational process.

Considering the innate conservatism of the legal mind, a characteristic which is usually sound and useful, it is too much to expect that any proposals representing a departure from traditional methods of pleading and practice will meet with immediate or universal acceptance of the bench or bar. The first and basic question which must be answered is whether or not our growth and development in this state has brought about or will bring about changes in the volume and type of litigation which require new and improved methods of approach to the administration of justice. If this be answered in the affirmative, then the bench and bar must approach the task of revision in a spirit of cooperation. We can understand the nature of that task if we look to the experiences in other states where it has been accomplished. Let me briefly outline the experience in two of these states.

In Minnesota the legislature adopted an act directing that the Supreme Court appoint an advisory committee to assist in considering and preparing the rules. An attorney was employed to classify and correlate to the proposed rules the Minnesota statutes governing procedure. Thereafter, over a period of 9 months, two other attorneys performed the task of research and prepared initial drafts of rules. Their work was reviewed by the committee as it progressed. Changes were made when required by difference between state and federal court jurisdictions. Many Minnesota practices deemed superior to those prescribed by the Federal Rules, or too firmly embedded to permit change, were retained. Because of the novel and somewhat drastic character of discovery procedures and the many protests made against them, the Minnesota rules afford additional protection against abuses of those procedures. The tentative drafts were submitted to the scrutiny of every member of the bar. Those drafts stated the proposed new rule, and included under each was a statement of its scope and meaning, the differences between it and the former state practice and between it and the Federal Rule. The explanatory material cited the former Minnesota law as it existed by virtue of the statute, district court rules relating thereto and court decisions, as well as law review comments. It also cited the parallel Federal Rule, with notes of the Federal Advisory Committee, federal court decisions and law review comments. The work took four years of labor and assistance using men on the editorial staff of West Publishing Company. I have a copy of one volume of the new Minnesota rules which you may examine if you desire.

The New Jersey procedure was somewhat simplified by reason of the fact that the Supreme Court took the initiative, prepared an original draft and submitted it to the bench and bar for criticism, carefully studied it at several annual Judicial Conferenees at which representatives of the legal profession and the legislative and executive branches of the government and the lay public attended and participated in an exchange of ideas thereon. The work covered a period of 5 years.

Any approach which contemplates anything less than an all-out effort is destined to failure. In any event, funds to carry out such work are required. Fortunately, the Idaho Code Commission Act was amended in 1953 in such manner that funds available to the Commission may be used, in the descretion of the Code Commissioners, to give financial assistance to the project of revising our Rules of Procedure.

I'm sure the Bar Commission would welcome the opportunity to meet with the members of the Supreme Court, the members of the Code Commission and select representatives of the District Court Judges and the general membership of the Bar to make preliminary inquiry into the matter. Such a movement could well be initiated by an expression of opinion of the members of the Bar at this meeting.

COMMITTEE OF LOCAL BAR ASSOCIATION PRESIDENTS

Many of you will recall that in 1941 a Committee of Local Bar Association Presidents was created primarily as a war emergency measure with the thought that if travel restrictions prevented the holding of an annual meeting, the local presidents, representing the lawyers in their associations, would meet with the Commissioners to transact the business of the Bar. The functioning of this Committee pointed out an unexpected benefit—that of closer cooperation and liason between the Commission and the local associations. The heart of the problem of making our state association an effective group is that of arousing and maintaining interest on the part of the local association and its individual members in State Bar activities. Reactivation of this Committee and at least semi-annual meetings would assist the Board immeasurably in carrying out activities of the Bar.

EXAMINING AND ADMISSIONS COMMITTEE

It has been recommended repeatedly at previous annual meetings that our Commissioners be relieved of the responsibility of serving on our Examining and Admissions Committee. Under our improved proeedure of administering bar examinations no less than 10 full days, annually, are devoted by eaeh of the Commissioners as members of the Examining Committee to do the job of preparing, giving and grading bar examinations. Practical considerations limit the time which your Commissioners can devote to Bar work and if they were to continue to supervise the work of the committee but were otherwise freed of the responsibilities of that committee, some of the other projects of the Bar could receive the attention of the Commissioners that is required.

STANDING COMMITTEES

In 1949 the Board of Governors of the American Bar authorized the appointment of a Standing Committee on Coordination of Bar Activities. That committee has encouraged a trend toward standarizing names and scope of corresponding or parallel committees and sections in the various state associations, using those of the American Bar Association which are applicable as models. With the establishment of the national law center in Chicago next August, this work of coordination will be further facilitated. While your Commissioners have always cooperated with the officers and committees of the American Bar Association, more effective work and cooperation could be accomplished through standing committees of the Idaho Bar, with one or more members of the Idaho committee serving on the corresponding American Bar Association committee. Standing Idaho committees on "Unauthorized Practice of Law," "Professional Ethics and Grievances," "Public Relations," "Lawyer Referral and Legal Aid," "Continuing Legal Education" are only a few of the important ones which could render sorely needed services to Idaho lawyers and to the people of the state. Merely to appoint such committees without providing for regular and periodic meetings would be a useless gesture. The members of the committee must be willing to contribute their time and energy to carrying out the objects of the committee.

REVISION OF DISCIPLINARY RULES OF PROCEDURE

Upon the filing of a complaint against an Idaho attorney for unethical or improper conduct, the complaint and the public have the right to expect a speedy disposition of the matter. Moreover, the attorney against whom the complaint is filed, particularly if the charge be untrue or unfounded, is vitally interested and entitled to a prompt determination. Unfortunately, under existing procedural rules of the Commission, such has not been the experience. A review of procedures used in sister states indicates the need for substantial revision of our rules providing for the creation of standing committees at the local or division level to conduct the hearings, with power to administer oaths and issue subpoenas. The work of revision is now being done by your Commissioners.

LOCAL BAR INSTITUTES

Your commissioners have announced the policy of meeting at various places within the state to coincide with a meeting of the local bar association. Through such meetings your Commissioners will have the opportunity to become better acquainted with the individual members of the local bar, to get their advice, and in general, to exchange ideas. In conjunction with such meetings the Commission and the local Bar may co-sponsor local bar institutes in line with the growing practice throughout the nation to continue the legal education of the members of

the profession. The first, and I believe successful, such meeting and institute was held in Lewiston last April on a trial basis. The Clearwater Bar has asked that future institutes be planned.

At this point you are perhaps wondering why the Board does not proceed under its statutory authority to act upon these recommendations or projects. The answer has perhaps occured to you also—money to do the job.

From my financial report you will observe that we have reached the point during the past two years where income and expense are substantially equal. That, to my way of thinking, is as it should be.

If we are to undertake some or all of the proposals mentioned, we must be prepared to meet the cost necessarily involved. Committee meetings, whether they be for considering new Rules of Civil Procedure, of local bar association presidents, and meetings of the Examining and Admissions Committee, of Standing Committees on Unauthorized Practice of Law, Public Relations, Continuing Legal Education, or the work of any of the committees mentioned, require reimbursement of travel expenses incurred by the individual members. A more efficient disciplinary procedure or the holding of local bar institutes will involve additional expenditures. Perbaps some of this expense can be absorbed by the local association, but for the most part it is fairly attributable to and must be paid by the State Bar.

The question is, is it your desire that your Commissioners undertake these projects? If so, then adequate funds to do the job must be available. It has been suggested that our annual license fee be increased to $20.00 per year. If you believe that such increase should be approved some action must be taken at this meeting so that your Commissioners will be authorized to ask the legislature to amend the licensing act to so provide. May we ask that you give this matter some serious thought in the next day or two and express your opinion at the Saturday morning business session. It has been very pleasant to have served as your Secretary during the past year, and I wish to thank all of you who have responded so splendidly to requests for assistance.

PRESIDENT ROBERTSON: Thank you Paul. The next item on the agenda is the address of the President. At least they call it an address. I think it should be more in the nature of a report. It is in the nature of an address only that it is a valedictory. At the end of the President's term, maybe the incoming President should make the speech at these meetings and tell the membership what he proposes to do. It might be a little more inspiring than a report as to what has been done.

During the past year the Commission has obtained the services of numerous lawyers in the state to serve on various committees. Perhaps the most time consuming, and certainly the most physically exhausting function that the Commission has to do and calls on committee help for, is the handling of the Bar examinations. During the past year, in addition to the Commissioners, there has been a grading committee composed of J. M. O'Donnell, Moscow, Honorable Clay V. Spear, Coeur d'Alene. And I may say, if you will pardon the pun, he was just common Clay when he went on this committee some three or four years ago and has stayed on since his elevation to the bench—also on the committee have been Willis Sullivan of Boise, Josepb McFadden of Hailey, Bill Furchner, of Blackfoot, and Gilbert St. Clair of Idaho Falls. We had one examination a year ago last spring that quite a large number of applicants took. We bad to enlarge the committee and had the services of Ray Givens, Dave Doane, John Carver Jr., all of Boise, and Ed Benoit of

Twin Falls. These Gentlemen certainly are deserving of the gratitude of all of you in the time they bave spent on behalf of the profession.

In addition we have had eommittees working on disciplinary problems. The State Bar, under the able chairmanship of Bill Eberle of Boise, has done considerable work for the Governor's Interim Committee on tax reform for the State of Idaho. As Paul has pointed out, if we had had the money, we might have had more committees doing more things. But we used up about all we had during the year.

There has been no legislative program thus far. Next winter the legislature meets, and the Bar will be interested, of course, in eonsiderable legislation that will be brought up at that time. We again plan to have a Legislative Committee, which, of necessity, must be eomposed of Boise lawyers. I hope, however, that we can get more liason between our Legislative Committee and our Bar throughout the State. I think the Bar Bulletin that we have been publishing during the past year will be very effective for that purpose. So often in matters of vital interest to the Bar, the lawyers of the state do not know about until the legislators have gone home. The last time the Legislature met, it tied up $14,000.00 under a special appropriation, and if it had been needed during the past two years for the purpose whieh we have it there for, to handle any emergencies, any expensive disciplinary matters or other court matters, it wouldn't have been available. It is a bad situation, and the Legislature will certainly be asked to eorrect that. I think that the memhership will be informed next winter, in the Bulletin, of that issue and several others which you will be requested to educate your legislators coneerning.

Since our meeting here last summer, the Public Relations Program that we started at that time, through the use of these radio skits, has gone forward a pace. And I think the radio programs have been had all over the state with respect to those records that we got from Colorado. There were other records available from North Carolina, and I think some from Michigan are available, and the Public Relations Program, like any good advertising program, must be a eontinual one to be effective. Furthermore, the American Bar Section on Public Relations has been most helpful. We have had the advantage of knowing what is being done in other states, and to the extent available, those things have been eommunieated to you through the Bar Bulletin. I hope that we can have a committee, a permanent committee, on public relations that will be able to function.

If the matters mentioned by Paul become effective and we do have a little more money to spend and pay the expenses of these committees getting together in meetings, I think we can probably get the job done there.

During the year the Idaho Bar Commission, in eonjunction with the Board of Governors of the Washington State Bar, served as host here in Sun Valley to a meeting of the Interstate Bar Council, whieh is a group eomposed of the organizations of the State Bars of the eleven western states. It was very stimulating and a helpful interchange of ideas. The matters that Paul talked ahout on disciplinary reform, the matters on public relations, the question of how best to revise our rules of procedure, were all discussed there, and we had the experience of bar organizations of the other states. And believe me, that is very helpful.

The continuing legal education program got off to a start, at least when last spring the Clearwater Bar, in conjunetion with the State Bar, held an institute in Lewiston with a guest speaker from Seattle. The program was rather highly technical, and I couldn't help feeling that at some time during the program maybe it was getting rather detailed for the average praeticing lawyer. But I think it was well reeeived. The reaetions we had clearly indicated that the type of

institute that we have here at the annual meetings, bringing in speakers and having discussions of matters of general interest to lawyers, those things can be made available on the local level so that we can have more of them and we can have them during the year and have them, of course, cheaper, because people don't have to leave home to attend them. It is planned that we can have institutes probably organized in Coeur d'Alene, Boise, Twin Falls, Pocatello, Idaho Falls and elsewhere throughout the state wherever a local Bar indicates that they want to have them. The institute program, I think, should work well with the campaign that will be made towards the reform of our procedural laws.

Your vice president, Mr. Racine, is very interested in the reform of our rules of procedure and has been designated by the Commission to take the lead in doing the necessary educational work that will be required before any reform procedure can be acceptable to you. As Paul has indicated, perhaps some state funds will be available, to the Code Commission. Perhaps we can also get some funds through the Attorney General's office, and the attorneys have told me in several instances that they know they can get speakers from Utah and Nevada and neighboring states, where they have adopted new rules of procedure, to let us know how it was done and how beneficial it proved in the practice of law.

In the matter of legal procedure, I think it is easy to say the procedure we have is highly logical and it just works fine. The common law forms of action were highly logical, but I don't think anybody now is sorry that they are gone. Justice Holmes says the life of the law is not logic but experience, and certainly experience in the other states has shown that the new rules are desirable, and those in Idaho who have practiced extensively in the Federal Courts, everyone of them that I have talked to, figured that we should have the state rules more in conformity with the Federal rules.

The experience, personally, that I have had in the last three years on the Bar Commission, has been refreshing and very stimulating. We have been handicapped by the time we were able to give and the money we were able to spend, but once we recognized those limitations, the work has been very interesting. And the cooperation of all of the members of the Bar, when requested, has been forthcoming at all times. And I want to take this occasion to thank all of you for the help yon have given me. (applause)

The next speaker will be introduced by Mr. Racine.

MR. LOUIS RACINE: Mr. President, Members and guests: One of the activities which the Bar Commission has in recent years attempted bas been the bringing of speakers from other states, with the assistance of the American Law Institute, and our next speaker is Mr. Francis Price, Jr., of Santa Barbara, California. Mr. Price is in practice in Santa Barbara. He is in general practice, althougb he has specialized considerahly in tax work. And the American Law Institute was kind enough to procure Mr. Price for us. His subject has to do with the tax aspect of divorce and separate maintenance actions and a property settlement agreements. That subject was chosen because we felt that perhaps it was common to all of us in this state who seldom specialize. It was common to all of us to have something to do occasionally with divorce and property settlements, and there are some very peculiar tax considerations with respect to those matters, which perhaps many of us are not too well advised on.

Mr. Price entered practice in 1945, I believe, in Santa Barbara. He is a graduate of both the undergraduate school at Stanford as well as the law school at Stanford. He served at a Lieut. Commander in the United States Navy, and, as I

mentioned, entered practice following the war. I am sure he will be most willing to answer any questions you may have after his formal presentation. And I am sure the matters which Mr. Price will have to give us will be beneficial to all of us. Mr. Price. (applause)

MR. FRANCIS PRICE JR.: We might draw on Hollywood for the title to this address. Instead of being called "Tax Problems In Divorce," we could really call it "The Eternal Triangle—Husband, Wife and Tax Commissioner." The hydra-headed, multifaced, nameless, but unfortunately not mythical, creature who has come to be known as the Commissioner, is certainly the third party, if not at every wedding, then at every divorce. (laughter) He violates the Biblical injunctions against coming between man and wife, and as a result, in addition to all the pain and anguish which accompanies almost every divorce, there is the added problem concerning which I hope to contribute something today, of how to get through this painful episode without making any unnecessarily large contributions to reduce the national debt.

You may say: "Very well. What are the questions involved?" Well, we have income tax matters, we have gift tax matters, we have estate tax matters. Many people have no problems of gift tax or of estate tax, but you hardly have a client in a divorce case who does not have income tax problems, as you all well know.

In connection with the income tax matters, the following are very basic questions which you will want to consider. Who pays tax on the alimony? Who may deduct the expenses involved? Is there a gain or loss incurred in any transfer made as part of a divorce settlement? If so or if not, what is the basis to the transferee of the property transferred? What is the effect of an agreement affecting life insurance. Then, as I said, there are estate and gift tax matters.

A brief glance at the historical background of alimony taxation might be in order. It didn't take very long after the income tax amendment became effective in 1913 for a man by the name of Gould to get to the United States Supreme Court, and there it was ruled he must report the alimony on his income tax return which he paid to his former wife (1). This was a bitter blow to Mr. Gould, and to every other divorced husband. So the ingenuity of the American taxpayer and his tax counsel was soon put to work to find out the answer to this question. If I have to pay money to that blankety blank woman, why do I have to pay income tax on it? The idea of a trust to take care of income tax payment was tried. In 1935 (2) the Supreme Court again said the husband still must pay the tax on this alimony. Then a more ingenious, or perhaps geographically more fortunately situated husband in a state, I don't recall which one—it might have been Pennsylvania where there is no continuing obligation of support following divorce—succeeded, in 1940, in obtaining freedom from taxation on income of the trust which he established as part of the alimony arrangement with his ex-wife (3). This resulted in the 1942 legislative changes in Congress, which are the basis for our comments this afternoon.

One reason for congressional action was to prevent discrimination between the husband who paid alimony direct and the husband who paid it through the medium of a trust, which he was able to set up under the laws of a particular state which would give him relief which he thus might have and another taxpayer might not. Another, and very important reason, was that in 1942, of course, we saw the entrance of the United States into World War II, with a drastic increase in tax rates,

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(1) *Gould v. Gould*, 245 U. S. 151, 38 S. Ct. 53 (1917)
(2) *Douglas v. Willcuts*, 296 U. S. 1, 56 S. Ct. 59 (1935)
(3) *Helvering v. Fuller*, 310 U. S. 69, 60 S. Ct. 784 (1940)

and the congressional purpose was elear. In spite of the faet that I will take some time to diseuss that legislative purpose, it really boils down to one thing. They wished to tax the alimony to the person who received it and not to the person who paid it.

In connection with the following remarks, I will adopt the same liberty which the treasury regulations do. They announce lightly that when they say husband, they mean not only husband but ex-husband, wife and ex-wife. And when they say wife, they mean not only wife but ex-wife, husband and ex-husband. Then they proceed to give a myriad of example, all of them of husbands paying to wife. I don't know why this is. It must be the way they feel it usually is. But in any event, there will be cases where perhaps wife pays to husband, so in such instances just read wife for husband and vice versa.

The field of federal taxation of alimony is different in one respect from other fields of taxation. And that is that state law is much more important in this field than it is in others. Because divoree is a state matter, it can often have a certain impact on the federal tax results. I shall not bore you with citations of authorities throughout this talk, although I have some of them outlined before me. If anyone is interested in a specific case or regulation, I would be happy, at the end of this session, to furnish you with such.

INCOME TAX CONSIDERATIONS, as a general rule, may be summed up by saying that periodic payments which are made to, or for the benefit of, the wife as alimony, following a decree of divorce or legal separation, or a written instrument incident thereto in discharge of a marital obligation of the husband, are taxable income to the wife and deductible by the husband. Well, that is quite a mouthful, and the courts have found it to be quite a mouthfull too. It is generally a condition of the deduction on the part of the husband that it must be a taxable payment to the wife. In other words, it is a rare case where one party will get a deduction, if the other is not taxed with the income. And, as a matter of fact, in 1942 a long, wordy Section 22-K (now Sec. 71) was added to the Internal Revenue Code telling us what alimony is taxable to the wife, and then 23-U (now Sec. 215) was the section added to provide for the corresponding deduction of the husband. It says more or less, "If we can stick her for it, you can get this deduction, but if we can't, you don't."

Just to show that no rule is without exceptions, there are alimony cases where others than husband and wife are involved. One recent New York case found a wife who was cagey enought to have a guarantor or surety on the husband's alimony. The husband didn't pay. The guarantor had to. She reported the alimony as income. The guarantor endeavored to deduct it. The court said, "No, you never shared her home. You can't pay her alimony." (4)

A situation of interest in community property states, in the period prior to 1948, arose in the Ninth Circuit, where the husband, paying alimony, married wife number two. As was common in our community property states prior to 1948, he and wife number two filed separate income tax returns, and each reported one-half of the community income and one-half of the community deductions as was required by law. So wife number two reported one-half of the alimony which her husband paid to wife number one. The Commissioner hit the ceiling and said, "What is going on here? A wife paying alimony to another wife? This cannot be? But the Ninth Circuit said it was paid out of her community income and it was a deduction. It met all the requirements of the law, and she won the case. (5)

(4) *Luckenbach v. Pedrick*, 116 F.S. 268 (D. C. N.Y., 1953)
(5) *Newcombe*, 203 F(2nd) 128 (CCA-9, 1953)

In analyzing the various requirements necessary to make alimony a deduction for the husband and taxable to the wife, we find that first of all there must be a decree of divorce or of separate maintenance. The reason for this rule, in 1942, went out of being in 1948. By that I mean this: In 1942, except in community property state, a husband was looking desperately for some way to split the income within the family group. You are familiar with the family partnerships and other devices tried, usually without success. The congressional action on alimony was based on the premise that unless a court decree, either divorce or separate maintenance was required, there would be a tax dodge. A husband and wife, and truly separated, would dream up a separation agreement and spilt their income between them. That was probably a good reason in 1942, but since 1948, when husband and wife can file joint returns and divide their income equally between them for tax purposes, it has no purpose.

The pending Revenue Code of 1954, (House of Representatives Bill 8300) will eliminate this requirement and will be satisfied with payment made pursuant to a written instrument as well as in the case of a decree*. However, I will take

*After the date of the above remarks the eode was enacted and Section 71 (a) (2) provides for the deduetibility of payments made pursuant to a written agreement executed after date of the code, if the parties do not file a joint return. This would include alimony pendente lite, and will place the husband in a better bargaining position as temporary alimony no longer involves a tax penalty.

some of your time to dieuss the necessity for this decree for the following reasons: First, the pending bill will probably pass, but may not. Secondly, there are years prior to I954, which would be its first effective year, which are not yet barred by the statute of limitations and which might be opened up by the Treasury Department, and where this would be important. Finally, the rule where the alimony is awarded by decree, and not by an agreement, where there is no property settlement agreement, in other words, would eontinue under the old law.

Then wbat is a decree of divorce or separate maintenanee? Any decree which ends the marriage, or which provides for permanent separation and for the support of the wife is such a decree (6) However, an aetion to enforce a separation agreement would not qualify, (7) and a divoree decree entered nune pro tune would be effective for federal tax purposes only from the day it was aeually entered and not from the day for which it is eonsidered effective for state purposes. (8) An order for temporary alimony, support pendente lite, will not qualify. (9) And a decree of annulment, in most states, is not a decree of divorce or separation under the federal tax law.*

There are some states I am told where an annulment decree is effective ony as of the date of the decree, and not as of the date of the marriage. In such states the federal tax laws will accept this as a decree of divorce. (10) Interlocutory decrees, I understand, are not used in Idaho. But many of your neighboring states do have them, and you will find that the Treasury Department has ruled that an interlocutory decree is a decree of divorce for sueh purposes. (11) How-

(6) *Wick*, 7 T.C. 723, aff'd 161 F(2d) 732 (CCA-3, 1947)
(7) *Terrell*, 179 F(2d) 838 (CCA-7, 1950)
(8) *Smith*, 168 F(2d) 446 (CCA- 2, 1948); *Daine*, 168 F(2d) 449 (CCA-2, 1948)
(9) *Kalchthaler*, 7 T.C. 625 (1946)
(10) *Reighley*, 17 T.C. 344 (1951)
(11) I.T. 3761, 1945 CB 76

ever, the celebrated Utah banker, Mr. Mariner Eccles, filed a joint return with his ex-wife following a Utah interlocutory decree and prior to the final decree. He was sustained by the Tax Court, and by the Fourth Circuit, (12) A Colorado woman by the name of Evans decided that if this was so, then she would not need to report payments made to her by her husband as alimony during the interlocutory year. In this case she also won out in the Tax Court and in the Tenth Circuit. (13)

I mention this to you only so that if you should come across a divorce in one of these states, it is well to know that there may be a possibility for refund or for filing joint returns, if the parties are sufficiently amicable.*

The validity of the divorce decree under state law is a question that will come at once to your minds in determining whether or not there is a divorce. It is a surprising thing, when you realize the technicalities of this federal tax law and the many traps for the unwary, that it is surprisingly liberal on the question of validity of divorce decrees. It makes no difference that the decree might be held void in another state or in the state of last matrimonial domicile. (14) This would be true in the case of a period of short residence and substituted service by publication, and it would even be true of a Mexican mail order divorce, providing the parties relied on it. The best example I can give of this is a case where the wife successfully contested the husband's divorce in the state of last matrimonial domicile, and yet the court held that he was entitled to deduct the payments he made to her as alimony pursuant to this decree held void in another state. I note that the husband had remarried in reliance on the decree which he obtained, and I think probably some such evidence of good faith would be necessary. (15)

The Tax Court has a peculiar rule which says that a husband who makes payments under an order pendente lite in one state and then gets a divorce in another may not deduct the payments he makes pursuant to the divorce decree, because they are temporary support payments. (16) It would appear that there are no such requirements as this in the statute, but it is something which you should consider, if you have occasion to obtain a divorce for a client who is under any support order from any state former residence*

The payments must be received subsequent to the final decree of divorce or separation. This is a matter of time. First we said there must be a decree. Even though there is a decree, only such payments as are made after it in time can be

*All of the above authorities must be viewed in the light of I.R.C. 71 (a), (3), above referred to, and removing in some cases the requirement of a *final* decree.

(Under the provisions of Sec. 71 (a) (2) of the new code payments may also be deductible where the following requirements are met: (1) actual separation; (2) a written separation agreement; (3) periodic payments made after execution of the agreement and (4) because of marital obligation; (5) parties may not also file a joint return.

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(12) *Eccles*, 19 T.C. 1049, aff'd 208 F(2d) 796 (CCA-4, 1953)
(13) *Evans*, 19 T.C. 1102, aff'd 211 F (2d) 378 (CCA-10, 1954)
(14) GCM 25250, 1947-2 CB 32 (1947)
(15) *Feinberg*, 198 F(2d) 260 (CCA-3, 1952)
(16) *Tressler*, 12 TCM 358, P-H Memo TC 53-111 (1953) (On appeal to CCA-9)

deducted. This is true regardless of whether the obligation to make the payments arise from an agreement or the decree or both. The husband may have made the payments for sometime prior to the decree, but may not deduct them until after the decree. (17) Temporary alimony, as I said, is not deductible. (18) You will see at once here that the wife is in an excellent bargaining position if she has a court order for temporary support. Because so long as that continues, the husband may not deduct the payments, whereas if that same figure or amount were required of him as permanent alimony under a final decree, he would be entitled to an income tax deduction. The actual entry of a nunc pro tunc order and not its effective date controls. As the Tax Court said, retroactive judgments of state courts do not determine the rights of the federal government under its tax laws. (19)

The payments must not only be made after the decree but pursuant to the decree or a written instrument which was incident to the decree.

The clearest case is where the payments are called for by the decree itself even though taken from an earlier agreement not incident to the decree itself. (20) There can be no question then that they are pursuant to the decree. But they may also be called for by a written instrument. The question would then arise, "What is a written instrument?" The easiest and most obvious answer is that an oral agreement would not be a written instrument, but surprisingly it took a Tax Court decision to settle that question. (21) However, the agreement may be completely informal. A letter offer orally acceted has been held to qualify. (22) The written instrument has to impose a legal obligation. (23) In other words, where a husband promises his wife, in writing, to pay certain amounts per month subject to termination by him on 30 days notice, the court decided it was not a written instrument within the meaning of Internal Revenue Code. (24)

Then the question will arise, "When is an agreement incident to a decree?" I can say, without any question, that this one phase of the law has caused more technical litigation than all the other aspects of alimony taxation. I hope that the new law change, which I outlined to you a moment before, will take care of some of these problems. But it is not a complete answer. The courts' attitude in this matter has changed over the years, and they now show a more liberal attitude in carrying out the clear intent of Congress to find that alimony is taxable to the one who receives it, and not to the one who pays it. The Tax Court, however, has adhered to a relatively strict rule on this point. The question is whether the instrument has to be "Incident," that is, whether it must be incident to the divorce decree itself or merely to the divorce status. You can see that it would be easy to have an agreement which is incident to the part and parcel of the divorce, but has no connection with the decree. It is not a requirement that the parties contemplate filing immediate suit, but at least the agreement and decree must be part of one package. If there is a clause in the agreement—and this should be a warning for all—calling for incorporation of the agreement into the decree and its survival thereafter, or either one of those provisions, the court will attach great significance to them. They will aid in establishing that the written instrument is incident to the divorce. There

(17) *Wick*, 7 T.C. 723, aff'd 161 F(2d) 732 (CCA-3, 1947;) *McKinney*, 16 T.C. 916 (1951)
(18) *Joseph D. Fox*, 14 T.C. 1131 (1950) But see 1 RC 71 (a) (3)
(19) *Diane*, 9 T.C. 47 (1947), aff'd 168 F(2d) 449 (CCA-2, 1948)
(20) *Murray*, 174 F(2d) 816 (CCA-2, 1949)
(21) *Ben Myerson*, 10 T.C. 729 (1948)
(22) *Jefferson*, 13 T.C. 1092 (1949, acq.); *Campbell*, 15 T.C. 355 (1950, acq.)
(23) *Sharp*, 15 T.C. 185 (1950)
(24) *Daine*, 168 F(2d) 449 (CCA-2, 1948)

will be no question at all if you can incorporate a clause in your agreement somewhat to the effect that the agreement shall be ineffective for any and all purposes unless it shall have been approved by a court decree, and it shall then be incorporated therein.

State law in various jurisdictions may create a problem there. Some states would call that an agreement for divorce, and therefore it would be collusive and void under the state law, and hence it would not be desirable to insert such a clause. However, many states, I know, hold that this is not an agreement for divorce but merely an agreement as to what would happen in the event there should he a divorce. If your state adheres to that rule, which many do, then I think such a clause would be the safest thing to insert in every property settlement or separation agreement which you draft and where a decree is contemplated. The safest practice of all is to have the agreement introduced into evidence, request the court to approve it, and either incorporate it by reference or set forth the alimony provisions of the agreement in the decree in full. If this is done, I think one can safely say that the Treasury Department cannot successfully contend that the agreement is not part of the package of the divorce, and hence that the payments are not deductible alimony.

Now, if an agreement is made prior to the divorce decree, you will want to know what situations will arise concerning this test of being incident. If the decree mentions the agreement, executed however long before, the agreement will clearly be incident to the decree. (25) The decree need not mention the agreement when the parties contemplate a divorce at the time of the agreement. (26) But there again the problem of proof is great, and you are much safer if the agreement is mentioned in or incorporated into, the decree.

In one case the parties contemplated a Nevada divorce, when they drew the agreement, but later a New York divorce was obtained. The court said the agreement designed for one divorce, which never came off, was still incident to the other. (27)

Where an agreement is made to induce a divorce, there is no question but that it is incident. (28) But here again the dilemma of state public policy and rules on collusion, on the one hand, and the requirements of "incident" on the other, are very clearly set forth. As a matter of fact, in the Johnson Case, in the Tax Court, (28) the losing argument of the Commissioner of Internal Revenue was that the agreement was one for divorce, hence it was collusive, and it was void, and therefore the husband should not be entitled to a deduction. The Treasury lost, but the mere fact that the argument was made should be a warning to us all. (29)

Where the agreement provides for alimony and survives the decree, there is no question that the payments will be deductible, (30) and the rule applies even where the payments merely take the place of alimony or support which would otherwise be due and payable. I should note parenthetically here that Congress nowhere uses the word "Alimony." It avoids that word because it did not intend to limit the deduction to payments which would constitute alimony under state law. Hence the rather involved verbiage used in the Internal Revenue Code in setting forth what

(25) *Blum*, 187 F(2d) 177 (CCA-7, 1951)
(26) *Jefferson*, 13 T.C. 1092 (1949); *Hogg*, 13 T.C. 361 (1949)
(27) *Fry*, 13 T.C. 658 (1949)
(28) *Johnson*, 10 T.C. 647 (1948, acq.)
(29) *Hesse*, 7 T.C. 700 (1946)
(30) *Fry*, 13 T.C. 658 (1949)

payments would be deductible without any mention of the word alimony, although we, in our conversation here, will use it frequently, because it is a shorthand reference to the deductible payments which we mean.

Where the interval of time between the agreement and decree is short enough to make it part of the package of divoree, even though one does not mention the other, you will find the payments will qualify as deductible alimony. (31) What is short enough? One case was thirteen days. (32) Another one was three months. (33) In both cases it was held this was a short enough period. If there is a reason for the delay, even longer periods can be suecessfully explained away. In one case a year, (34) and in another case a year and one-half. These were situations where the wife could not get the funds from the husband, or where the parties were quarreling over some matter of settlement delaying the final decree. However, I would say to you that if for any reason there is a lapse of more than a few days or weeks after the execution of the agreement, and before entry of the deeree, you would be well advised to have a brief one paragraph supplemental agreement merely bringing the old agreement up to date and declaring it ratified as of this date, have it signed by the parties, and incorporate both agreements into the decree.

As a matter of fact, there have been cases with autenuptial agreements made for the support of the wife before the marriage, and relied upon by the parties at the time of the divorce to provide for the support of the wife, which have been held to be qualified as alimony agreements provided either the decree or a later separation agreement would refer to the later antinuptial agreement. (36) In other words, if the wife says she is satisfied with the provisions made for her in the antenuptial agreement, the attorney obtaining the divorce should make sure that either a separation agreement or the decree itself mentions that fact.

As to agreements made after the divorce decree it is easy to say the general rule is that they will not qualify and will not be considered to be incident. (37) I only know of a few exceptions, such as where the later agreement is incorporated into a decree which modifies the earlier decree, (38) or if it modifies an earlier agreement which was part of the decree. (39) (40)

The new 1954 law will virtually eliminate a number of these problems. The rules concerning payments incident to divorce decrees will remain unchanged, but the new proposal will permit the husbands to deduct and will tax to the wife periodic support payments or alimony even, if made under a written separation agreement. A similar treatment will be afforded payments made during the interlocutory period and prior to the entry of the final decree, and after orders for payments pendente lite. The new law is effective, for the calendar year 1954 and for all taxable years beginning after 1953, except for the provisions of 71 (a) (3), requiring an order made after March 1, 1954.

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(31) *Lerner*, 195 F(2d) 296 (CCA-2, 1952)
(32) *Mahana*, 88 F.S. 285 (Ct. Claims, 1950), cert. den. 339 U.S. 978, 70 S. Ct. 1023)
(33) *Johnson*, supra
(34) *Fry, supra*
(35) *Zilmer*, 16 T.C. 365 (1951)
(36) Reg. 118, Sec. 39.22(k)-1, Example 3)
(37) *Dauwalter*, 9 T.C. 580 (1947)
(38) *Harris*, 11 T.C.M. 895, P-H Memo T.C. 52,258, (1952)
(39) *Du Bane*, 10 T. C. 992 (1948); but see *Dauwalter, supra*, and *Cox* 10 T.C. 955 (1948), aff'd 176 F(2d) 226 (CCA-3, 1949); *Mahana and Hogg, supra; Fairbanks*, 15 T.C. 62 (1950), aff'd 191 F(2d) 680 (CCA-9, 1951), cert den. 343 U.S. 915 (1952)
(40) *Bergen*, 10 T.C.M. 865 (1951) P-H Memo T.C. 51,272

The fifth general rule as to qualifications which must be met by is that the payments must be in discharge of a marital obligation existing at the time. I believe that in Idaho, as in a number of other states, busbands and wife may make contract with each other as with third persons. As is readily to be expected, one may become indebted to the other. They may make an agreement to pay off this amount by periodic payments from one to the other. Congress didn't intend for one to get deduction for paying his creditor, just because the creditor was his wife. The theory is that payment must be in lieu of the obligation of the laws of every state requiring a busband to support his wife. (41) Payments have come before the court where a business obligation or a debt was claimed by the husband as alimony. And, of course, it would be grossly unfair to require the wife to pay income tax on something whicb was merely the return of her own capital. (42)

I give you as an example Lehman. (43) He made payments to his mother-in-law. The wife had a legal duty to support the mother-in-law, and he deducted, as alimony, the payments he made to his ex-mother-in-law. Believe it or not, he succeeded in prevailing in that case. The court said that the wife acquiesced in this form of payment, and then invoked the doctrine of constructive receipt to tax her with such payments.

The support obligation of the husband must exist at the time wben the payments are made or the payment is executed. This is right in the statute wbich says that the payments must be in discharge of a legal obligation, which, because of a marital or family relationship, is imposed upon or incurred by the busband. (IRC 71). Where an agreement is executed either before or contemporaneously with the decree, there is little or no problem. The obligation is incurred wbile the parties are husband and wife, and hence it is obviously a part of the martial duty to support. (44) Some question will arise, if the agreement is invalid or voidable, but the taxpayer bas uniformly been sustained in such cases. (45)

I might point out that the support duty must exist at the time or should exist at the time, but it is immaterial whether or not it will continue after the agreement or decree. (46) For example, no court in any state with which I am familiar, can decree alimony that will be payable after the husband's death or after the remarriage of the wife. Yet you are all familiar with cases where such alimony bas been invoked by agreement. If those agreements are made, they are perfectly valid, and the payments will be qualified as deductible alimony because the agreement was made at a time wben the duty of support existed. (47)

If the agreement is executed after the decree, the general rule is that the payments will not be qualified. (48) This is a rule operating against sound public policy, because obviously the husband would not make such an agreement with a strange woman. He is doing this to carry out his moral, if not legal, obligation, and he should so be encouraged. (49) However, when he is to be denied a

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(41) *Blumenthal*, 183 F(2d) 15 (CCA-3, 1950)
(42) *Du Baine*, 10 T.C. 992 (1948)
(43) *Lehman*, 17 T.C. 652 (1951), nonacq. 1952, appeal dismissed)
(44) *Jefferson*, 13 T.C. 1092 (1949); *Hogg*, 13 T.C. 361 (1949)
(45) *Campbell*, 15 T.C. 355 (1950, acq.) (see *Newton v. Pedrick*, 115 F.S. 368 (S.D.N.Y., 1953) and *Reighley*, 17 T.C. 344 (1951)
(46) 1T 4108, 1952-2, CB 113 (1952)
(47) *Fairbanks, supra; Laughlin*, 167 F(2d) 828 (CCA-9, 1948)
(48) *Cox* 176 F(2d) 226 (CCA-3, 1949)
(49) contra, *Dauwalter*, 9 T.C. 580 (1947)

deduction on the payments made, it is going to be a lot harder to get him to make any such arrangements for the support of his former wife. The only way I know of avoiding this rule where the parties are already divorced and where you desire to have a post-decree agreement, is to have the agreement approved by the court in a new decree modifying the old one, if your court retains continuing jurisdiction to do such a thing and to make it a part of the earlier decree. (50) If this is not possible, a less preferable solution would be to amend a prior agreement, if there was a prior agreement, and if you can make this new one an amendment to it, you may get the deductions for the payments paid under the agreement after the decree. (51)

There is an exception to the general rule denying the deduction in that if the support obligation continues after the divorce, and this is very rare, or after the decree of separate maintenance, which, of course, is a general rule, the later agreement will qualify. In other words, the husband, under such circumstances, does have an obligation to support his wife at the time of the later agreement.

The next requirement for deductibility is that the payments must be periodic. (52) In other words, Congress did not mean to permit a husband to deduct a lump sum settlement which he might make on his wife as part of the divorce settlement, and such a lump sum settlement will not qualify, whether it stands alone, or is coupled with periodic alimony payments such as might be made in the agreement. (53) The payments made by the husband, if he falls in arrears and is later compelled to bring payments up to date, will all be taxable to the wife in the year in which they are received. (54) You can see right away that she will suffer a tax penalty, and the husband will have a tax break, if he could manage to avoid contempt citations for a year or two and then, when they finally catch up with him, pay two or three years back alimony in one. He would then get the entire deduction in the year in which he paid it, and his wife would have to report the entire amount received as alimony income for that year.

Many practioners recommend that the wife's attorney endeavor to secure a clause in the agreement calling for some sort of penalty or liquidated damages on the part of the husband, larger payments, if you will, if he falls in arrears. And it is probably a good idea to see if you cannot negotiate for a clause stating the husband will pay any extra taxes suffered by the wife because of his delay in making such a payment. The Bureau of Internal Revenue favors such a procedure, because they have issued a ruling to avoid the dilemma with which you are familiar of "a tax on a tax on a tax on a tax," where someone pays someoue else's income tax, and the amount of that payment is added to the income resulting in a larger tax, which results in a larger income, which results in a larger tax, ad infinitum. The Bureau will add the tax just once and let it go at that.

Installment payments of this lump sum payment will not be deducted as alimony except in one special instance. In other words, if there is a specified principal sum to be paid, it wouldn't make any difference if it is paid over a period of two or three years, or whether it is paid all at one time. The periodic payments must be indefinite in time and in total sum. And the test is mathematical. If the

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(50) *Harris*, 11 T.C.M. 895 (1952), P-H T.C. Memo 52,258)
(51) *Fairbanks, supra*
(52) *Fox*, 14 T.C. 1131 (1950); *LeMond*, 13 T.C. 670 (1949)
(53) *Baer*, 196 F(2d) 646 (CCA-8, 1952)
(54) *Gale*, 191 F(2d) 79 (CCA-2, 1951); *Narischkine*, 14 T.C. 1128, aff'd 189 F(2d) 257 (CCA-2, 1951)

principal sum can be computed from the terms of the agreement or decree, then the deductions will be denied. In other words, if by reading the agreement and decree you can say, "Well, it is obvious he is going to pay her X dollars," then there will be no deductible alimony. So an obligation to pay a specified aggregate sum may suceeed in defeating the deduction. (55) (56)

Payments may be irregular in time. This specifically provided in the statute, and they may be dependent upon conditions precedent, which conditions may or may not come into being. (57) If payments are irregular in amount, this should not disqualify them, although the Tax Court in one case seems to hold to the contrary. (58) There payments of $300.00 per month for five years were to be followed by payments of $100.00 per month for life. These provisions were in two separate paragraphs of an agreement, and therein was a defect in draftsmanship which should have been avoided, because it gave the treasury its entering wedge. They said the $100.00 for life commencing five years in the future is elearly deduetible. But the payments of $300.00 per month for five years is merely the sum of $18,000.00 payable over five years. The Tax Court ruled against the taxpayer on the $300.00 a month payments. The Third Circuit reversed the Tax Court in favor of the deduction, but the Tax Court has stubbornly adhered to its former rule. (59) I can see no possible argument against the deductibility of alimony whieh would be specified as $300.00 a month for five years and thereafter $100.00 a month. Beeause it was put in two separate agreements, the Treasury Department seized upon this argument whieh at least prevailed in the Tax Court. See (60)

Installment payments may qualify as alimouy under one particular set of circumstances. The prineipal sum must be payable over a period exceeding ten yearls from the date of the decree or instrument. The decisions say that the date of the decree or instrument means the effective date, and in some cases you will find that a matter of one day has become terribly important. (61) Naturally agreements drawn since 1942 find the practitioners carefully choosing periods exceeding ten years. Divorce decrees drawn before the 1942 changes did not have this background. And one ease with which I am familiar found that the decree was entered just exactly on the ten year mark. In other words, the payments were to run exaetly ten years from the day of the entry of the decree, so the Treasury Department said ten years is not in exeess of ten years, and therefore the deduction was denied. Well, the Circuit Court labored mightily and found, under the laws of that state, it was the day the Judge signed that decree and not the date entered, and he signed it the day before, although it was entered the day following. So the period was ten years and one day, and the deduetion was allowed. Don't put yourselves or your elients in sueh a situation as that. Be sure that you get at least one or more days over the ten year period.

Now, in addition to requiring that the installment payments last for more than ten years, the Code says that a deduction in any one year may not exeeed 10% of the aggregate sum. In other words, a high bracket taxpayer who might, we will say, pay his wife $100,000.00, eould pay $91,000.00 the first year and $1,000.00 an-

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(55) Reg. 118, No. 39.22(k)-1(a) (3)
(56) *Casey*, 12 T.C. 224; *Orsatti*, 12 T.C. 188
(57) *Mahana*, 88 F.S. 285 (Ct. Cls., 1950), cert. den. 339 U.S. 978 (1950); *Grant*, 18 T.C. 1013 (1952)
(58) *Smith*, 11 T.C.M. 1167, P-H Memo T.C. 52,343 (1952)
(59) 208 F (2d) 349, (CCA-3, 1953)
(60) Reg. 118, Sec. 39.22(k)-1(c). *See Norton*, 192 F(2d) 960 (CCA-8, 1951) aff'd 16 T.C. 1216 (1951)
(61) *Blum*, 187 F(2d) 177 (CCA-7, 1951), cert. den, 342 U.S. 819 (1951)

nually for the remainder of the period, thereby getting himself a very substantial tax deduction. But this would not be allowed. He would be limited to 10% or $10,000.00 in any one year no matter how much he paid. If he exceeds the 10%, he does not lose the entire deduction, but that part over 10% will never be deductible by anyone. (IRC 71)

Now, the recent trend in these decisions can be summarized this way: Payments made to last until death or remarriage have always qualified as alimony. Payments for a period of less than ten years, if they are indefinite in amount, may qualify under some circumstances. (62) For example, the Roland Young supra, who was a motion picture star, had an agreement to pay his wife a certain percentage of his annual income for a period of less than ten years. Because his income was not fixed, the court said this was an indefinite amount, and therefore he obtained the deduction.

Next you will find the cases where the payments are of a fixed amount per year for a period of less than ten years, but subject to termination on death or remarriage. And there is where most of the litigation has arisen. The taxpayer says that these payments are uncertain, because the wife may die or the wife may remarry. The earlier tax court cases said that there was not sufficient uncertainty, and denied deductions in these cases. (63) The Second Circuit overruled the Tax Court and held such payments are periodic. (64) On the case of Jimmie Fidler, (65) the Tax Court has declined to follow the Second Circuit, so what is going to happen in those situations is anyone's guess. The Fidler case is currently on appeal to the Ninth Circuit. Certainly there is enough confusion to call for some kind of congressional or Supreme Court action.

In the Smith Case, supra, which is the one concerning payments of $300.00 a month for five years, the Circuit Court held that such payments were deductible. However, there was another clause calling for $25,000.00 due in ten semi-annual installments which was held not deductible. So all I can leave with you on this matter is to say that in determining what is periodical money, uncertainty is certainty. If the sum is uncertain, you are certain. If it is not, then the loss of the deduction is certain.

PRESIDENT ROBERTSON: Would you repeat that?

MR. FRANCIS PRICE, JR.: I don't think I can. (laughter)

The question of what expenses are deductible should be considered. Counsel fees are a subject near and dear to my heart and perhaps to yours as well. Certainly you are going to be in a better position with your client if you can tell him that your fee is deductible. The general rule is that the payment by the husband of attorney's fees, either his own or those of his wife, in almost all cases, are held to be a non-business, personal non-deductible expense. (66) The wife is in a somewhat better position in this regard, as she is in almost every field of divorce law. She may deduct fees which are incurred to establish her right to alimony or to collect arrearages of alimony or to enforce her right to alimony. The Treasury

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(62) *Young*, 10 T.C. 724 (1948, acq.); *Lee*, 10 T.C. 834 (1948, acq.)
(63) *Steinel*, 10 T.C. 409 (1948); *Fleming*, 14 T.C. 1308 (1950); *Orsatti*, 12 T.C. 188 (1949)
(64) *Baker*, 205 F(2d) 369 (CCA-2, 1953
(65) 20 T.C. ....., No. 149 (1953)
(66) I.T. 3856, 1947-1 C.B. 23; *Howard*

recognizes this. The alimony is taxable income to her. It is an expense necessary and ordinary for the production of income, and hence it is deductible. (67) The husband said, "My wife hired a lawyer to get more alimony out of me, and I hired a lawyer to lick him. That was a non-business expense for the production of income for her. So why isn't it protecting my treasury from a raid also deductible when I hired an attorney to defeat this?" The Court says that is too remote, because he is only resisting a claim. He is not increasing his income. I think I must concede that the Treasury's position is correct, because a husband may deduct alimony out of principal. He doesn't have to pay it out of income. He cannot say that any attempt on his part to lower or limit his alimony is increasing his income. It may have no such effect. (68)

There is one possible departure from this rule, and that arose in the Eighth Circuit where the husband was controlling stockholder and the president of a business. The wife had rather big ideas, which included getting enough of the stock so he would no longer have a controlling interest. He hired at attorney to resist the divorce and the court allocated a part of the fees he paid him, because this man was doing more than just trying to get a defeat for a claim for alimony. He was endeavoring to prevent having his stock, his business interest, taken away from him. (69) Our Ninth Circuit, has indicated, in the Lindsey Howard Case, supra, where they denied a deduction, that had the circumstances been such as I outlined, they would permit the husband to make the deduction.

With those rules we can leave the question of deductible counsel fees, except that I should point out that if the husband pays the wife the money, and the wife pays the attorney, there is a possibility that she will get the deduction. Whereas if he pays the attorney direct by virtue of a court order, no one gets the deduction.

I have mentioned most matters from the point of view of the husband, because he is generally seeking the deduction. In most cases the wife prefers that the payments not be deductible. I think you will see, if you have not already encountered such a situation, that regardless of the hostility between the divorcing spouses, it is important for each one to aid the other. Because perhaps one can negotiate a better settlement by making a deduction for the other, or in other words, by letting the Government contribute part of the difference. So it is important for the wife to say, "Well, if you make the payments direct to me rather than to my attorney, then I will take less alimony or make some adjustments, because you will be getting an income tax deduction."

The support of the children, of course, is a matter which is contained in every agreement and every decree where minor children are present. The statute clearly says that such payments are taxable to the husband and not to the wife. However, if the payments are not segregated between what is alimony and what is child support, all will be treated as alimony. All will be deductible by the husband and all will be taxable to the wife regardless of whether or not she uses all or any part of this sum for the support of the children.

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(67) Reg. 118, Sec. 39.24(a)1; *Gale*, 13 T.C. 661 (1949) aff'd on another issue 191 F(2d) 79 (CCA-2, 1951)

(68) *Donnelly*, 16 T.C. 1196 (1951); *Howard*, 16 T.C. 157 (1951) aff'd 202 F(2d) 28 (CCA-9, 1953)

(69) *Baer*, 196 F(2d) 646 (CCA-8, 1952)

Many agreements and decrees were in force in 1942 where the parties had not bothered to say how much was for the wife, and how much was for the children. Of course, a bad situation arose for the wife under those circumstances. The Tax Court has indicated that a retroactive amendment of the decree specifying which part was for the wife and which part was for the children, will be given effect nunc pro tunc. (70) Retroactive effect is not recognized in the case of showing when a divorce became effective, but in this case, the Tax Court says the parties are merely correcting an error, because it was always intended that part was for the wife and part for the children, so it will give retroactive effect to the amendment. Furthermore, the courts have strained themselves mightily to determine, from a decree, how much is for the wife and how much is for the children. (71) The payment may be $500.00 a month to the wife, and if she remarries, then $200.00 monthly until the child is 21. The court will then say, "Obviously $300.00 is for the wife and $200.00 is for the children." Here again, is a situation where, if the husband fails to make the payments required of him, a tax loss will be incurred. That is, all payments made are first applied against the requirement for child support and second against alimony. So, if he makes less than the total payments, he can't say, "I paid my alimony payment. I just failed to make the payment for child support." The court will say, "No, you made the child payment and not the alimony." So there is an impetus there for many to keep up with their obligations. (72)

As far as draftsmanship and procedure is concerned, in the ordinary case it will save the husband more money to give up the exemptions for the children (unless he wishes to take the optional standard deduction) and to pay more alimony to his wife, having it all payable to her, and thus deductible by him. This is more taxable income to her, but perhaps, depending on their relative income tax brackets, he can make it sufficiently attractive to her so that she will accept. It is important that the husband should not pay the expenses of the children direct, for example, paying tuition at a school or something of that nature, direct rather than through the wife, unless the agreement is first amended. This is for the reason I mentioned earlier that any payments made are applied first on child support and second on alimony. (73) So if the husband was supposed to pay $500.00, of which $100.00 was for the child, and he paid $50.00 towards the doctor bills for the child direct to the doctor, and then deducted that from the $500.00 he paid to his wife, he would say, "I have done just what was required of me." But the Treasury Department would say the $50.00 came out of the alimony reducing the deduction. So if the husband is going to make payments direct for child support rather than to the wife, he should be sure that the agreement is amended to protect him from his loss of alimony deduction.

The 1954 Revenue Code is going to ease the dependency requirements where both spouses contribute the support of the child and permit them to agree as to who shall get credit for the child as a dependent. (IRC 151-4) They can trade them back and forth. If there is more than one child, one can take one and one the other. As of now, the rules are rigid. Also the pending law will introduce what is known as head of family concept to take the place of the head of household and will permit full, rather than only partial, income tax splitting benefits to a person

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(70) *Sklar*, 21 T.C. ....., No. 39 (1953)
(71) *Leslie*, 10 T.C. 807 (1948); *McBerty*, 16 T.C. 968 (1951) *Fleming*, 14 T.C. 1308 (1950)
(72) *Fleming, supra*
(73) *Blyth*, 21 T.C. ....., No. 31 (1953)

who qualifies as head of family, and most any divorced person maintaining children in the household will so qualify. These are sections 152-C of the pending hill, and they are something to bear in mind if and when they beeome effective. (These provisions were later deleted by the senate and did not beeome law.)

Alimony trusts ean be dealt with at great length, but I will not endeavor to do so! The rules in ease of alimony trusts are mueh the same as with direct alimony, that the ineome is taxable to the wife. However, there is no deduction for the husband. He would be getting an unwarranted benefit, because he is not required to include the income in his income, and therefore by that exelusion he gets all the benefit he needs. (74)

There is one situation worth mentioning in eonnection with alimony trusts, and that is that a special eode section was added to take eare of the rather rare situation where the husband was using a presently existing trust—say a trust he set up for his wife before marriage or during marriage. At the time of the divorce he says, "All right this trust will eontinue, and that will be your alimony." That would not qualify, beeause it would not be incident to divorce. It was incident to the marriage or premarital status. Therefore, they had to add a special section, section 171-A (now seetion 682) stating that ineome from such trusts would be taxable to the wife and not taxable to the husband. In other words, in the case of those trusts, they need not be part of the divorce paekage. However, that applies only to trusts from which the income would be taxable to the husband under the law without reference to divorce. By that I mean the following: Revocable trusts, short term or so-called Clifford Trusts, or trusts in discharge of legal obligations.

The sections dealing with trusts also deal with estates, and as we said, the husband's estate may be paying alimony too, if he has incurred such an obligation by agreement. The estate will be considered as a trust except that the payments must be incident to the divorce and have the same legal obligation tests as we considered earlier for alimony. (75) In other words, the husband's estate is entitled to a deduction for periodic payments made after death if paid out of income. The trust may have, or the estate may have, tax exempt income. In this case the wife is treated as a beneficiary of the trust and gets a tax exempt status accorded to her alimony. (76) This can be important in the case of high bracket tax payers, where the trust might contain municipal bonds.

A situation which will arise every time that the husband's estate is bound to pay alimony is that the wife is a creditor of the estate. By special code section, she is treated as an alimony recipient and not as a creditor, because paying one creditor does not ordinarily furnish a tax deduction. However, she will then file her creditor's claim in the estate for the amount of her alimony over her life expectancy. If her life expectancy is ten years, it would then be a matter of figuring how much alimony would be received, and to file a claim for that. The estate probably has to be held open and continue to make these payments as they arise. This situation is unsatisfactory for all concerned. The payments received by the wife are fully taxable income to her. However, they will not be deductible by the estate unless paid out of income. The estate does not bave the break that the husband does in his lifetime, which is that he can pay alimony out of the principle and still get a deduction. The executor anxious to close the estate and distribute the assets, may, in many cases, wish to commute the payments and pay the ex-

(74) *Daggett*, 128 F(2d) 568 (CCA-9, 1942, cert. den. 317 U.S. 673
(75) *Laughlin*, 167 F(2d) 828 (CCA-9, 1948; GCM 25999, 1949-1 C.B. 116
(76) *Stewart*, 9 T.C. 195 (1947)

wife off, in other words, to reach an agreement with her, make a lump sum payment and get rid of it. One problem will arise bere, and that is, would this be deductible by the estate and taxable to the wife? As you know, if a casb basis taxpayer receives advances for salary, he is taxable on the entire amount wben received. However, the courts have held that where a husband, in his lifetime, changes his agreement with his ex-wife and pays her off, he may not deduct that lump sum, and she is not taxable with it. So the estate probably could do the same thing. (77)

One solution, in my own personal experience, was where the executor purchased an annuity for the ex-wife in discharge of her claim, so that the estate could be closed. We obtained a Treasury ruling that the receipt of the annuity would not be taxable income to the wife, as she was afraid that getting all that value at one time would cause her to be taxed with it all as ordinary income.

That leads me to a consideration of life insurance and annuities in alimony matters. I don't mean life insurance in the sense of the wag who said that alimony could be best defined as the cash surrender value of a husband. (laughter)

Actually, insurance will come into the alimony picture in many eases, because life insurance often is the largest single asset and hence, on divoree, its future disposition is very important. If the husband agrees to keep up the life insurance policies on his life and pays the premium for the benefit of the wife, are the premiums alimony to her, income deductible by him, or are they not? That has been the question which bas taken the time and attention of the courts. Certainly this much is true: That if the policy is irrevocably assigned to the wife, or in trust for the wife, then it is her property, and therefore, when he pays the premiums, he is in effect paying her income. (78) The courts will say that the wife has constructively received the premiums and has therefore received income, and the husband will obtain a deduction in the amount of the premiums paid. And this may be true even though the wife's interest is subject to some contingency. It is also true where the wife is irrevocably beneficiary and the child the second beneficiary, in the event the wife predeceases. Still the premiums will be taxed to the wife. (79) (80)

However, there are many arrangements where the insurance is intended only as security. The husband may say, "I will agree to keep these insurance policies in force to guarantee the payments for the wife's life." The wife is not then the owner of the insurance policy. It is security. Therefore the premiums are not ber income and not deductible by the husband. (81) If the policy may revert to the husband, then it is a pretty fair bet that he will not be allowed to deduct the premiums, because he has a certain interest in it. (82) The Circuit Court decisions indicate that if the wife must outlive the husband to get the insurance benefits, or if she has no beneficial interest in the policy unless she outlives the husband, the deductions will be denied. One of these cited cases noted, in denying the deduction, that the wife had no dominion or control over the policy. She was not named as a hencficiary and had no authority to change or appoint thc beneficiary. Neither did shc acquirc any interest in the loan value of the policy. The Tax Court may

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(77) *Loverin, supra; Van Vlaanderen,* 175 F(2d) 389 (CCA-3, 1949)
(78) I.T. 4001, 1950-1 C.B. 27; *Stewart, supra*
(79) *Hart,* 11 T.C. 16 (1948), acq. 1949-1 C.B. 2
(80) I.T. 4001, *supra; Hart, supra; Stewart, supra;* Reg. 118, Sec. 39.22(k)-1(d)
(81) *Blumenthal,* 183 F(2d) 15 (CCA-3, 1950); *Carmichael,* 14 T.C. 1356 (1950)
(82) *Smith,* 208 F(2d) 349 (CCA-3, 1953); *Seligmann* 207 F(2d) 489 (CCA-7, 1953)

allow a deduction on the constructive receipt to the wife theory, despite the fact there is substantial benefit to children or others in the policy, and despite the fact that a remote possibility exists that the insurance policy may at one time revert to the husband.

Now consider the case of annuities used to satisfy alimony obligations. I told you I had one experience where we used an annuity, but I can say that generally speaking that is about the most unsatisfactory way of getting an alimony obligation out of the way that you can find. In the first place, the full amount received by the wife is taxable as ordinary income to her. The 3% or life expectancy rule does not apply. No part of the annuity purchase price is deductible by the husband, because it is a lump sum payment. (83) Thus we have a situation where the husband loses the deduction and the wife has to pay income tax on what amounts to a partial return of her principal. The only satisfactory solution that I can think of in this case is for the husband to buy the annuity himself, and make the payments to the wife and not have her the owner of the annuity. Her tax is unchanged, but the husband will get the benefit of the annuity rule on reporting income and will get a full deduction for payments to his wife.

Suppose that the annuity costs him $50,000.00 and was to pay $3,000.00 a year. He would pay $3,000.00 received from the annuity to his ex-wife and get a full $3,000.00 alimony deduction. However, on the 3% rule, 3% of the $50,000.00, or $1500.00 would be the only amount required to be reported by him in his income tax return.

The other possible solution is for him to pay the money to the wife and let her obtain the annuity. She would then get the benefit of the 3% rule. I might also point out that the pending revenue bill will change the situation on the 3% rule and make it more liberal to the taxpayer, but the problem will still exist. (See section 72, I.R.C., where recovery of cost is based on annuitant's life expectancy.)

If the life insurance, after the husband's death, is used to make payments to the wife, and if under the settlement agreement she receives periodic payments, these will be taxable income to her. However, as the deduction died with the husband, then no one will be getting a tax benefit, and she will be suffering a tax penalty. If the insurance was for security only during the husband's lifetime, this is all right. But it is a very harsh situation, if the wife had to pay an income tax on the premiums during the husband's lifetime because the policies were considered to have been assigned to her. Therefore it is important to have the insurance paid to the wife in a lump sum, if there is any question of the settlement options resulting in a taxable income to her. Another consideration would be that the wife should carry the insurance and pay the premiums, and the husband would merely pay larger alimony to account for the extra expense to which she would be put. I give you one word of warning on term insurance. If term insurance is carried, having no present cash value, the wife receives no benefit from this payment during the life of the husband. Hence, under no circumstances, could the husband get a deduction for premiums payable on term insurance. He should therefore pay the amount of the premium to the wife and let her carry the term insurance, if this is the sort of arrangement which the parties wish.

The question of estate tax comes up, and the question of whether life insurance proceeds will be included in the husband's estate also comes up. By life insurance proceeds I mean those used for alimony purposes such as we have just

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(83) Reg. 118, Sec. 39.22(k)-1(b)

discussed. Under only two circumstances will the proceeds of these life insurance policies be included in the husband's gross estate. One is if the policy was for security only, to liquidate the obligation after his death—of course, this is the same thing as making the policy payable to his executor—and the other would be if his policies had been transferred to the wife as a gift.

Leaving income tax matters and considering estate tax problems, we find the general rule to he that a husband must support his wife only during his lifetime. The courts may not, in the absence of an agreement, decree alimony binding upon his estate after death. However, if he voluntarily incurs such an obligation, and the agreement is valid, his estate is bound. Alimony payments which his estate may provide, may provide an estate tax deduction. And if paid out of income, may provide an income deduction as well. (84) The estate may get a double deduction. This is an exception to the usual rule that if you have something deductible for income tax purposes, you must sign a waiver that it will not be taken for estate tax purposes. (85) But the deduction for estate tax purposes of alimony requires that the claim be based upon either adequate and full consideration or a court decree. (86)

Let me explain what I mean. Release of martial property rights is not consideration. The wife gets a payment from the husband and releases her dower and curtesy rights, (if there are such in the particular state), family allowance, probate of homestead, et cetera, and this does not constitute consideration, because it would be merely a means of avoidance of estate tax. However, the support rights which the wife may have bargained away for these payments are valuable consideration, and a claim based upon support rights or release of support rights will constitute consideration. (87)

The courts have said that if the obligation is founded on a court's decree that there will be no question of consideration. (88) Here we get to the rule mentioned earlier about the wisdom of incorporating the agreement in the decree. Not only does it insure the income tax deductions during the husband's lifetime, but if he has made an obligation to continue payments after his death, the fact that the agreement is not the basis of the claim, but rather the court decree, will make it fully deductible. (89) The amount of the deduction for estate tax purposes will be the present or commuted value of the wife's continuing claim. In other words, they will take actuarial tables to determine how long she will live. They will figure out the total sum payable over what period of years, and they will figure the present value on the 4% tables, and the estate will get a deduction not merely for what is paid as it goes along, but for the full amount it is anticipated will be paid.

A lump sum settlement should be neither taxable to the wife nor deductible by the husband. The marital deduction may get into the picture here, because if the wife still qualifies as a spouse, as defined in the marital deduction laws, the husband's estate may claim the marital deduction for a part of what is to be paid to her. (90) The parties having a decree of separate maintenance or an interlocutory decree can still qualify as husband and wife for marital deduction purposes.

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(84) *Maresi*, 156 F(2d) 929 (CCA-2, 1946)
(85) *Laughlin's Estate*, 167 F(2d) 828 (CCA-9, 1948)
(86) *Converse*, 163 F(2d) 131 (CCA-2, 1947)
(87) *Sanford*, 308 U.S. 39, 60 S. Ct. 51 (1939); *Converse, supra*
(88) *State Street Trust Company*, 128 F(2d) 618 (CCA-1, 1942); *Converse, supra*
(89) *Young*, 39 B.T.A. 230 (1939); *Maresi*, 156 F(2d) 929 (CCA-2, 1946)
(90) C.B. 1948-1 331,335

This is different from the case of joint returns. They can't file joint returns if they have a decree for separate maintenance, and according to the Treasury, even if they have an interlocutory decree.

Following the estate tax, there is the question of gift taxes. This should never arise in the case of periodic alimony payments. Those are deductible by the husband and taxable to the wife. They should not be a gift, but if there is a lump sum settlement, whether it is alone or coupled with alimony, you will find that the gift tax question may often be raised. Transfers made without consideration are treated as a gift and taxable as such, if in excess of the exclusions and exemptions which are allowed by law. The courts early dealt with the question of antenuptial settlements, and said that the gift tax was enacted to prevent evasion of estate tax. In estate taxes you can't deduct the claim unless it is based on a consideration, and support rights are consideration. Property rights are not consideration. Therefore, the Supreme Court said, the same rule applies to transfers before marriage. They are not based on valuable consideration, and they will be included in the estate, because release of property rights is not a valuable consideration. (91) (92)

Then came, following these antenuptial cases, a ruling of the Treasury Department known as E. T. or Estate Tax 19 in 1946. (93) And this purported to settle the law for both estate and gift tax for both antenuptial and property settlement payments. The Treasury said that relinquishment of property rights does not constitute consideration. The reliquishment of support does constitute consideration, and then said they would determine in each case, the value of such support rights. Furthermore, they said that if the payment made to the wife is for a release of both types of rights, property and support, they will allocate between them unless the parties make the allocation themselves. There is a note here. Be sure and make the allocation, because the Treasury has indicated that if it is reasonable it will be followed. If the wife receives certain property rights and certain support rights, and she is getting a lump sum payment, spell it out in the agreement—how much is for the property rights and how much for the support rights.

Certainly it is important, if there is an antenuptial agreement, that it be made after the ceremony, because the Treasury says a promise to make a gift is a gift, and if it is going to be a gift, you certainly should have the benefit of the marital deduction, and so it should be made after the ceremony. This leads one to conclude that such antenuptial agreements probably should not be made, but I believe, under Idaho law, they are possible, and although rarely used, you may come across one.

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(91) Section 2516 of the Internal Revenue Code of 1954 provides that where a husband and wife enter into a property settlement agreement or other written agreement relative to martial and property rights, if such agreement is incident to divorce, and if divorce in fact occurs within two years thereafter, then regardless of whether the agreement is approved by the decree or not any transfers of property made pursuant to the agreement shall be deemed to be transfers made for a full and adequate consideration in money or money's worth, and hence not subject to gift tax if they fall in either of the following classes:

(a) Transfers to either spouse in settlement of either martial or property rights, or

(b) Transfers to provide a reasonable allowance for the support of issue of the marriage limited however to the minority of such issue.

Note in this connection that this change in the gift tax law will apply only to transfers made after December 31, 1954.

(92) *Merrill v Fahs*, 324 U.S. 308, 65, S. Ct. 655 (1945); *Comm'r v. Wemyss*, 324 U.S. 303 65 S. Ct. 652 (1945); *see Comm'r. v. Bristol;* 121 F. (2d) 129, C.C.A.1 (1941)

(93) E.T. 19 (1946-2 Cum. Bull. 166

Now, I told you what the Treasury ruled. I can then say that in 14 out of 15 cases in the Tax Court, the Treasury lost every time, in trying to get these divorce transfers held to be gifts. (94) The Tax Court said, very reasonably, that it may be all well and good to say there is no consideration in antenuptial settlements, but we are dealing with divorce agreements. There is a fine distinction between a man with lovelight shining in his eyes, making a transfer to his intended, and a man contemplating the ruin of his home, the loss of his children and destruction of his estate. Any settlement he makes is certainly going to be an arms-length bargaining agreement, and can't, by any stretch of the imagination, be called a gift. I think there is a lot of logic in that. However, the Circuit Court did not always agree with the Tax Court. Sometimes they did and sometimes they said, "Well, this is based on a judgment." And they ruled in that fashion.

Finally, in 1950, the Harris Case (95) came to the Supreme Court. This is important for two reasons. One, it is the only Supreme Court decision on this point. And two, guess what? It was the woman who paid in this one! Cornelia Harris had the money, and she made the transfer to her husband in order to get rid of him. The Treasury said she made him a gift. The Supreme Court decided as follows: They said that in the first place the Tax Court was wrong when they said there is a difference between the antenuptial agreement and the divorce agreement. They are one and the same for tax purposes. But they said the gift tax does not apply because the agreement had been incorporated into the decree, and hence it was a decree and not an agreement which made the transfer. The Harris decision, I think, is inferior to the Tax Court rule it supplanted, but that is it.

It is important to make sure that the agreement is incorporated into the decree to protect you against the charge that this is a taxable gift. However, there is a danger in this case, which I don't think has been adequately pointed out. Every leading case on these matters arose in our friendly neighbor to the south, Nevada, during the time when its court was empowered by statute, when granting a divorce to make such disposition of the community and separate property as shall appear just. (96) That is a unique provision in a community property state, or any kind of a state which gives the court power to make a division of property other than community property. The words "and separate" were deleted by the Nevada Legislature in 1949, so no longer does the Nevada Court have that power. I can think of a very good argument, from the point of view of the Treasury, to say, "Well, yes, we are bound by the Harris case. That is the rule of United States Supreme Court. But the Nevada Court could have taken some of this woman's property and transferred it to her husband. Nobody would contend this is a gift if she merely voluntarily did what the court would otherwise do for her. It was not the agreement which made the transfer, it was the law. It was not a gift." Now they can say the court has no such power to make this transfer, and therefore if you choose to make the transfer, you make a gift. I don't know why I should worry about trying to make up the Treasury's side of the case, because I don't get a salary from the government!

But apparently the commissioner does not treat the Harris case this way. He says, in a ruling as recent as January 1954, (97) that in the Harris Case it was held that where property settlement agreement entered in contemplation of divorce was

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(94) *Edmund C. Converse*, 5 T.C. 1014 (1945), affimed 163 F.(2d) 131 (CCA-2, 1947)
(95) *Harris V. Commissioner*, 340 U.S. 106, 71 S. Ct. 181 (1950)
(96) Nevada Compiled Laws, sec. 9463
(97) Rev. Rul. 54-29, IRB No. 3, Jan. 18, 1954, pg. 9

to become effective only upon the approval of the divorce court, and sueh agreement was ratified and approved by the divorce court, the wife acquired her property interest by eourt decree, and not by transfer of her husband. The agreement in this case was not to become binding upon either party unless approved by the decree of divorce. The Harris Case was a five to four decision, and the minority stressed the fact that the agreement, by its terms, was one to continue after the judgment.

I don't know the law in Idaho on this point. In California I do know that our law is that if an agreement is incorporated into the deeree, it ceases to exist as an agreement. It is merged in the decree, and from there on you have only the dceree. If it is possible to provide in this state that your agreement should be merged into and become part of the decree, you will have a further weapon against any claim of the Treasury that a taxable gift has been made.

So in preparing the agreement, I would recommend the following steps: first, provide that the agreement must be incorporated in the deeree; second, if your state laws will permit, provide that the agreement is not effective until and unless it is so incorporated. I don't think they should be held as agreements for divorce, but the courts of some states might not agree. Choose a court with authority to rule on such matters. You probably can't find a court like the obliging one in the Harris Case, but at least pick a court which has jurisdiction to ratify the agreement. Then provide for incorporation, and merge the agreement into the decree. Then make no transfers of property until the court has approved and incorporated the agreement in the decree.

Now, I mentioned that the Treasury will endeavor to value support rights in order to determine what consideration the wife will furnish to the husband in taking a lump sum payment in release of her support claim. The Treasury will first look at the husband's income and station in life, and then take the commuted value of payment he made to the wife. Where the wife's remarriage will stop the support payments, the Treasury says, "We can figure not only how long this woman will live, but we can even figure out what her chances of remarriage are."

They mean they will use tables of experience in workmen's compensation cases, where they found out how likely a widow was to remarry. Can you imagine anything more illogical and unsound than to take the case of a widow of a working man dependent upon marriage for support, and say that ber chances of remarrying are the same as those of a divorced wife whose income will stop if she remarries?

A division of community property is an important thing in any community property state. And it is of importance in connection with the gift tax matters. In the first place, if there is an equal division of community property, each party taking his own share, there should be no question of gift taxes. I know of only one case on that matter, and that involved the motion picture director, Mr. Norman Torrlog, and it related to California community property in a Nevada divorce (98). Each party got one-half of the community property, eouveying the other half to the opposite party hy agreements which were delivered aftcr the divorce, and to be effective upon divorce. There was a separate provision made for the support of the wife. In other words, it could not be argued that this community propcrty division was alimony. The Tax Court held this was not a gift. Now, the only alarming thing about that case was that it arose at all. Why should it be considered a gift? I think that should be noted that it arose during the 1942 to 1948 period, when the Federal

(98) *Taurog*, 11 T.C. 1016 (1948)

Laws ignored our community property laws and said all was the property of the husband, and they didn't care what the Idaho Legislature said. Therefore, any transfer made by the husband is a gift. Now, if there is an unequal transfer of community property, I think, to the extent of the excess it would be treated the same as separate property transferred, and you would need to consider the Harris case and other gift tax cases which I cited. Furthermore, there may be income tax consequences to the division of the community property which will relate to the nature of the various items transferred. The Treasury has ruled that payments of the wife's counsel fees by the husband are not a gift to the extent that the obligation is that of the husband. (E.T. 19)

I have said we have dealt with income tax considerations. But we must still consider the important question of capital gains and losses, and the basis of property transferred. This problem is before you every time there is a transfer of anything other than cash. The usual rule is, as you know, that in case of a gift, the donor's basis is used by the donee, and the donor's basis, or the market value at the time of transfer, whichever is lower, is used for a loss. The courts bave ruled that the definition of a gift is not the same for income tax purposes as it is for gift tax purposes. (Farid-Es-Sultaneh), 160 F. (2d) 812 (CCA-2, 1947). In other words, in the Harris Case, the Supreme Court said the release of property rights was not consideration and would not prevent the transfer from becoming a gift. But then the Seeond Circuit said that such a transfer, although a gift for gift tax purposes, was not a gift for income tax purposes. What that means is that the husband may be held for gift tax on the property transfer, but the wife may get a stepped up basis for the property by taking the market value at the time of transfer as her cost basis by saying she furnished consideration under the ineome tax laws.

The question of whether or not gain or loss will be recognized on a transfer is very important. Loss may be recognized, but will be disallowed, because the husband cannot take a loss on the sale of property to his wife, but gain may be achieved. It is particularly important, when we have had ten to fifteen years of continuel inflation, to your client who may wish to make a transfer of the family homestead to the wife, in ease of divorce, to avoid further alimony claims. You want to be sure he doesn't have to pay capital gains tax. Certainly, if he transferred appreeiated property to his wife for a valuable consideration, he realizes a gain measured by the excess of the market value at the time he transfers over his cost. The courts say he received consideration in the release of the support rights against him in the exact amount the property transferred to her. Furthermore, loss will be disallowed if the parties are husband and wife, and it might be disallowed if the transfer is not made until after they are divoreed, if the property was not held by him for profit. (99-100.)

There is one very dangerous pitfall, and that is Section 117-O, (now 1240-1), which says that if the husband transfers depreciable property used in trade or business or held for the production of income, the gain will be ordinary and not capital. In this case, the transfer should not be made until after divorce.

The division of community property, where an equal division is eonsidered by the court as a partition and not a sale, creates no capital gain. This is true even though some assets go to the wife and some to the husband rather than having undivided interests go to each one. You will, of eourse, at once know that it would not

(99) *Mesta*, 123 F(2d) 986 (CCA-3, 1941)
(100) I.R.C. 165; *Walz*, 32 B.T.A. 718 (1935)

be very practical to have a divorced husband and his ex-wife to own undivided interests in the community property. It is normally partitioned. So the court said as long as it is an equal division, it is not a sale, and they can transfer and hold these assets without being subject to a capital gains tax. (1) However, if the assets are divided unequally, gain, but not loss, will be recognized (2). One thing to look out for in a division of community property, and I mean by this a non-taxable division of the community property, is the cost basis of each item. Because the courts say that the old basis to the community for each item is the basis to the one who gets it. Let me illustrate.

Suppose the parties have $20,000.00 in securities and a home that is worth $20,000.00. Suppose that the securities cost $20,000.00, so that if they were sold, there would he no gain. Suppose the house cost $10,000.00. The husbands says: "You take the house worth $20,000.00, and I will take the securities worth $20,000.00." It is an equal division. But sbould the wife sell the house, she will have the capital gains tax based on $10,000.00 appreciation, and the husband would have no capital gains tax. So in dividing community property, to property protect your client, you should know the cost basis of cach asset. That would have a bearing on any future sale by the parties.

Now, another situation which will often occur, is where one spouse uses separate assets to trade for the interest of the other in community property. Suppose a husband had separate assets, and there is a business which is a community asset. He wants to keep the business. He doesn't want to sell it or be a partner with his ex-wife in it. He says: "I will give you so much of these assets and take, as my part of the community, the entire business." This has been held, in 1954 tax court cases, to constitute a sale by tthe spouse who transferred the interest in the community property. And it is something which I think you have to bear in mind. (3-4).

A lump sum settlement of future obligations to pay alimony is not a sale, and it should not be taxable to the wife or deductible by the husband. The regular periodic payments as I told you, are treated as being on a cash basis. If there are arrearages, this would be taxable and deductible in the year paid. (5)

Just before closing, let us look briefly at the 1954 changes. I have mentioned most of them as I went along, but I thought I would summarize them for you at the end, because they make three rather important changes in the alimony tax laws.

First, though not directly affecting alimony, is the change in annuities. As I said earlier, annuities have been taxed on the 3% rule. By this is meant the fact that 3% of the cost of the annuity is considered income, and the balance considered return of capital, until the entire cost has been recovered, and then all is taxable. Now, the proposed law, will take the life expectancy of the recipient of the annuity (let's assume it is ten years) and will say that according to experience, in ten years, your entire capital will be paid back. Therefore 10% of what you get will be considered return of capital, and only the balance as income. I know of very few annuities that will pay 10%. As a result of that, the receipient of the annuity income will get a better tax break. (IRC 72).

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(1) *Walz*, 32 B.T.A. 718 (1935); *Oliver*, P-H TC Memo 49-102 (1949)
(2) *Johnson v. U.S.*, 135 F(2d) 125 (CCA-9) 1943); *Rouse v. CIR*, 159 F(2d) 706 (CCA-5, 1947); *Long v. CIR*, 173 F(2d) 471 (CCA-5, 1949)
(3) *Jessie Edwards*, 22 T.C. ..... No. 10 (1954)
(4) *Gordon Edwards*, TC Memo 954-11, P-H TC Memo 54,117
(5) *Grant v. CIR*, 209 F(2d) 430 (CCA-2, 1953)

The second important change is that the deductible and taxable alimony may arise out of payments of separation agreements without any court proceedings whatsoever. This leads me to believe that in cases where parties contemplating separation or divorce, through religious convictions, age or other reasons, are not likely to remarry, there may be tax benefits to be obtained by having a separation under a separation agreement approved by your courts, if this is permitted by state law. Under present law, the parties, if sufficiently amicable, could file joint returns and obtain the highest tax savings. If the proposed law were passed, the payments made by the husband to the wife would qualify as alimony, whicb they would not today.

Other important cbanges are the deductibility of temporary alimony (I.R.S. 71 (a) (3), and the right to agree on dependency exemptions where both spouses contribute to the support of a child. (IRC-151-4).

The matter of state income tax laws is one I won't go into here. You are far better versed in the provisions of the Idaho State Income Tax laws than I am. I know it is customary to follow the deduction for Federal purposes in preparing the state return. I have been told that the Idaho Attorney General ruled that alimony was not a deduction, although I don't know for sure whether that is the case. I do know that some states have taken the position that where the ex-wife lives out of the state, the deduction will be denied. We bad such a case in California, and the courts decided against the state and ruled that the ex-wife was taxable on alimony (6). Of course, you can see the position of the state of California. The wife was in Missouri, and sbe was not going to pay income tax to California (7).

Now, I hope I have, if not compounded the confusion, at least shared my confusion with you on these points.

If you have any questions on the matters discussed, I would be very happy to do what I can to answer them. Thank you very much. (applause)

PRESIDENT ROBERTSON: Thank you very much, Mr. Price.

MR. JOHN CARVER: On that last question, capital transactions--you said, I believe, that the use of separate property in the exchange would make it a capital transaction. I believe there is one case that says, even where it is all community property, if the wife gets cash and the husband does not, and be gets all of the business, that is a capital transaction.

MR. FRANCES PRICE Jr.: You are right. I didn't make that sufficiently clear. It is a case where be either uses his portion of the community to purchase something from her, or whether he uses separate funds, that there will be a gain to the wife. However, there is not a gain where she trades him ber interest in one community asset for his interest in another community asset so long as the values are equal.

MR. JOHN CARVER: You are talking about the Edwards case?

MR. FRANCIS PRICE Jr.: Yes.

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(6) *Francis v. McColgan* (107 Cal. App. 2d 823, 238 Pac. 2d 70)

(7) John Sidney Thompson, 22 Tax Court, ... No. 39 (May 12, 1954), where the court deals with the problem of whether the payments were intended to be alimony as contended by the husband, or as consideration for transfer of community property as contended by the wife. The court ruled with the wife, expressly reserving any decision on the point of whether the wife realized income taxable as capital gains.

MR. JOHN CARVER: Is it your opinion that that rather drastically affects us in these community property states on all these separation agreements?

MR. FRANCIS PRICE Jr.: I think so definitely. I use the example of a man in a business, which he wants to keep, which is his community asset. I don't see how he can do it without having the wife be treated as having sold her interest in the business, unless he had enough community property that he could give her community assets equivalent to the entire value of the business. That would be an unlikely case. Ordinarily, he would have to borrow the money, for example, which I pesume would be separate funds, because he would be—

MR. JOHN CARVER: If he borrows, as in that case, on the insurance policies, that would be considered separate funds.

MR. FRANCIS PRICE Jr.: Funds acquired through borrowing would be separate funds, and she would be considered as having made a sale to him. And that is what was held.

MR. JOHN CARVER: Do you know whether that case is on appeal?

MR. FRANCIS PRICE Jr.: No, I checked just before I came out. It is 22 Tax Court number 150. It is Jessie Edwards and Gordon Edwards, Tax Court memo 554117. And I checked the citator as recently as two weeks ago, and there was no indieation of what had happened. But I see we have Prentice Hall man in the lobby of the hotel. Maybe you can find it there.

MR. JOHN CARVER: It seems to me, based on those cases, almost all of our separation agreements in this state over the last three or four years would be subject to being looked at on the point of view of gain.

MR. FRANCIS PRICE Jr.: Certainly in every one where there was any transfer.

MR. JOHN CARVER: That is the ordinary way in this state, because the wife's interest—our law is specific, and it is quite eustomary to give her the money and him the business so to speak. If they are going back and look at all those things and assess her with the gain because of the inflationary factors, there is a likelihood to be a gain in almost every case.

MR. FRANCIS PRICE Jr.: I agree completely.

MR. JOHN CARVER: On that gift tax proposition, do you know whether or not the Bureau will take the position that where the wife accepts less than her half of the eommunity property in this state, that the difference will be treated as gain? I don't think, in this state, they have ever pieked one up. I haven't listed any of them where she gets less than an equal half.

MR. FRANCIS PRICE Jr.: I would say she would have a loss, which would not be allowed, so she would have a negative—

MR. JOHN CARVER: So she is making a gift?

MR. FRANCIS PRICE Jr.: Yes. I think the only thing you can do is incorporate it in the decree and say it is not a gift and say she got less than her basis in the property, she incurred no gain and suffered a non-deductible loss.

MR. JOHN CARVER: What gave rise to the Federal Government's attitude that a husband's charging his obligation to the wife, in the form of alimony, would be treated any differently than discharging his obligation to the children in the form of support money?

MR. FRANCIS PRICE Jr.: I think it was the forerunner of the income splitting idea, because the two had been always treated—he was denied a deduction of either one, because it was a legal obligation. I think it was two things. One was that a wealthy taxpayer who could afford to move into the state where his obligation would cease after divorce, and could afford to set up a trust company, under Helvering vs. Fuller, the 1940 case, could escape tax, and therefore they wanted to bring his situation into line with that of the other husbands. On the other hand, there was the fact that the amount a man pays for support of his children, in case of large incomes, is not as much as the alimony his wife would get. I know cases where husbands agreed to pay $25,000.00 a year alimony. They might be wealthy, but from 1942 on, nobody could pay $25,000.00 to somebody else and pay the income tax on that $25,000.00 and live. However, the same thing does not apply to children, because the Supreme Court's decision on the trust did not extend to support for children. So that discrimination between trust alimony and ordinary alimony isn't in the picture with child support.

And the second factor was that the amounts probably just weren't so great as they were in the case of alimony in most cases. Congress felt relief was required on the other two.

I might point out that when I was discussing the gift tax matter, where the transfer is for the support of the children during their minority, they will never assess gift tax, because the husband will still be taxable on the income, say from the trust he establishes for the support of the children. Consequently, if it is his income, he didn't make a gift. However, they will say that anything that is not to be used up during the minority, that is anything for the children after age 21, or anything in excess of their necessary support, will be considered as a taxable gift by the husband at the time of the transfer. And this Harris rule of relying on the decree and saving yourself by incorporation will not come into the picture where the children are the transferees. That will make no difference whether consideration is involved or not. That will still be a gift.

PRESIDENT ROBERTSON: Are there any other questions to be directed to Mr. Price? If not, I have a few announcements to make.

(Whereupon several announcements were made and the convention recessed until 9:30 Friday, July 9, 1954.)

Friday, July 9, 1954, 9:30 a.m.

PRESIDENT ROBERTSON: The hour has arrived to open our meeting, and we will proceed to the first order of business, which partakes, to some extent of a lottery.

(Whereupon drawings were made for various legal publications.)

PRESIDENT ROBERTSON: We will proceed now to the institute item that we have on the program here this morning. I will ask Mr. Ralph Breshears, from Boise, to introduce Mr. Dunne, our speaker.

MR. RALPH BRESHEARS: Mr. President and Members of the Idaho State Bar: It has been very good fortune for the members of this Association, for a good many years, to have as guest speakers, men prominent in the profession and experts in their own particular field. This morning I am privileged to introduce to you a man with whom I am personally acquanted and have been associated, a man who has a wide experience in trial practice and trial work, and who does a great deal

of trial work in the Federal Courts and in the State Courts of California. He is a man who, I am sure, will deliver a worthwhile message to this Association. It is now my pleasure to introduce to you Mr. Arthur B. Dunne of the firm of Dunne, Dunne & Phelps, San Francisco, California. (applause)

MR. ARTHUR B. DUNNE: Mr. President and Members of the Idaho State Bar Association: Because wbat I have to say to you this morning is so much a matter of personal judgment, so mueh a matter that can't be demonstrated from the books, so mucb a matter for which there is no authority, although there are many texts on trial practice, that I should say a little more about myself so that you can properly salt down the judgments I may express.

In the first place, for something over 30 years, I have been handling cases on trial and appeal, civil cases primarily, on the defendant's side. And eertainly, in number, the bulk of those cases has been railroad personal injury cases, although I am fortunate I can say my experience has gone beyond that.

The seeond thing that you should know is the point of view from which I speak, because my praetice bas been in a metropolitan area. We are presented with somewbat different problems than you are presented with in smaller communities. The last thing I would want to do would be to suggest that with my background of experience, I could tell you how to try your case in your own communities.

First as to judges. In San Francisco alone we have seven Federal Judges and 20 State Court Judges. That means our acquaintanee with the Judges is, on the whole, on a professional rather than a social level. The second thing is that with some 1400 or 1500 practieing lawyers in San Francisco, the chanees are we will try a case against a man we never saw or heard of before. And the third thing is that we have jurors who come from every walk of life, from people who are on relief to, in rare instances, important executives in business. We very seldom know anything about them personally. We do, however, have a system under which we can find out something of their reactions as jurors.

In the Federal Courts the jurors sit for a term of four months. Usually at least two civil jury cases a week are tried in the Federal Court at San Francisco. In our State courts our jurors sit for 20 trial days. The result is that we are able to keep a file on jurors and can get a certain amount of impersonal information about their reaetions on juries. Such jurors beeome somewhat courtwise, so that we are not, in many instances, trying a case to people who don't know anything about a court, courtroom procedure or what they are supposed to do.

I have selected for discussion eertain aspects of trial by jury. I don't believe that trial by jury is essentially different from trial to a court, but I do believe that the problems aeeentuate themselves very much when a case is tried to a jury.

I am assuming, in what I bave to say, eertain types of cases. I am assuming a typieal fact dispute ease. Exclude certain types of cases. For instance, exclude anti-trust cases, which are tried ordinarily, at least a government case, on the records of the company involved, such as cases involving monopoly or restraint of trade and price fixing cases. The same goes for rate cases, trade discrimination cases and certain types of eontract cases. I am also excluding that type of case, and they are reasonably rare, which present only a question of law, and those equally fairly rare cases in whieh the facts are not essentially in dispute and the factual dispute revolves around the inferences that are to be drawn from somewhat eoneeded facts or whether admitted conduct lives up to some standard. So the typical case I have in mind is the negligenee personal injury case, battery, libel, slander, false arrest and

malicious prosecution, fraud and deceit, both real and constructive fraud, oral contracts, and, of course, the case which I suppose is preeminently the one that presents some of these problems, the really contested divorce case.

I make certain assumptions in what I have to say to you. I assume that there are certain cannons of ethics and that lawyers should conduct agreeably to them but I assume that my opponent may not.

Secondly, I assume the adversary system of trial. I assume that I am an officer of the court, that I owe the court certain duties. I must not knowingly mislead the court, either as to representations of fact or as to what a case holds or a statute says. But I assume, on the other hand, that I am under no duty to try my opponent's case. I can't affirmatively mislead him. On the other haud, I am not called upon to give him any assistance. Whether we should have such an adversary system is a subject in itself. I suppose it is a matter for argument. It has been suggested that our trials degenerate into a mere battle of wits and that cases are not properly investigated and proper results are not reached. I am prepared to argue that with anybody. I think it can be demonstrated that with fairly competent, decent lawyers on eaeh side of the case, the great probability is that the matters involved will be fairly and fully exposed—much more fairly and fully exposed than under any other system that I know of.

These assumptions are basic to what I have to say. The big problem is the administration of justice. In discussing the problems involved in jury trials—I have read a good many diseussions of them—we sometimes lose sigbt of the ultimate objective. The ultimate objective is the administration of justice. I appreciate the difficulty of defining the word "justiee", but I think, to any trained lawyer, it has certain definite connotations. We must keep always in the foreground of our thinking that we are seeking the administration of justice.

The administration of justice is the settlement of individual disputes. Those disputes are to be settled with the machinery we have in a courtroom. If we are to know what the problems are in making that maehinery work, we have to know what our objective in the working of that maehinery is. I suggest to you, in the first place, in approaching the problems that I want to discuss, that there has been a tendency to look upon the administration of justice and settlement of individual disputes as a quantitative matter rather than a qualitative matter. Mueh of the discussion seems to turn upon the number of cases that can be ground out by a given eourt in a given period of time rather than on reaehing a fair result in the particular ease, even if it is a little more expensive and if it takes a little more time. Seeondly, in endeavoring to discuss qualitative objectives there have been attempts to generalize on what the objective in the particular suit should be.

I have seen and heard it said that the objective is that the truth should be exposed. You will find that statement of the utlimate objective of the trial of a lawsuit, coming largely from some gentlemen, I say with deference, of limited experience in the trial of cases, who want to reform the rules of evidence so that everything under the sun can be dumped in. I prefer to state the objective in a little different way. I prefer to say that the objective is the administration of justiee, in the individual case, that the objective is a result that is fair and sociably acceptable.

Perhaps I bave taken on a pretty large order when I say that a differentiation can be made in the trial of a lawsuit between exposing the truth on the one hand and upon the other band reaching the vague and abstract ideal of a fair result upon the facts.

A farmer, I take it, might have some difficulty in giving you a definition of a cow. He would have no difficulty in walking out into a field and finding one among the other animals. A trained lawyer will have no difficulty in looking at a case and seeing the difference between dumping in all sorts of evidence so that the "truth" may come out, and a fair result. Let me give you an example, not drawn out of thin air. An employee of a railroad is injured. He sues. He claims permanent disability. Now, if everything under the sun is to be dumped in that may have some possible and remote bearing upon the result, whether it has to do with what happened or is an emotional appeal to a jury, and a verdict of $50,000.00 comes in, it might be said, "Well, that is simply the result of the facts. The truth came out." But, if, after the case is over, the man who has received that judgment immediately wants to return to work upon the ground that he has gotten over his injury, it isn't very hard to say that the result in that particular case is not a socially acceptable result.

I think the difficulty with people who want to let anything come in that has any possible logical relevancy, on the theory that then the truth will come out, is that they are assuming there is such a thing in the trial of the lawsuit as absolute truth. That, I deny. To the contrary, I suggest that the result in the trial of any lawsuit is, at the very best, only an approximation. (See Jerome Frank, Courts on Trial.) And indeed at times it is an extremely rough approximation. This results from two great difficulties.

In the first place our facilities for reproducing the facts are faulty. A witness can be honest, but inaccurate. He can be inaccurate in his perception, in his recollection and in his reproduction. But the witness, also, may be dishonest. There are dishonest attempts at production ranging all the way on from mere coloring of testimony to outright perjury. Unfortunately I am forced to the conclusion that outright perjury, in some respects at any rate, is much more common than most lawyers, certainly most judges, and certainly practically all commentators on trials of cases are willing to admit.

Secondly, the jury is an extremely poor instrument for the determination of facts. Jurors are subject to natural prejudices. They respond to irrelevant appeals. They are not equipped in many instances to handle the matters that are presented to them. In some types of case a jury can serve well enough—particularly when the dispute is in the realm of common experience of jurors. But often it does not. But where on question is the cause of a cancer. I have recently been employed to defend an action. The case will be tried to a jury. There will be conflicts in the testimony, I assume, of experts. The matter will be submitted to twelve laymen for determination. I venture to suggest that there would not be one person connected with the trial of that case, whether it be the attorneys, the members of the jury or any of the judges who may ultimately sit upon the case, who would be willing to have his own condition diagnosed and prescribed for by twelve people representing a cross-section of the general community.

The fact is that today, with the techniques that we have and the type of question that arises, the jury is inherently a poor instrument for determining some of the questions that are presented.

What, however, am I to answer if somebody says, "Well, what is your definition of a fair result? Who are you to say that a result is fair or unfair?" I answer that a result is a fair result when it is socially acceptable, and that it is socially acceptable when it will be approved by disinterested, fair minded, informed persons. What will be so approved is not the same in all circumstances.

One of the most criticized rules in personal injury cases is the so-called "fellow servant rule". By the Federal Employer's Liability Act of 1908 it was abolished as to railroad workers who fell within that act. By now it has been abolished practically everywhere. Almost everyone would agree that in our present industrial society the fellow servant rule has no place. But assume this set of facts: A farmer, operating his own farm, needs help. He employs two farmers, friends of his, who likewise are operating their own farms, to work together. One of them, working in view of the other, works carelessly and injures the other in the absence of the man who employed them. Now, where is that loss to fall? The farmer who employed them or the man who was guilty of the negligent act or the injured man who might himself have so controlled the work as to prevent injury? I suggest to you that in such circumstances the application of the fellow servant rule can produce a socially acceptable result. I am suggesting that what is a socially accepted result is necessarily a shifting concept, depending upon the general scene, as well as the specific factual situation. But be that as it may, I deny that we, as trained and experienced lawyers, are not in a better position to determine what is a socially acceptable result than someone who has little or no training or experience in the field in which we operate.

There is one other preliminary point. There seems to me to be an increasing reluctance upon the part of the appellate courts to assume responsibility for the end result in the trial of lawsuits. Perhaps that may arise from some disappointments upon my part. But from reading cases, it seems to me that increasingly appelate courts are unwilling to assume the responsibility for the end result and are throwing it back onto the trial courts. And unfortunately, I am afriad that to some extent that attitude is affecting the trial courts. It means this: The lawyer who is trying a fact dispute case cannot try it upon the theory that if the result is bad he may get relief from an appellate court. It is up to him to see that he gets the result he wants in the trial court. To a very large extent, then, what I am saying to you is that cases cannot be tried for the record, as they could be tried 50 or 75 years ago. They have to be tried for the jury that is sitting in the jury box.

I suggest five primary problems in the trial of a case. There could be another grouping. Perhaps the problem could be put into six or seven groups or confined to two or three. I have grouped the primary problems of the trial lawyer in a fact case, under five heads.

The first is ascertaining the law. That is no particular problem in my opinion in the usual case. Usually a conscientious lawyer has prepared his case reasonably well and knows the legal elements that are involved. There are cases in which an important rule of law is doubtful. In such cases, if that rule is pivitol, the lawyer trying the case has no choice but to go straight forward, assuming that the rule will be ultimately settled his way and try his on that theory. But I think, in most fact dispute cases, if there are doubtful rules of law, a conscientious lawyer will soon learn that there is a doubt and try his case to avoid that doubt, at least avoid it to the extent that he won't be reversed on appeal, if he gets a judgment. I think it is bad practice, as a practical matter, for a lawyer blindly to assume that doubtful questions are going to be resolved this way, and equally dangerous to attempt to assume a rule in the trial court and then hope to be able to circumvent the question when it gets to the appellate court.

The second problem is procuring proof. I don't think there is any real problem here. Today there is a very considerable amount of discussion of two related subjects touching the procuring of proof—pre-trial procedure and discovery.

Pre-trial procedure is a matter of separate discussion in itself. It has uses. It is not a cureall. I don't know what the situation is in your state. We are in the process of studying the situation in our state eourts in California. I think that the advocates of the system are arguing too much for it. I think pre-trial procedure ean be overdoue. As a matter of faet, with very few exceptions, it is not much used in the Federal Courts in California. On the other hand, it has been extensively used by Judge Fee in the Distriet Court in Oregon when he was there, aud I think one of the arguments agaiust the extensive use of this system are some of Judge Fee's own results. I speak from experience. (laugbter) The pre-trial order in this particular case was 3600 pages and took six years to prepare. Neither of those statements is an exageration.

Discovery procedure has been given new machinery and the field enlarged. Perhaps I have too little sympathy with enlarging the field of discovery. I suppose that in about another 20 years there won't be any lawyers left who were raised with the original training I had, because for something over the first ten years of my practice, trial practice in the Federal Courts, there was no such thing as discovery. But we weren't surprised. No good trial lawyer was really taken by surprise in the trial of any case. I think that arguing the advantages of discovery can be very much overdone both as to discovering documents and taking depositions. The argument for extensive pre-trial discovery, taken in connection with pre-trial procedure, is that it removes the battle of wits in the courtroom. This again is a subject in and of itself, but I suggest to you that though it may remove the battle of wits from the courtroom, but it ouly removes it one step to the stage before you get into the courtroom. I suggest also that if pre-trial discovery is too extensive, it serves no purpose except to put a premium on perjury. You may have to face some of these problems. With documents, both discovery and pre-trial procedure properly controlled can serve a useful function. But when it comes to requiring the produetion of statements of witnesses, and particularly the statement of a party, there is room for abuse. A party to a lawsuit who wants to see a written statement that he made before the dispute arose and the case got into court, often wants it ouly to know how far he can go in testifying with impunity. A party who is honest and has decent recollection doesn't have to worry about what he has written.

The third group of problems in the trial of a lawsuit arise from the nature of the machinery for the determination of the suit itself. I have said that the jury is an imperfect piece of machinery. I repeat this because it has decided bearing upon the other two problems which I do want to spend some time on.

The other two great problems that a trial lawyer has to face in the trial of a lawsuit are misstatements that will be made by a witness and misconduct by counsel upon the other side. I use "misconduct" in a very broad way. Somewhat distinct and a combination of the two, a very large subject in itself, is the problem of the professional witness who is both a witness who can make a mistake and an advocate who can engage in misconduct.

An amazing thing with respect to these two problems that a trial lawyer has to face—false testimony and misconduct—is the very, very little help that he can expect from an appellate court if the result goes against him. Indeed, as to misstatements of witnesses, it is a constitutional proposition, where a case is tried by a jury, that the appellate court can't give you any assistance. And, unfortunately, appellate courts have a tendency to brush aside claims of misconduct upon the ground that while the conduct wasn't proper, after all, it didn't prejudice the case, and the jury surely was able to see through it. This is an attitude of mind that I have never been able to understand, but it is found repeatedly in decisions

of Appellate Courts. An experieneed trial lawyer, during the trial of a ease, deliberately and throughout the trial of a ease engages in a planned eourse of conduet for only one purpose, and that is to affeet the jury. Then the appellate court says it is improper, but althought he got a verdict, he didn't succeed in what he was trying to do.

With respect to these two problems, misstatements and misconduct, there is no easy solution. There is no single thing that can be said that is going to resolve the problems of the trial lawyer. He has to recognize that the truth does not always prevail in the trial of a lawsuit. It may be sad commentary, but it is true, and he has to guide his course accordingly, perhaps toward rettlement or, if this is not feasible, toward softening the blow, if he is not successful overall.

Again I emphasize as strongly as I can, that in dealing with these problems, there are no fixed rules. Any lawyer who goes into court assuming that there is a set solution for any of the problems, is heading for trouble. The most that can be done is to pose the problems, to have them in mind, and possibly to suggest some guides, which, in the last analysis, are simply my own opinion based upon my own experienee. The guides which someone else might suggest could be entirely different.

I am going to divide what I have to say upon these two problems of dealing with the witness who misstates and counsel who goes beyond the bounds of propriety under several heads. The division is arbitrary, and much that I have to say as to the one matter will apply to the other.

First as to misstatements of witnesses. Courts charge juries, that under our proeedure we must start with the presumption that every witness is presumed to speak the truth. Now, that presumption operates well enough where a single witness testifies on a matter that is not really contested, or where the testimony goes only to the general background of the ease. But normally—no, I will say always—the fact dispute ease I have assumed doesn't get into eourt unless witnesses are going to testify to somewhat dyametrieally opposed propositions. The fact is that a trial lawyer, preparing to try a lawsuit, must start with the assumption that some witness is not going to speak the truth.

There are a variety of types of misstatements. Mark Twain has said that there are 869 forms of lying. I don't propose to take up all 869 forms, but there are several general elassifications of misstatements that I think an experienced trial lawyer will recognize. And I belong to that school of thought that much of the misstatement by witnesses cannot, in the last analysis, be classified as innoeent.

There is to begin with, the witness who fails to state a material matter. If the failure is innocent and the witness is honest, there is no problem. If the omission is by design, the problem is essentially the same as with the man who has gone upon the stand intending deliberately to perjure himself. Indeed, such coneealment will usually be found coupled with some form of misstatement.

With affirmative misstatements, there is, of course, the witness who innocently misstates. There is the witness whose testimony contains an essential eore of truth, but who colors either from a natural tendeney to exaggerate or from perhaps an unconscious bias. There is the witness who feels a little inaccuracy will save a world of explaining. There is the hostile witness who is thoroughly biassed but not to the point of actually manufaeturing testimony. The statements of such a witness usually take the form of unwarranted conelusions. There is the biased and reckless witness who is ready to manufacture. There is the deliberate and calculated liar

who goes on the stand with a planned story. I make some differentiation between the last two, because I think that at times advantages can be taken of the fellow who goes on the stand with a planned story, intending to lie that can't be taken with the man who is biased and will recklessly manufacture.

With this problem of misstatement, the appellate courts won't, and can't give much help. A trial court can give some help. It can help by rigidly applying, in proper circumstances, the heresay rule. It can help in requiring a full foundation of knowledge to be laid before a witness is permitted to testify and keeping out conclusions.

Let me digress a moment. When do you urge objections with a particular witness. I suggest, and I will enlarge upon this, that any experienced trial lawyer who has properly prepared his case can pretty well smell out where misstatements in the other side are going to come and can pretty well foretell the witness, if not by name, at least the type of witness, from whom the misstatement will come, so that he is not wholly in the dark when the witness if first sworn and should be prepared to appeal to the court to keep the witness within bounds. A trial judge can give very considerable help in excluding conclusions. Too often judges will overrule objections to conclusions upon the ground that if the conclusion is unjustified that can be exposed on cross examination. Well, that is often too late. The damage is done. When you get into the appellate court, you will be told, "What appellant urges is simply a conflict in the evidence. It is simply a conflict between statements made on direct examination and those made on cross examination." I believe, however, that while trial judges can give you some assistance, the trial lawyer must look out for himself.

I think a great many lawyers who are inexperienced feel these matters of misstatement can be dealt with on cross examination. Lawyers who so proceed and think they can take care of such matters on cross examination in the courtroom are only fooling themselves. I don't propose to go into the subject of cross examination at length. Mr. Rosenthal made an excellent and very suggestive talk to you a year ago on that subject. It might be worth your while to pick up his talk as it is reprinted in your journal and look at it once in a while. But there are one or two things I want to say about proper cross-examination, pointed to the problems I have in mind.

Number One: Cross-examination, by itself, just won't do the job. You always run the risk that if you conduct a fairly good cross examination, the only result may be to convince the jury that you are clever and that you have taken some advantage of the witness. Second, cross examination must be treated, not as an individual exchange with an individual witness—as an isolated experience,—but as part only of the whole of the case. In approaching cross examination, you must have thoroughly in mind the whole of your case. In many instances cross examination of witnesses will depend not upon what the witness said on direct but upon what you elsewhere are going to be able to prove. Then there is sometimes the possibility of the so-called silent cross examination where the witness has made mistakes. The lawyer is somewhat baffled. He may be afraid to make the situation worse by cross examination and simply endeavors to shrug the witness off. I have heard it suggested that the silent cross examination is a very clever maneuver. I don't believe it, at least with an important witness. I think any important witness should be given some sort of cross examination. And last, on the matter of cross examination, let me repeat it again, don't hope to get too far with cross examination, and don't try to overreach. The chances are that it will boomerang on you. Cross examination is something that is to be conducted with the utmost care.

How, then, are you going to prepare yourselves to meet, in that last analysis, a misstatement that you anticipate from the other side? First, you must learn your own case completely, not only the essential facts, upon which the case should turn, but, as well, collateral matters. Collateral matters can be very useful in cross examination and in the development of side issues which may arise as a result of misstatements. Don't assume anything. You will unconsciously, in the preparation of your own case, approach at least some of the witnesses with some prepossession as to what the case is about. You are likely to interview your own witnesses with that in mind and channelize the discussion with your own witnesses. It is extremely dangerous to do that. It is very time consuming to let a witness talk. But give a witness free rein when you are interviewing him. It must be done. It is amazing the number of times suggestions that the witness has thought unimportant will slip out, and you will really discover something. Even pick up as much gossip as you can. You can't rely on it, but it may be very useful as a lead.

By all means, don't let your clients run your case. And by all means don't overlook the simple and the obvious. Many times the ultimate fact solution in the trial of a case is so simple and so obvious that you will completely overlook it while looking for something more complicated and more difficult.

In the course of preparation, be sure your own house is clean. Be sure that what you are planning for the other side's witnesses doesn't happen to your own. Carefully examine your own witnesses. Give them more of a cross examination than you can possibly anticipate that they will get from the other side. If you do that, you may be reasonably well assured, if your preparation is careful, where the truth of the matter lies. If you can do that in detail, it is not very difficult to know where misstatements from the other side are going to appear and from whom they will appear. You won't be taken by surprise.

Prepare your witnesses so they can carry the load of the trial. To me, that is extremely important. I have seen the statement made repeatedly that juries try the lawyers and not the parties. I don't believe it. I believe those statements are made because lawyers tend to flatter themselves. I would be afraid that if lawyers heard what went on in the jury room, they would have a much lower opinion of the place they played in the trial of a lawsuit. And if you don't let your witnesses carry the load in a trial of a case and take the stage, your jury is going to have nothing to think about when it gets to the jury room except a man who is paid to advocate a given side of the case. If they remember only the lawyer on one side and a good witness upon the other, the lawyer who grabbed the stage from his own witnesses is at a very decided disadvantage. Don't worry about minor discrepancies among your own witnesses, although it is a matter of delicate judgment sometimes as to when the discrepancies are minor.

Have a plan of attack in presenting your own case. When you are faced, or expect to be faced, with serious misstatements of fact from the witnesses upon the other side, the strong way of meeting that does not lie in their cross examination but lies in your own case. Don't let one witness carry too much of a load. If you have two witnesses who can testify to the same facts, one of them may be able to testify to additional facts. Don't make the one witness who can cover the broader field carry the load on both matters. Ease the load for him by putting on the other witness first. Prepare the way for an important witness and give him tools to work with. If there are material objects to be introduced in evidence, see that they are in evidence. If diagrams are to be introduced, see that they are introduced and explained. The same goes for documents. If he is going to testify as to matters that can be covered by other witnesses, have those other witnesses cover them

first, and have them covered by him too. In other words, if you have an important witness who is your only witness on a vital subject, you can't corroborate him on that, but you can corroborate him on something else and prepare the way so that as a matter of introduction to the jury that witness is going to be testifying to a matter that the jury probably already has accepted. If they will accept the first part of his testimony, there is a very good chance they will go along with the rest.

Your first witness is the one who is most likely to draw the heaviest cross examination. The question sometimes arises, if you have more than one witness on a given subject, in what order are you going to put them on. Are you going to put your strongest witness on first? I suppose that that is the procedure that is usually advocated. But it certainly should not be an invariable rule. Assume two witnesses, one of whom is particularly subject to attack. An example of that is the claim agents for a defendant company. If that claims agent can be corroborated, put the claims agent on first and let him take all of the blistering attack that you can expect from counsel on the other side. Q. "You are the claims agent from such and such a company, aren't you? A. Yes. Q. Your business is to go out and investigate, isn't it? A. Yes. Q. Your business is to go out and investigate and get facts and material so that your employer can defend claims brought against it? A. Well, those are not my instructions. My instructions are to get the facts, whatever they are. Q. You know perfectly well you are trying to gather material that will help in the defense of this case, aren't you?" You know that type of cross examination. It can become very nasty. If the claims agent has been subjected to that type of cross examination and has managed to stand up fairly well and you can then corroborate him as to the essentials of his testimony by a witness who is not subject to such attack, you have not only served to corroborate him, but you have served to demonstrate to the jury the wholly unwarranted type of counsel on the other side is willing to resort to.

What about the opening statement. It is perfectly obvious that in some instances there are matters you must hold back until a witness who is going to make a misstatement has committed himself. That doesn't mean, however, that opening statements should not be made. I believe that opening statements should always be made, and that opening statement for the defendant, unless there are special reasons for another order, should be made immediately following the opening statement for the plaintiff. Now, remember I have said there are no hard and fast rules. But I am suggesting that as a general proposition an opening statement can be made, and I think a lawyer for the defendant, no matter what he tries to hold back until the plaintiff has committed himself, can still make an intelligent opening statement that will serve as an introduction to the jury and will be of some assistance to him in the trial of a case. If you know what the other side is likely to produce and you know that certain witnesses that they will call are going to testify honestly, by all means take advantage of that type of material in an opening statement. An opening statement can also serve a very useful purpose in that type of case where—this is particularly true of the defense—the plaintiff will call those witnesses upon whom you must rely. Don't let the jury get the impression that the only evidence is that coming from the plaintiff, because having called your witnesses, when it comes to your case, you will have nothing to produce. Let the jury know that in that particular case, the plaintiff's case and the defendant's case will be tried together and not in two halves as with the usual case.

Should witnesses be excluded? There is certainly no universal rule that all witnesses should be excluded so that you can more successfully cross examine a witness you expect is going to make some misstatements. To the contrary, in some

cases it may be a very useful education, with a calming affect upon witnesses on the other side, to have them present in the courtroom to hear what some other witness on their side of the case has had to say and perhaps to see some of the treatment they have received.

Objections to evidence when made by you can be used not for the purpose of excluding testimony, but as very useful tools in stopping the evenflow of a prepared story, particularly when counsel on the other side is not sure that his witness will remember the story and is aiding him along the way with suggestions and leading questions.

Lastly, of these general matters, is the use of impeaching statements. If the witness is not a party, the impeaching statement must he used when the witness is on the stand. Where the witness is a party, and the impeaching statement can then be used for the purpose of impeaching the witness, or it can be introduced at a later time as an admission and as independent primary evidence, you must decide whether the statement should be produced and the witness confronted with it while he is on the stand. I have heard it said that it should not be done, because he will simply explain it away. But if it is brought in later in your case, he can always be called on rebuttal for explanation. I think by and large that the impeaching statement, even of a party, should be used while the witness is on the stand and should not be reserved for later use. Obviously there are exceptions to that rule.

It has been suggested to me that it is the practice to take a short recess. Some of you may want to smoke. I know I want some water, so with your premission, I will suspend for a short time. (applause)

(Whereupon a short recess was taken)

MR. ARTHUR B. DUNNE: Now, if I may take up the dealing with certain types of these witnesses who are going to make misstatements. Again let me say that I think that in the last analysis everything I am going to say will boil down again to a caution as to the use of cross examination, a caution to rely upon the strength of your own case and not on the demonstration of the weakness of the other side's case by cross examination.

First there is the honest and misstaken witness. How should such a witness be cross examined? First, primarily for information. Where possible, have that information directed primarily to the development of facts which will dovetail with your own case, so they serve as a foundation, in effect, for testimony that you will introduce. If you can contradict by writing, of couse do so. And otherwise endeavor to show why the witness is mistaken. By all means be fair. Lean over backwards in being fair with the honest and mistaken witness. With such a witness I would suggest that leading questions be used with care. On cross examination of a witness for the other side, by and large, you can expect to get an unfavorable auswer to a leading question which, if answered yes, would tend to bolster your case. The tendency will be, if that leading question is directed at the substance of the witness' testimony, to be consistent to give you an unfavorable answer. The leading question, I think, should be used primarily in dealing with the dangerous witness who must be held within bounds even at the risk of getting an unfavorable answer.

Now as to the witness who colors,—who is not dishonest, but colors from a natural tendency to exaggerate or for unconscious bias. Such a witness again is very difficult, most difficult, because there is a core of truth in the evidence of such a witness. Again the endeavor should be to show why the witness colors and

again to get information, if possible, that may help your case. You want answers that you can argue, because you can argue they have come from a witness called by the other side who is biased against you.

The hostile and biased witness is not essentially dishonest, is next on my list. Such a witness is not necessarily untruthful as to the facts, but will indulge in unwarranted conclusions and generalizations. Cross examination of such a witness should be directed to showing that the conclusion, the biased conclusion, is a misstatement or unfounded. Here a trial court can give you considerable aid, because this is the type of witness who not only will make extravagant claims by way of conclusions, but he is likely to volunteer information. The court can help you in keeping such a witness under control. Sometimes such a witness is inclined to rationalize or to argue or to evade. If that is so, and your examination is confined to precise detail of fact, and you don't let such a witness wander off into the realm of conclusions, cross examination can be successful.

Your cross examination should be directed also towards developing the limited knowledge that such a witness actually has of the detail and exposing bias. A broad leading question should not be used, although probably leading questions will be necessary to keep such a witness under control. An examination on collateral matters is not likely to be helpful, and is likely, in all probability, to harm, by giving the witness an opportunity to get out of hand and again to express his conclusions.

The other two general classes of witnesses are those who are telling an untruth and know it. One is the reckless witness who is going to assist the side calling him at all costs, but who has no planned story. The other is the deliberate perjurer who goes on the stand with a thought out story beforehand. Again, don't hope to get too much on cross examination. In 30 years of trying cases, in some of which I have had very considerable amount of ammunition, my experience in getting a witness who I knew was deliberately lying to recant has been extremely limited. I don't think I have been able to do it in more than two or three cases, and in each of those I had material that was overwhelming. For example the plaintiff in one case testified to being at a given time at a given place. I was able to demonstrate at that time that he was in jail. In pressing that, I was eventually able to get the witness to recant on the essentials of his whole story. But that seldom happens. A lawyer can expect to experience that type of thing in cross examination only once or twice in a lifetime.

Remember that with both witnesses of this type, there is the chance and you can judge this from knowing the lawyer on the other side, if you do know him, that the witness has not been fair to counsel upon the other side and has endeavored to fool him as well as mislead the jury. That can sometimes be taken advantage of.

With both types of witnesses, the surprise question or the question on a surprise subject, is probably the most advantageous type of question you can use. Don't expect to dream that up on the spur of the moment. If you can anticipate where such a witness will appear, and if you have prepared your case properly, you may be able, by taking time, to put your finger on the question that will be the surprise question. It is not going to come to you as a matter of inspiration in the courtroom. Of course, you should be ready for both types of witnesses with whatever material you may have, either to impeach or contradict.

Even with such witnesses, don't overlook the chance to get information that will be helpful by laying a foundation for the testimony which you are expecting to produce.

If the reckless witness has gone on the stand with a story which has been planned, there I think the old adage that it takes 20 lies to cover up one, may be relied on, and sooner or later such a witness will expose himself. But cross-examination to this end is extremely dangerous. It can ruin a record so far as appeal is concerned, if there is a verdict against you.

Now, with the deliberate perjurer, you will find that some, and I have experienced them, are completely and utterly without conscience and deliberately lying doesn't bother them in the least. I venture to suggest, however, that that is not true of most people who go upon the stand planning to lie. I think that even people that do that don't like to do it. They will have planned to lie on only one portion of the matter that they are going to testify to, or will be required to testify to on cross examination. And usually it will be on a simple point. Sometimes, by cross examination, a complicated and involved lie can be exposed. Don't hope to do it when the line is as to a simple fact. If a witness is the only witness to a matter testified to, or the only person who could be a witness, and he testifies to a simple fact, I suggest to you that it is practically impossible to destroy it by mere questions and answers, by mere individual exchange between counsel and the witness. But such a witness who has planned to lie and doesn't like to lie, is under a handicap. In the first place, he knows that he is lying. In the second place, you can indicate to him that you know he is lying and if you can get that information over to him, he will sit on the stand with a feeling that everybody in the courtroom knows that he is lying. That doesn't mean that he is going to give up. He will persist in what he has to say, but press him on it. Your record is ruined on that particular matter anyway. Press him on that, sweat him on it, then turn to something else you want, and he won't lie to you. I have done that, and when I turned to some other subject, I have seen a look on the witness's face, in effect, saying to me"You can't get me now, you blankety blank, because now I am telling the truth." He is relieved to be able to tell the truth, and it is amazing what gold is in them thar hills. (laughter)

Now a few things as to improper conduct of counsel on the other side. Here a trial court can be and should be of help. But if a court is going to help you, it is up to you to see to it that you give the court an opportunity to do it, and this means that if you are going to give the court a fair shot at it, you have got to behave yourself.

It is difficult to overcome the feeling that if counsel for the other side is not acting properly, you must do something about it. It is too bad that lawyers can't serve on juries for a while. Because I can argue with you for hours that if a lawyer is not behaving himself, it is going to disclose itself to the trier of fact as well as it discloses itself to you, but no amount of balk will convince you as will one experience acting as a trier of fact. And if your client complains to you that the lawyer is not behaving properly it is a fair indication that maybe the jury has the same objection. As I say, it is too bad lawyers can't sit on juries. I say that from some experience. For three years, one year as a member and two years as a chairman, I sat on a trial committee of the State Bar of California trying cases of claimed misconduct on the part of lawyers. And to me, in shaping my own conduct in the trial of a case, that experience of sitting across the table, seeing improper conduct, and realizing my own reaction to it, was one of the most valuable experiences I ever had. It taught me that misconduct of counsel has a tendency, at least, to destroy itself.

A distinction must be made between long and short trials, however. In a long trial, a lawyer misconducting himself may hang himself. I have in mind one very

well known case tried in San Francisco, where, to my mind, one of the factors leading to a verdict of guilty in a criminal case was the way that the case was defended. It was a long case, and the jury got wise to what was going on. But unfortunately, in a short trial, you can't always sit by. In a short trial, if you wait too long, you may find that virture, in the words of the old song, is not only its own but its only reward.

Now as to general forms of improper conduct which I think are common. There are attempts to get improper matters before the jury. There is proof of a proper fact, but in an improper way. There are, of course, the direct emotional appeals. There is the lawyer who indulges in wild charges and smart cracks. There are the unnecessary objections that are made for the purpose either for confusing or of arguing to the jury during the course of the objections. There are signals to witnesses, improper leading questions and the brow-beating of witnesses. Those are the things that a lawyer is afraid he is going to run up against so far as the counsel of the other side is concerned.

I have suggested to you that in the first place I think those practices have a tendency to destroy themselves as a general comment on all of them. Now, as to the first three. Attempts to get unproper matter before the jury, proof of matters in an improper way, and emotional appeals. I suggest, with respect to these matters, you be absolutely sure that you haven't brought this on yourselves. The thing to do is to be fair. If you are going to be fair upon these matters, don't let your client run the case. Be sure that you have eourage enough to recognize the weaknesses in your own case. And I don't mean the weaknesses that may appeal to you as lawyers, but the weaknesses in presenting a matter to a jury. If that something in your case is weak and that you can't put it over to a jury, don't try. Don't try to reach for too much. The minute you do you expose yourself to attaek by the other side.

Let me give you an example. Take an automobile case where both the driver and the passenger are injured. Have the eourage to throw away the driver's case, if that is necessary to save the passenger. If you are on the defense, don't try to get a defense verdict on transparently weak grounds. If you know the case is an extremely dangerous ease, but your try is fairly, you might get out with a modest reward. Juries have a tendency to punish what they consider hollow defenses. Consequently, from the start of the pleadings, admit faets that should be admitted. If it is necessary to go as far as to admit liability, admit liability. When you make your admissions, don't weasle. Make your admissions full and fair. There is a decision in the Supreme Court of California, a comparatively recent decision, holding that it was improper to show the manner of death, mangling of the body, when there was a full and fair admission, not only of the death, but of liability. (Fuentes v. Tucker, 31 C 2d 1, 187 P 2d 752) But it will not apply if the admissions are weasling and conditioned because the mechanics of the aecident might have some bearing on the issue of liability. Don't make transparently weak affirmative claims. If you will give to the other side the concessions to which it is entitled, you are not likely to open yourself up to what, after you have lost the case, you consider very improper eonduct of counsel upon the other side.

As to the matter of getting improper matters before the jury: This can be done in opening statements, in offers of evidence, in objeetions to evidence, and it can be done in the closing argument. If your case is properly prepared, you ought to be able to anticipate mueh of this. One deeided remedy, where the judge can help you, is by taking up such matters in chambers or in the absence of the jury. If you must make objeetions to such matters, make your objections under-

standable to meet the erack that often is made "Of course, if you don't want the truth to come out–." Make your objections understandable to the jury. I think any trial judge who sees that you are up against attempts by the other side to get improper matters before the jury, if he won't stop it himself without objection, will permit you to make the form of layman objection to the evidence that will indieate to the jury a basis for your objection resting on common sense or fairness. sometimes attempts to go into improper matter can be met by an offer to let the matter come in if the whole story be told, and your objection is that you don't want only part of it to be told, and then to be hamstrung in telling the rest of it.

Again let me depart and give you as an example my own experience in a case against a very vigorous and ingenious trial lawyer. During the course of the trial, the court asked for certain information. I didn't have it at my fingertips, there was an assistant with me, I asked him for it, and he went through a file about three inehes thick. Counsel, upon the other side, immediately asked the question, "What is that file?" I said that it was our file of the investigation of the case. Turning to the eourt and jury, he said "I think I ought to have the whole of that file. If they have that here, Judge, shouldn't the whole truth come out before the jury?" That gave me an opportunity to make a speech, and say that I was objecting because if I did not the other side could use my file, if it were produced, in impeaehing my witnesses and otherwise in the trial of the case while I, myself, eould not use that file because it would be argued that the material was simply self-serving, but I went on that I would have no objeetion to the use of that file, provided counsel on the other side would stipulate that I could have the same latitude in using it that he had. Of eourse, I didn't get that stipulation, but I got over to the jury what we were after. The fact of the matter was I had to defend wholly on cireumstantial evidenee, and I was able to make use of the fact, that because of the request of counsel on the other side, there was available every scrap of information that we had and nothing was being held back. At times it may be very useful to offer to meet counsel upon the other side on some battle ground that he has chosen.

Now, as to the proof of a proper fact in an improper way. By and large I think there falls within that class the use of certain improper and emotional arousing demonstrative evidence. You can meet that at times by a fair admission of the facts, and in such circumstances, if the fact is fairly before the jury, a court will sustain an objection to the merely lurid details that are about to be introduced for the purpose of appealing to passions and to emotions. And don't think there is anything new recent advocaey of the use of demonstrative evidenee. If you think there is, may I suggest that you read the Institutes of Quintilion and find out how they used to try certain cases to the Roman juries. Of eourse, there are the direct appeals to the emotions. Very often they are appeals which go far beyond the record in the ease. Perhaps sometimes in order to meet them, although I shouldn't I suppose, advocate this, it may be neeessary to resort to a little judicious misconduct on your own part.

What about the lawyer who is making smart cracks and wild charges? Usually wild unfounded charges will take care of themselves and will produce an inherent weakness in the case upon the other side. A lawyer should never give you the opportunity of ereating an issue upon which you can lick him. I wouldn't be worried about wild eharges. Then there is the lawyer who is eonstantly making smart eracks. I think by and large they take care of themselves too. Some lawyers have as other people have, a natural capacity for a elever, quick and well termed phrase. If you aren't sure that you have the same eapacity, don't try to meet a

lawyer of that sort upon his own battle ground. If his cracks are directed at you take them. I would much rather have counsel on the other side attack me than attack my client. I, at least, have eonfidence that I can take care of myself but I am not always sure that my client can. At any rate, if you behave yourself decently during the trial of the case, your own conduct is the best answer to any personal attack which can be made on you. Lastly take your time. Don't go after him until you have really got something you can hammer him with. You will get a chance sooner or later. When you do, it will be very much more telling for the fact that up to that time you have taken it and remained quiet.

Now you shouldn't be too worried about the objection to confuse. Your job, as a trial lawyer, if there are such objections, is to help your witness and to get the case back on the track. The unnecessary objections also kill themselves off.

There is the lawyer who signals to a witness either hy statements or by making objections. That type of thing I never would let pass. I think that should be called to the attention of the jury, and I think it can always be done. It can be done quietly by indicating the significance to the jury of just exactly what is going on.

As to leading questions: I would be very careful in using leading questions. It goes back to what I suggested to you a moment ago. By excessive use of leading questions, you take the stage away from the witness, you make yourself the principal actor, risk the rare likelihood of what a lawyer had to say will be remembered in the jury room, and create a situation in which the jury can't remember what the witness said, because the witness didn't say anything. Don't ask leading questions of your own witness, if your own witness is a good witness.

Now, as to leading questions upon the other side: Very often, of course, objections must be made to leading questions. But objections should not be made to leading questions merely because the objection is technically good. There are times when very real advantage can be taken of the fact that counsel on the other side examines the witness by leading questions. I shall never forget the trial of a case that I defended for a railroad, where a boy, eleven years old, lost a leg, and the witnesses upon the other side were boys about the same age. Over objections made sufficiently clear so the jury got the point of the objections, the trial judge upon the ground these were boys, permitted leading questions. I was able to cross examine those boys very effectively by not putting a single leading question. They were helpless when there was nobody to help them along, and when they had to tell their own story in their own way, in answer to precise questions. They contradicted their so-called testimony in answer to leading questions. In the second place, I could not attack an eleven year old boy in my argument to the jury, but I could attack the testimony of counsel on the other side. So it may serve you well that counsel upon the other side has resorted to leading questions and that you let him get away with it.

There is one other very bothersome matter. A witness is in difficulty, and counsel who has called him proceeds to examine him by leading questions. The message is gotten over. You make the objection. The objection is sustained. The witness now having been advised what the answer is, a perfectly proper question is put to him. What are you going to do? You can do a number of things. You can make an objection simply for the purpose of having the witness listening to something else hoping he may forget the signal. The other thing is to immediately

assign, when the leading question is ask, misconduct. The chances are that the objeetion will be overruled. But at least it will get over to the jury what is happening.

Finally, as to the lawyer who browbeats a witness: There are witnesses who need protection from sueb a lawyer. And you, as counsel, who have called them, are required to give such witnesses a certain amount of protection. For my own part, bowever, if I have properly prepared my case, and have properly prepared that witness, I welcome the cross exaination whieh endeavors to browbeat a witness. In the first place, in such a cross examination, the cross examiner will often not get the answers that he is looking for. In the second place, a jury is liable to be very sympathetie for that witness. In the third place, it can have a bad effect upon the jury, if you are constantly coming to the witness' reseue. I prefer, if I am to meet that kind of a lawyer, to have prepared my case sufficiently so that be can take care of himself without my aid, and I would rather sit and listen to the witness take care of counsel and give him a licking.

Now as to these various things whicb, in a very hasty and superficial way, I have suggested to you, I ought to say a word of remedy. Obviously we can't change the trier of fact. Tbat is going to require a constitutional amendment, and although juries, I think, are very poor instruments for ascertaining the facts, there is also a difficulty, a very real difficulty, in suggesting a substitute. It has been thought that a proper substitute has been found in administrative agencies. But the literature of criticism of administrative agencies is legion. Statutes and rules won't do any good. Appellate courts can't give any assistance in some respects and won't in others. There are two places where there can be some relief. It can't be done by rules, but it can be done by the people involved. It can be done by courageous trial judges. You bave bad experiences with the so-called weak trial judges, and with the tough trial judges. I think any competent, decent, trial lawyer would much prefer to try a case before a so-called tough trial judge than before a weak one.

The second remedy lies in the Bar itself. The Bar must set the standard for and train its younger members. The Bar must let it be known that it supports those trial judges who bave the courage to deal with impropriety in the cases tried before them. (applause)

PRESIDENT ROBERTSON: Mr. Dunne, we are deeply appreciative of your coming up from California and giving us this lecture this morning. I know that everyone bas not only profited by it from a technical standpoint, but I think the perspective you bave given us of our judicial administrations system has been a healthy one.

(Whereupon various announcements were made and the meeting recessed until 2:00 p.m.)

Friday, July 9, 1954, 2:00 p.m.

PRESIDENT ROBERTSON: The meeting will please come to order. For your information, our program for this afternoon consists of two addresses, one by the Honorable William Jameson, President of the American Bar Association, and the other by the Honorable Harold R. Medina. After Mr. Jameson's address, there will be a short recess, and we will take up in about five minutes after that for Judge Medina's talk.

In the organization of the American Bar Association, Idaho has two members in the House of Delegates which is the policy forming body of that organization. One of them is a representative of the State Bar Association, who, this year, is Mr. Louis Racine. The other is a delegate elected by all the American Bar members from the State of Idaho, and Mr. E. B. Smith of Boise fills that office at this time. Mr. Smith has known Mr. Jameson for a long time, and at this time I would like Mr. Racine and Mr. Smith to bring Mr. Jameson to the platform, and I will ask Mr. Smith to introduce him. (applause)

MR. E. B. SMITH: Mr. President, Commissioners, Members of the Idaho State Bar, distinguished guests, ladies and gentlemen: I feel that I don't know your next speaker by the name of William Jameson. We know him, and the American Bar Association knows him, by Bill, just Bill Jameson. He comes, from, the Great State of Montana, which is to the east of Idaho, was born and reared in that state, educated in the higher educational institutions of Montana. We feel that in the American Bar Association he is a part and parcel of the great northwest, that he is a true westerner in every sense of the word and by virtue of the fact that he is a westerner, we feel that Idaho can claim him just as well as Montana. Bill has been a very, very tireless worker in the American Bar. We who know him and who have known him for some years realize the tremendous amount of work that Bill has accomplished. But we will skip that for the time being and bring him down to date.

He was elected president of the American Bar Association at the Boston meeting last September. He has given his entire time to this position. There isn't any such a thing as practice of law for Bill as long as he is president of the American Bar Association. It is an impossible thing to do, try to practice law when you are president of the American Bar Association, because it takes all of your time. As an example, he has just been on the road for 80,000 miles in the last six weeks and hasn't been home once. There is just one thing that Bill has done during that 80,000 miles in six weeks that just isn't truly western. He has traveled all that time on fifteen gallons of ginger ale and never drank in true whiskey style. (laughter). Bill Jameson. (applause)

HONORABLE W. J. JAMESON: Mr. President, my good friend Earl Smith, Members of the Idaho State Bar and guests: First I want to thank Earl for that gracious and interesting introduction and all of you for the most cordial welcome that you have extended to Mrs. Jameson and me here in Sun Valley. I recall, as we were coming over on the bus Wednesday afternoon and got that first breath of good mountain air after spending several days in Texas and Chicago, Mrs. Jameson said, "This certainly feels like home." And since our arrival here, you have done everything possible to make us feel at home. Certainly this is a fitting climax and a perfect climax of a year spent very largely in visiting state and local Bar Associations.

I should correct Earl in that those 80,000 miles have not been covered in the last six weeks, but in the last eleven months. We have one regret. That is that we are going to have to leave this afternoon and won't enjoy the balance of the meeting. I thought we would have to leave on the stage at 3:00 o'clock, but we turned hitchhikers at noon and succeeded in thumbing a ride to Idaho Falls, so we will be able to stay for Judge Medina's address. I was particularly anxious to do so, because I know from past experience we have a treat in store.

Let me mention just incidentally that one of the things I am looking forward to at our annual meeting in August is the official acceptance of Judge Medina's new

book, entitled "Judge Medina Speaks." I have talked to persons who have read it, and I know it is a book every lawyer will want to have in his library, and it will be equally interesting to the layman. One of the employees of the publishing company who was to write some advertisement on it took home two or three galleys. He became so absorbed, that he took a trip back to New York that same night to get several more galleys and spent the night reading that book. Lest there be any misunderstanding, let me say I am not getting any commission on the book. (laughter). Nevertheless, representing the American Bar Association, I do have a personal interest in its sale, because Judge Medina, with his characteristic generosity, has assigned the royalties to that book to the American Bar Association for the use of the section on Judicial Administration. (applause)

I think I probably should apologize to some of you who have heard me on prior occasions, because you are going to have to listen to at least part of the same old stuff this afternoon. They tell me that one of my predecessors, who served thirty years ago, boasted that he never gave the same speech twice. But it developed that he gave only thirteen speeches during the year. I think this is 110 for me, including law schools, state and local Bar Associations. But I found that Arthur Vanderbilt, back in 1937, used just four speeches, and I thought with that distinguished precedent, perhaps I could get away with the same number this year.

Earl referred to the strenuous schedule of the President of the American Bar Association. I recall, at our meeting in Boston last August, the oldest and I presume certainly one of the most distinguished of my living predecessors, John W. Davis, said the prime requisite for being president of the American Bar Association is a rugged constitution. One of the others said there should be added a sense of humor. These two requisites have been impressed on me on many occasions, I think most forcibly in South Carolina. One of the fine new organizations sponsored by the American Bar Association is the American Law Students Association. And let me say that I think this organization deserves the whole hearted support of not only the Bar Association but also individual lawyers throughout the country. It was my privilege to talk to that group in Boston, and after that I had an invitation from the two delegates from South Carolina to address their law school. We agreed upon a date, and shortly before I left Billings, I had a letter from the chairman of the county Bar Association saying that since I was to be in Columbia anyway, they would like to have an informal luncheon in my honor, and I might be called upon for a few remarks. That was the advance notice. I got off the train at seven o'clock one morning and was met by two young friends who began to outline what they had in store for me. We started at 8:00 o'clock with a breakfast given by the Dean of the law school who was also President of the South Carolina Bar Association. We had to finish by 9:10 to get to another meeting where I was to talk about the American Bar Center. We had to be through with that meeting by 10:00 o'clock to go to the radio station where I was to be interviewed. About that time one of the boys pulled a sheet of paper out of his pocket, containing the subject on which I was to be interviewed: (1) "What do you think of the Bricker Amendment? (2) What is the American Bar Association doing with respect to the law's delays ? (3) What is it doing in the field of uniform legislations? (4) Discuss the relationship between the Bar and the Press." All of that was to be covered in a six minute interview. (laughter)

Well, we didn't get around to any of those subjects, but we dashed back to the law school where I talked from 11:00 to 12:00, and then over to this so-called informal luncheon, where I thought I was going to tell a few lawyers what the American Bar Association was doing for them. It was a delightful affair. Distinguished guests were there from all parts of the state, all the Justices of the

Supreme Court, the Federal Judges, and they apologized because Governor Byrnes was out of the state and in his absence I was to be introduced by the President of the University. That wasn't so bad, but out in front was a microphone, with letters on it. It said, "Do you mean to say this is going to be broadcast?"

"Oh yes," they said proudly, "We have thirty minutes over the largest station in South Carolina."

So while the rest enjoyed that delightful southern fried chicken luncheon, I reorganized my speech to tell the radio audience what the American Bar Association was doing for the public.

Well, I had another interesting experience out in California in January. It was one of those weeks of sub zero weather in Montana, so I looked forward to a week in California. That was before I knew what was in store for me. I arrived in Sacramento late one Sunday night, and we started in at 7:30 on Monday morning with a breakfast at the Sacramento Bar Association. During the ensuing six days, I spoke at nine Bar Association meetings, made three radio talks, visited four law schools and participated in 18 of what my California friends referred to as incidental and collateral engagements,—all the way from a visit to the navy yards at Mare Island to a very fine climax, on Saturday afternoon, when we made the so-called red carpet tour of the Universal-International Studio. And during the course of that afternoon, I had my picture taken with Janet Leigh, Barbara Rush and Piper Laurie. Let me say I can gauge the age of an audienee by their reaction to that incident. When I mentioned that to a law school, there is a reaction of genuine appreeiation of a real accomplishment. (laughter) But for the benefit of some of you who don't know anymore about Hollywood than I did, let me say they are extremely attractive and charming young ladies.

I had to go directly to New York from California for a meeting of the New York Bar Association. Back in my office they had been feeling sorry when they saw that schedule for California. But unfortunately, in my absence, those pictures arrived. When I got back to the office, of course, there was a pile of correspondence that always awaited me. And on top of the correspondence were these pictures. Well, I confess that in each of them I had a very pleased, if somewhat fatuous expression, and on top of the pictures was this notation, "You were busy in California!!" (laughter)

So you see this job of mine has its compensations as well as its problems.

I find, as I go about the country, there is still some misconception with respect to the American Bar Association. Not long ago, in Chicago, one of our good friends said he still found a lot of lawyers who thought the association was sort of a private club. I think this was most graphically expressed in a letter from a young lawyer in a small town in Kentucky whom I had the pleasure of meeting when I visited the Kentucky Bar Association. He wrote, "Both of us, are from rural states with few large communities. I imagine you have heard the same thing many times, I have. The ABA is a private club operated for the use and benefit of large city lawyers who have already made theirs. What the hell is in it for the country lawyer? I will never go to an annual meeting, so why waste my money belonging?" Now that is a pertinent question, and it deserves an honest and satisfactory answer.

It seems to me my primary obligation this year is to report to the lawyers of this country, in both large cities and small towns, just what the American Bar Association is doing for the lawyer and for the public.

Now, of course, the idea that the American Bar Association is sort of a private club is completely erroneous. There was a time that was true. You take back in the so-called "Saratoga" era, before the turn of this century, at one meeting they seriously debated the question of limiting the membership in the association to 1,000 lawyers. And one way they proposed to accomplish that was to increase from five to seven years the number of years practice required before admission. Contrast that, if you will, with the situation today.

We encourage all young members to become members of the Association as soon as they are members of the Bar. We make a concession in dues for the first five years. Our largest appropriations are made for the Junior Bar Conference and the American Law Students Association. And we have serving on some of our most important committees, and assuming a major role, members of the Junior Bar, including many who have just been out of school for a few years. Actually we have a higher percentage of membership in the rural areas than in the large cities. The state of Nevada, with two-thirds of the state's lawyers in the American Bar Association, leads all states. New York is at the bottom.

And when it comes to the program of the Association, as your president said, at the present time we have the House of Delegates as the policy making body of the organized bar. Prior to 1937, the association was purely autonomous and the program and policy were formulated at each annual meeting, and it depended to some extent upon where the meeting was held. But now, through the House of Delegates, which meets twice a year, action is taken upon committee and section reports. The House of Delegates is composed of representatives of all the state Bar Associations, many large local Bar Associations and affiliated legal groups. At the present time, of the 222 members of the House, only 107 directly represent the American Bar Association as state delegates, assembly delegates, past presidents, and section delegates, and 115 come from other groups. So I think we can say that the American Bar Association today is truly representative of the American lawyer, whether he comes from the largest city or the smallest town. It represents lawyers of varying shades of political, social and economic views all united in a constructive program for the advancement of the profession and for the attainment of the objectives of the association.

Some of you may recall an article a few months ago in the American Bar Journal by James Grafton Rogers in which he wondered if any officers of the association had any conception of the ramifications of the past and present activities of the American Bar Association. When I took office last August, I thought I had a pretty good idea of what the organized Bar in this country was doing. But as Earl told you, I have traveled a good many thousand miles during the past few months. I visited state and local Bar Associations and law schools in 38 states. During that same period I have received reports from our 58 committees and our 17 sections with their 300 committees. And I am continually amazed at the breadth and the scope and magnitude of the work being carried on by the organized Bar in this country. And I am increasingly impressed with the importance of the work that is being carried on at the local level. Because certainly it is only through the complete cooperation of all local Bar Associations that the work of the organized Bar can be truly effective.

I was particularly interested yesterday in listening to the excellent report of your secretary, Paul Ennis, and his reference to the proposed program of coordination and also the proposal for a conferenee of local Bar presidents. I had the pleasure, about a month ago, at the meeting of the Iowa State Bar Association, of

meeting with the Executive Committee of their conference of local Bar presidents, and let me say I was tremendously impressed with what they are doing. And they have a most effective program.

James Crafton Rogers made one other statement. He said one might say, with confidence, that no other professional organization, and perhaps no national association of any kind, has done so much with so little money as the American Bar Association. Well, of course, we like to think that statement is true. And if it is, it is because men like Judge Medina, A. L. Merrill, Louis Racine, Earl Smith and many more here in the State of Idaho, and their counterparts in every state of the Union are willing to give their time unselfishly, often at their own expense, in promoting some project for the benefit of our profession or towards the attainment of its great public objectives,—the preservation of representative government in the United States; the furnishing of legal service to all, at a cost within their means; the improvement of the administration of justice; the maintenance of high standards of legal education and professional conduct; and the promotion of world peace through the development of a system of international law consistent with rights and liberties guaranteed under the constitution of the United States.

This year, of course, is a transition period in the history of the American Bar Association. It will witness the culmination of what I believe to be the two most significant projects in the history of the association. The first, of course, is the construction of the American Bar Center on the campus of the University of Chicago. I am pleased to make to you today a report on the progress, both in the construction and financing, of that fine project. It was my privilege, last week, to visit the building. It is beautiful. It is even more attractive than it appears from the architect's sketches. It is well along towards completion, and we are assured by the contractors, it will be completed by the time of the dedication on August 19th.

I am glad to report to you also that of the $1,500,000.00 we sought to raise from the lawyers of America, already we have $1,400,000.00. We have just $100,000.00 to raise between now and our meeting on August 19. Thirteen states have already exceeded their quota, and that includes the State of Idaho. It also includes Judge Medina's State of New York. And it also includes my own State of Montana.

Incidentally, we have received a number of important commemorative gifts, and it seems to me it is particularly appropriate to commemorate the lives of distinguished judges and lawyers in this building, which Justice Jackson so aptly described as a "Cathedral to testify to our faith in the rule of law."

What is that going to mean to the lawyers of America? In the first place, it will provide adequate facilities for the American Bar Association to carry on its program. In the second place, for the first time we will have a complete library of Bar material available for Bar Associations and for individual lawyers. In the third place, it will be a clearing house for legal research. I confess that when I first heard that term, I didn't know what was meant. But our administrator, John Cooper, sent out letters to the Deans of all law schools, and he received back a list of over 1900 un-published manuscripts in the form of theses for master's degrees and legal research programs which had been carried on which were never published. We have assembled all that material. It is classified according to subject matter, and the first publication of the American Bar Foundation is that list, which has been sent to the law schools and others who might be interested. I think you will appreciate what that will mean in the way of correlating legal research. And as far as our own program of research is concerned, let me mention a few projects. The first is known to all of you. That

is in the improvement of the administration of criminal justice. We have an excellent committee under the chairmanship of Justice Jackson, and under the direction of Arthur Sherry, who is professor of Criminology at the University of California, now working on a design or blueprint for a comprehensive and objective five year study in that field. I think one of the most significant reports to be submitted at our meeting in August will be the report of that committee and the formulation of plans to carry on that important project.

Recently we received a small grant from the Alfred P. Sloan Foundation for the publication of what we term "Encyclopedia of Freedoms." It is a source book which we think will be of inestimable value in our program of training in American citizenship.

So much for the Center. The other project that is being completed this year is the survey of the legal profession. You will recall it started some seven years ago. Its first director was Arthur T. Vanderbilt. When he became Chief Justice of the Supreme Court of New Jersey, he was succeeded by Reginald Heber Smith. There has been a distinguished council of judges, lawyers and laymen, and in addition, over 400 have participated in what they call the survey team. They produced over 150 reports. Some of those reports are encouraging, and some distinctly disturbing, but all point the way for more effective service to our profession and to the public.

I am going to mention just one report, that of Judges Orie Phillips and Filbrick McCoy on "The Conduct of Lawyers and Judges," which ends up with this pertinent question: "How does the American lawyer stand today in the respect of his community both as an individual and as a representative of his profession?" And the answer is that he stands well but not well enough. And according to the report, the reason he doesn't stand well enough is the lack of an adequate program of public relations. We don't let the public know the nature of lawyer's duties, the importance of hiring a lawyer for legal problems, the basis of his charge for his services, and the public activities in which lawyers are engaged.

Well, I am glad to report to you, that the American Bar Association, and I find the same to be true in state and local Bar Associations throughout the country, have embarked on what I would term an enlightened program of public relations.

Just one other thing with reference to the survey. Of course, it is important that those reports and recommendations be utilized and implemented, and this year we have definitely started on that program. All of the reports have specific recommendations, and these, in turn, are referred to the appropriate section, committee or other agencies of the ABA. Let me illustrate with the first group,—a series of reports on economic data, lawyer census, the lawyer's income, the government lawyer. There are a number of reports along that line. I thing you will appreciate that involves long range study. It is not of particular value to most of us who have been engaged in practice for some time. But I find, among the law schools and younger lawyers who are seeking a location, that that information is particularly valuable. So these reports have been referred to our research and library committee of the foundation with the idea they will keep the information current so it will be available. That is just typical of what we intend to do with all the reports and recommendation of this survey.

When the survey was completed, it was found there was one subject that had not been adequately covered and that was the participation of lawyers in public affairs. So the Bar Association in Oklahoma arranged with the Bureau of Business Research of the University of Oklahoma to conduct a rather comprehensive and objective survey among the lawyers of that state. The results, I think, are interesting and very encouraging. They found, for example, that over 80% of the lawyers of that

state were engaged in some type of political activity. They found that over 85% belonged to some church and 50% were active in church work. 72% were members of Chambers of Commerce and other business groups, 64% were active in charitable organizations, 46% in patriotic organization and 38% in youth organizations. They found the lawyers spend an average of 46.7 hours per week in legal work, with 72% working from 40 to 60 hours and 12% working from 60 to 90 hours. I think this is most significant of all: they found that the lawyers of Oklahoma, and I think the same would be true in Idaho, Montana and other states, spend an average of 5.9 hours per week, or 13% of the average work week, in legal work for which they know they will not be compensated. That seems to me to be a good indication that in these rural areas on a voluntary basis, the lawyers are recognizing their obligation to provide legal service to those who cannot afford to pay for it. In the larger centers, that is handled by organized legal aid societies.

The two questions asked me most often are: what is the American Bar Association doing for the public? What is the American Bar Association doing for the American lawyer? I am going to take about seven or eight minutes to answer each of these questions.

What are we doing for the public? You remember that a few years ago the ABA adopted five major long range objectives. How are we meeting those objectives? The first is the preservation of representative government in the United States through a program of public education and understanding of the privileges and responsibilities of American citizenship. President Eisenhower reminded us in his message to our last meeting, "that the role of the lawyer in the daily life of the nation and communities is vital to our democracy," and that "the lawyer is the guardian of individual liberties guaranteed under our constitution—and their defense is one of the main objectives of the Association." A distinguished member of our committee on American citizenship, Judge Robert V. Bolger puts it this way: "Unless we preserve our form of government, everything else will collapes, our free enterprise system, our educational, scientific and artistic institutions, and above all, our religious liberty."

We have committees on Bill of Rights, Individual Rights as Affected by Nation Security, and Communist Tactics, Strategy and Objectives. It seems to me these committees together, in recent years, have proposed a very constructive program, suggesting a sound but sometimes rather delicate balance between the protection of individual rights guaranteed under the constitution and the safeguarding of national security through combating communism and preserving our form of government. Certainly, as lawyers, all of us have a challenge to leadership in this all important task of maintaining a government of law and not of men, with a proper balance between the protection of individual right and the safeguarding of national security.

The second major objective is the promotion and establishment within the legal profession of organized facilities for furnishing legal service to all citizens at a cost within their means. Organized legal aid is not so important in Idaho or Montana, but you will be interested to know what has been done in the rest of the country. The American Bar Assoeiation started a promotional campaign in 1946, and since that time the number of legal aid societies has more than doubled. Last year they handled over 350,000 cases for the indigent. Why should we be interested in legal aid? First of course, as lawyers, we recognize our obligation to provide legal services for those who cannot afford to pay for them. But there is a second reason. Legal aid is coming. The question is whether it is to be handled by a government bureau or under the leadership and guidance of an independent Bar, and we feel

it should be under the leadership and guidanee of an independent Bar and that it is a primary responsibility of the legal profession.

Well, our third objective is the improvement of the administration of justice through the selection of qualified judges and adherence to effective standards of judicial administration and administrative proeedure. Under that we have nine important sections and committees. Let me mention one activity during the past year, and that is the work of our committee on judicial selection, tenure and compensation. It has carried on a campaign for increase in salaries for federal judges and members of Congress. I have received many letters from members of Congress and from members of the Commission that was appointed to study this problem eommending the work of that committee. We are hopeful that it will bear fruit, if not at the present session of Congress, early in the next session and result in an increase in salaries for eongressmen and federal judges.

I won't have time to go into any of the rest, except to mention this. In California, when I got through with one of my talks, one of the municipal court judges asked me why I didn't say something about the Traffic Court program. The only reason I hadn't was that in a matter of thirty or forty minutes you can only hit a few of the high spots. But after all, from the standpoint of public relations, public service and cooperation of laymen in the administration of justice, we don't have any more important program than in the field of Traffic Court. I think the basis for this was expressed by Charles Evans Hughes, when he was Chief Justice of the United States Supreme Court: "Upon the minor courts rests the burden of all of our legal institutions. Justice in the minor courts,—the only courts millions of our peoples know, administered without favoritism by man conspicuous for wisdom and probity, is the best assurance of respect for our institutions."

Our fourth objective is the maintenance of high standards of legal education and professional conduct, to the end that only those properly qualified shall undertake to perform legal services. Continuing legal education, that marvelous program started in 1947 by the so-called committee of 22 of the American Bar Institute and the American Bar Association, has been carried on most effectively by the various sections of the association and the state and local Bar Associations, in the institute, workshop and panel programs.

One of the reports in the survey of the legal profession was the report on unauthorized practice in which that field was traced from the time John Adams started his one man crusade against the bailiffs, petti foggers and tavern keepers who were practicing law in his day down to the present time when we rely primarily upon the conference method, reaching an agreement upon statements of principle with bankers, real estate agents, accomtants and others who might be engaged in the unauthorized practice of law. In that connection I was interested, not long ago, in a conversation with Ed Eisenhower, who is a member of that particular committee. He said the longer he served on that committee, the more impressed he was with the importance of correlative obligation on the part of the lawyers to be better prepared in those fields in which we complain of unauthorized practice. In other words, if the accountants are better able to advise on tax questions, even the legal aspects of tax questions than we are, or if the trust officer of a bank or some life insurance agent is better qualified to advise on the legal aspects of estate planning than we are, then we are not in a very good position to complain about the unauthorized practice of law in those fields. I feel, in addition to opposing unauthorized practice and doing so vigorously, we should also recognize our correlative obligation and be better prepared and qualified in those particular fields.

Our fifth objective is the promotion of world peace through the development of a system of international law consistent with the rights and liberties guaranteed under the constitution of the United States. In that field we have our Section of International Comparative Law and our Committee on Peace and Law through the United Nations. They don't always agree. More often they do. But they didn't agree, for example, on the Bricker Amendment. I might say that during the past year I have received many letters from lawyers and others throughout the country asking by what authority the high brass, as they often put it, of the American Bar Association presumed to speak for the American lawyer on the Bricker Amendment. Well, of course, the action was taken by the House of Delegates that I referred to a while ago, composed of representatives of state and local Bar Associations as well as the American Bar Association, and the action was taken only after an able and intelligent presentation of both sides of the question. But it seems to me that entirely apart from the stand taken by the association—and, of course, we have many members who do not agree with that stand—entirely apart from that, I think it has served the purpose of alerting the American people, the American lawyers and Congress to the problems involved in Treaty law and executive agreements. And it has also provided a forum through the American Bar Association for the presentation of both sides of that important question.

I think I have about five minutes more, and I am going to attempt to answer this second question. What is the American Bar Association doing for the American lawyer? The answer is found primarily in the ten so-called bread and butter sections of the association. Let me refer to two or three of them.

Take the section on taxation, which has been aptly described as the people's tax attorney. The work of that section has been praised many times on the floor of Congress, in both the House and Senate. What specifically has this section done? Well, for one thing, it was a committee of the tax section of the American Bar Association that phrased the provision and assumed a major part in the enactment of the legislation for the so-called marital deduction or splitting income in income, estate and gift taxes.

It was another committee of the tax section of the American Bar Association that was primarily responsible for the legislation that permits us today, on the sale of a residence and repurchase of another residence within a year, to compute the capital gain only on the excess instead of the full amount on the gain on the sale of the first property. It was the tax section that was primarily responsible for the reinstatement of the rule against computation of capital gain or capital loss on spin offs from corporations. Those are just three things that the tax section has done.

Those who attended the meeting in Atlanta last March will recall that section had a number of important proposals, including a provision for marital deductions as applied to qualified life estates. I think there is a lot in what George Morris said,—that if the American Bar Association had done nothing else in recent years except the work of the tax section, the work of that section alone has justified the existence of the association and its support by the American lawyer.

Take the insurance law section. Many of you here today belong to that section, as I have, since it was organized back in the early 1930's. I have said many times I don't see how any lawyer who is engaged on either side of insurance litigation can afford not to belong to the American Bar Association and the section of insurance law. That is true not alone because of the proceedings and the excellent reports, but also because of the annotations of all standard policies,—automobile, casualty, health and accident, workmen's compensation. I recall about two weeks ago I was

at the Mississippi State Bar meeting, and Walter Armstrong happened to be there. He related an incident in connection with the section of insurance law. He said, when he came back from the service, he had a number of cases pending against one of the airlines. It was a novel question. He hadn't been able to find any cases directly in point, and whatever authorities he had found, were against him. He attended a meeting of the American Bar Association, the section of insurance law, and in one of the panels they were discussing the qnestion involved in his lawsuit. And they gave him, on that occasion, two unreported decisions which assisted him and enabled him to win his lawsuit and provide a fee that would pay his American Bar Association dnes for the rest of his life. We don't guarantee those results always, but I thought you would be interested in that one instance.

Or take the section of public utility law. They have a committee of, I think, over 30 who get out annually a report that runs from 100 to 125 pages on the decisions, regulations and statutes in the field of public utility law. A former chairman of that section told me that he figure that if they had to pay for the work that was done by the committee, it would run at least $50,000.00. I am sure that is correct, and it is true also with respect to the work done by the insurance section and many other sections.

And take the section on real property, probate and trust law, with its five divisions and 25 committees. And there is the section of corporation, banking and business law, with its six divisions and 26 committees, and everyone of those committees engaged in one or more constructive projects. I am going to cite just one. That is the committee on bankruptcy of the section of corporation, banking and business law. A few months ago, when four bills were introduced in the Senate relating to bankruptcy and providing, among other things, for salaried attorneys for referees and trustees in bankruptcy, that committee got into action. It got the approval of the Council of the Section and Board of Governors of the American Bar Association to appear in opposition to the legislation. That is typical of the things that the section and the section's committees are doing regularly for the benefit of the profession.

I see that my time is up. I am going to close with a summary of what the Association does for the American lawyers by relating a little incident that occurred in my home state a few months ago.

I was soliciting funds for the American Bar Center. I wrote to a young lawyer from a small town, the only lawyer in that town. He was not a member of the Association. I was agreeably surprised to receive, by return mail, a rather substantial contribution for the American Bar Center. I thought that certainly here is a good prospect for membership in the Association. I sent him an application blank. It was returned unsigned with this comment. "I think the American Bar Association is doing a fine job. I am glad to support it financially, hut I don't see any reason why I should belong. I can't attend the annual meetings, and I don't have an opportunity to participate in its affairs." I am sure many other share that viewpoint, and yet it seems to me it is shortsighted. I know something about that lawyer's practice. I know that purely from a standpoint of dollars and cents it would pay him to belong to the American Bar Association and its sections of mineral law, real property, probate and trust law and tax law, because those are the fields in which he is primarily engaged. I know he would be stimulated by the American Bar Journal and the other publications. But above all, I know that he is a public spirited and civic minded lawyer, and he would derive satisfaction, as many others do, from simply belonging and participating indirectly through the payment of dues and moral support in the advancement of these many projects

for our profession and in helping attain the objectives of the Association. It is true that we can't all attend annual meetings. Last year at Boston, at our largest annual meeting, less than 10% of the members were in attendance. We are meeting that situation to some extent with regional meetings. But even with these meetings it is doubtful if we will ever have more than 15% or 20% in attendance. But every lawyer can participate, even if it is just in the payment of dues and moral support, in advancing the program of the organized Bar in this country.

With the completion of the American Bar Center, for the first time the American Bar Association will have adequate facilities with which to carry on its program. With the survey of the legal profession, its reports and recommendations and their proper utilization and implementation, we are in a position to put on an expanded program. There is just one more thing we need, and that is additional membership.

I am glad to report to you that last year for the fiscal year ending June 30th, we set a goal of 5,000 new members. I found on the first of July, when I was in Chicago, that we had attained that goal with 5,029 members. But instead of 5,000, we should have 10,000. Instead of 52,000 members of the ABA, we should have 100,000. And if we can increase our membership, there is no question that we will be in a position to do a mueh more effective job for the legal profession and also come much closer to attaining the puhlic objectives of the association.

Let me say in conclusion, if there are any here today who are of the same mind as my young friend in Montana, we would be very happy to take your application for membership. I know that any member of the House of Delegates, A. L. Merrill, Earl Smith, Louis Racine, and any of the rest of us, would be pleased to have you join with us in what we consider one of the most important programs, not only for the legal profession, but for the country at large. And if we can increase our membership to the extent we should, there is no question that the American Bar Association, in cooperation with state, local assoeiations and all the affiliated groups will be able to do a far better job for our profession and also for the public.

You have been very kind, and let me say again that I am only sorry we have to leave shortly after this meeting. Thank you again for the magnificent time you have given Mrs. Jameson and me here at Sun Valley. (applause)

PRESIDENT ROBERTSON: Thank you sincerely, Mr. Jameson. We will have a short recess of about five minutes.

(Whereupon a short recess was taken)

PRESIDENT ROBERTSON: This is the time fixed on the schedule for the address of the Honorable Harold R. Medina. I have asked Mr. Robert Brown, immediate past president of our organization, and with some local pride perhaps, I have asked Mr. Harry Benoit of Twin Falls, which is the first town in Idaho in which Judge Medina set foot, to bring Judge Medina to the platform. (applause)

Ladies and gentlemen. In all the fun and serious study that we have had here for the last several days, we perhaps have forgotten that in the daily press there are constant reminders that we are perhaps living in perilous times. The hysteria from the materialistie left and the panic and the political opportunism of the reactionary right, I think, leave all of us confused, that is all of us who don't have time to give the study to public affairs in our daily lives that we ought to. And we, I think, are fortunate in having Judge Medina here to give us of himself on the

subject of "A Look at America." For many years, since the development of mankind to the point where be could express himself, man has speculated with faith and wondered what part it played in the life of man. The ancients attributed it to the stars. The poets have talked about the tide and the affairs of men, which, taken at its flood, can lead him to greater things. Circumstances, I take it, as well as human beings, must be combined together to make greatness, and we understand it in common parlance. For example, to take an instance from across the water, and apparently Winston Churchill at one time arose to an occasion that a few years before Sir Neville Chamberlain had not been able to rise to.

Not many years ago a Federal Judge was assigned a case involving the trial of what the press called the first string communists of the United States on, I believe, charges of conspiracy to overthrow the United States Government. What this Judge had to recommend him on the facts, as far as the public knew at that time, were somewhat limited. He had been captain of a water polo team in college. (laughter) He had been a profound and respected man in the law profession. He had been a successful praetioner in the law, and he apparently had what it takes to be appointed a Federal Judge. (laughter) But that trial developed into an ordeal which made the more aneient ordeals of fire and water seem comparatively mild. It was assault upon the mind, on the very psyche, of the Judge in that case of all the instruments and weapons and terrors of psychological science. The way in which Judge Medina came through that ordeal is now a matter of history. He has emerged as a symbol of the triumph of reason over hysteria. He has emerged as a symbol of the American administration of justice over everything that the powers of in justice were able to throw against it.

Judge Medina has been honored by honorary degree and testimonials far beyond anything that we can give him. But certainly, as country town practioners, Judge Medina, we welcome you and Mrs. Medina here as the inherently human persons that we have known for about the past 48 hours. Ladies and gentlemen, Judge Medina. (applause)

HONORABLE HAROLD R. MEDINA: Mr. Jameson, Mr. Robertson, Distinguished Guests and Members of the Idaho Bar and your lovely ladies: It has been just wounderful here in Idaho, and I appreciate that introduction, Mr. Robertson, more than I can tell you. Wo thought we were going to have a good time out here. We got a little fore-taste of it in Montana last December but I never dreamt there could be such a place as this, to tell the truth. You have taken us to yourselves, and you have made us feel so much at home, and we have been so happy and so relaxed here, that I feel quite like one of you.

You know, to hear Bill Jameson talk about these speeches he was making around, well I don't have too much sympathy for him, because in Montana they are the greatest listeners to speeches that I ever saw in my life. Three or four speeches a day is nothing at all. They sit there by the hour. I suppose they are used to having Bill fascinate them out there. He is a wonderful person.

Now, I am going to give you first this afternoon a little background of the trial. And then I am going to tell you something about what happened after the trial and make some observations that I draw hy way of conclusions.

When I finished the trial, I made up my mind I was not going to talk about it at all. I figured the record would speak for itself, and I would keep my mouth shut, and that is what I did. It was not easy to do when everyone was trying to make me go around making speeches about communism and communists and this

and that, but after all that was over five years ago, and I think some of these things will interest you a little bit. So let's take ourselves baek there to the beginning of the trial.

Well, I had been told that eommunists were very bad, and I kind of thought of them as roughneeks who wanted to divide up everybody else's property, and I really didn't know much about what they were. But I was told it would be very bad.

So we got ready for the trial there, and my Eth said, "Of course I want to be there the first day of the trial."

I said, "You stay right at home.'

"Well," she said, "I will dress like a commie and you won't even see me there."

I lost that argument the way I always do. (laughter) And so we got down there the first day of the trial, and the plaee was jammed. There was this enormous courtroom, the biggest one we had there, and there were seats right up near the Judge's bench. We weren't going to have any jury put in that day, and I began lookiug around for her, aud by golly, I eouldn't find her. I said maybe the old gal has sense enough to stay home after all. So they began making these motions to take the pistols away from the "trigger happy polieemen," and I denied that motion. And then there was a motion to move over to Madison Square Garden where all the poor people could get in and listen to those proceedings, and I denied that motion. And I was batting out these motions as fast as they were being made, when all of a sudden this little fellow Saeher jumped up and said, "There is a stool pigeon!" And I looked over and there she was. (laughter) There she was, hy golly, with an old felt hat on and buttons taken off of her eoat, and she started slipping down in the chair, so I could only see the top of her head. It turned out that it was the fellow sitting down in front of her who was the stool pigeon, but she stayed away for about two weeks after that.

Anyway, this sort of thing went on for a week or so, and I was kind of enjoying it, in a way. There was a lot of repetition, and a lot of motions and one thing and another, but I didn't quite get wise to what was going on.

And the first thing that happened was that the deputy police commissioner came around, and he said, "Now, Judge, we would like to provide protection for you."

"Well," I said, "Now you take that protection around somewhere else, because there is no danger involved in this at all. Just forget about it."

Well, he went away, and the next day he came hack and said, "Now maybe the commissioner himself is going to have to come down, but he sent this message. You know your job, don't you, Judge?"

I said, "I know a little bit about it."

He said, "We know our job, and you do what you are told." (laughter)

I kind of understood that sort of talk, so I had those fellows around with me all the time. And it is quite interesting to see the different jurisdictions in action when the FBI men were on the job and the city detectives were on the job and the state troopers were on the job. When we got through with that trial, the windshield of our car should have been saved for a museum. Because in following those state troopers--they go about 65 miles an hour hlowing their sirens, and I found

out the first day that unless you are about five or ten feet behind them, people that are getting out of the way don't know there is somebody right behind the state troopers, and they cut back in again, so I had to be close to them—and the pebbles from their wheels pock marked the windshield so you could hardly see through it.

But if you think it is a lot of fun having these fellows around all the time, and every time you go in the house at night they pull down all the shades so a fellow can't get a very good shot at you if he is disposed to take one, it gets a little tiresome. And some of these notes about how I was going to be shot tomorrow morning at 10:00 o'clock and this and that, none of that stuff ever gave me the slightest worry or trouble at all. I think the only part of it that was a little disturbing to some members of the family was the thought that maybe the grandchildren might get kidnapped, and when these fellows were around taking pictures, the girls in the family were trying to get the grandchildren out of the way so they wouldn't get stuck in the limelight. But that whole part didn't bother me, except that I didn't like the idea of somebody being there all the time. Every time I went to brush my teeth, a man was there to make sure I made out all right. (laughter)

I first began to get wise as to what was going on in a very curious way. We had been at this trial, what we call the jury challenge, first, which was a challenge to the entire panel, and that had been going on about a week, when the delegations began to arrive. And if I got down to the courthouse at about half past eight, there would be a delegation. And when I got through with that delegation, there would be another delegation. And if I got there at 8:00 o'clock, there was a delegation also. When I got up from the courtroom for lunch, there would be two or three delegations waiting. And I sort of felt I was up there representing America, and that it wasn't right for these fellows to come around and tell the Judge to throw the case out and to tell the Judge what he ought to do, and it was my job to let the delegations come in and explain it to them. And I would bring in that first delegation, and they started telling me to throw the case out and how it was oppression of laborers and a fraud on the workers and this and that. I would say, "Look here boys, you can't do this. This is America. We don't do that kind of thing here. You are not supposed to try to influence a Judge whether you are a rich man or a poor man or any other kind of a man. If any politician or anyone else came in here trying to tell me how to decide a case, I would throw them out, and you boys are going out. That is all there is to it."

Well, you know, you couldn't get them out until each one of those fellows that came in there had put in his two cents worth, no matter how you did it, unless you called in the cops. And I didn't want to call in the cops. I said, "By golly, if somebody is going to throw these guys out, I am going to throw them out." And that is what I did. (laughter)

There were delegations of workers from factories all over the United States. They said they were. Now, I can't honestly say I remember any of them coming and saying they came from Idaho, but I know there were some from Wyoming. There were some from Montana. There were some from California, from Maine, from Vermont, from Mississippi, from Georgia, from Ohio, from every part of the United States. For three days I went without lunch seeing these delegations and trying to explain,—delegations of housewives, purple heart veterans and all kinds; and after about a week I finally caught on, and I almost caught on too late. Because they had me worn down to a frazzle. There I was, conducting this trial all day long and spending half of the night working up propositions of law that

bad been tossed at me like bombs all day and seeing these delegations, and I finally caugbt on. I should bave caught on the first thing but I didn't. And then, wben I said no more delegations ladies and gentlemen, it was just as though I turned off a faucet. There were no more of them.

Now, just stop and think about that delegation business. Think of the power of an organization that can have these fellows eoming from all over the eountry and say their little pieee just the way they were supposed to say it. You can say, why didn't you catch on earlier? Well, I didn't. But I caught on in time, and that was the end of that.

Well, they had some kind of a thing going on at about six week intervals all during that trial. I am not talking about wbat went on in the eourtroom, because you know a good deal about that. In the courtroom they were at me all the time, in their harassing me and calling me a crook and saying how prejudiced I was and doing the most insulting things that you can possibly imagine. I am talking about what went on out of the courtroom. And they were after me with these different campaigns at about six week intervals during that whole nine months period.

Well, I am not going to try and go into a whole lot of that, but I want to give you two or three particular incidents to show the power of the organization, the ingenuity of their way of working up these things and how they almost succeeded in breaking up that trial. Because you can't imagine lawyers who were trying to get an acquital for their clients doing what those fellows were doing.

Every move that was made in that entire nine months was designed either to break up the trial or to spread communist propaganda. And there wasn't any doubt about that. It was as clear as the nose on your faee from where I sat. When they didn't get me down on this delegation business, they started on another one that had to do with charging me as being discriminatory. They were always working trying to worry me or get me in some way affeeted by charges of discrimination against different minority groups, the Negroes or Jews or somebody one way or the other. And you know, if you really haven't got any prejudices, and I haven't—people's skin and their color and their religion mean nothing to me at all,—and to have somebody continually aeeusing you of doing the sort of thing you know isn't right, that you know isn't American, that in your soul you know you have no part of, and when they are at you all the time aceusing you of it and throwing it at you and doing everything to make everybody else believe you are doing the things you think are low down to do, I tell you, it isn't quite so simple and easy as it looks.

Anyway we got along. Those things didn't work out, and we finally came down to the third of June, a Friday. The preliminary part of it came the day before, it was a Thursday, and there was one of these defendants on the stand. He was being eross examined by the United States attorney, and he refused to answer a question. Well, I studied the question, and I said, "Now, my view is that that is a perfectly relevant and proper question, but I think the best way to do about this is to take it easy, and be sure we are right. I will take that under advisement over the night, and you have your counsel to consult with, and I will rule on that tomorrow morning. But my preliminary view is that that is a relevant question and that you are going to have to answer it or take the consequences." So the next day he was back again, and they put this question to this fellow, and there was an objection and so on, and to my surprise, the United States attorney withdrew that question. So we went on with some other things, and pretty soon the United States attorney was back with another question, and it was even clearer

than the first one, and this time the fellow's lawyer objeeted, and I overruled the objection. And then this witness said that he would refuse to answer on the ground of his constitutional privilege against self-inerimination. I said, "Mr. Gates, you took the witness stand voluntarily. You didn't have to testify, and when you went on the witness stand in your own defense, you waived those things, and you must answer relevant questions on eross examination. I will overrule the objeetion." Well, ho didn't care about that. He wasn't going to answer. So I said, "I direct you to answer." And he again refused. And then I said, "I hereby sentence you to imprisonment for thirty days, unless, in the meantime you purge yourself of the contempt."

Well, with that, the eourtroom, which was filled with these commies—they always got in a line around 8:00 o'clock in the morning so that when the doors were open, they were the ones who got in there—the whole atmosphere of the courtroom was one of extreme hostility all the time. That mass of people got up on their hind legs, and ereated a terrific noise and commotion. The lawyers were up there. The defendants were all up there. There were three of them started taking a step or two towards the bench. Well, let me tell you that was one moment when the good Lord was sure helping me. I listened, and I didn't raise my voice beyond the ordinary voiee I am using now. I said, "Isn't this Mr. Hall? Well, you just said so and so and so, and I hereby remand you for the balance of the trial." And then I would pick off another one, and got down what he said on the record, and I would remand that one for the balanee of the trial. Remember that all this time hellabalou and confusion and sbouting and marshalls being called in from all over the courthouse, caused quite a eommotion. Finally I got about five of them, and by that time they started to quiet down a little bit and they were all still standing, all tbe lawyers and the defendants, and I said, "Don't you gentlemen think it would be better if you sat down?" Well, they didn't think so, and then Mr. Dennis started after me, and he was his own lawyer, and he began giving me a tirade, the like of which you never heard. "Well," I said, "Now, Mr. Dennis, you know you are one of the lawyers, and if you think I am going to put you in jail with your friends, you are making a big mistake, because I am going to treat you just like one of the lawyers. I think it is a mistake for you to go on telling me these things, but if you really insist on doing it, you will take the consequenees someday." He didn't like that, because I was so ealm and so quiet about it, and he was beginning to look rather ridieulous. So he turned around and he said, "Sit down."

And plop! They all went down. They didn't pay any attention to me. They all sat down and one of the most serious menaees to the trial was temporarily over.

Now, that trial might have blown up that day. It was the design of those who planned what happened there to break it up that day. All I needed to do was make one mistake, and that would have done the job.

Well, we went on with the trial, and Friday afternoon I went off down to the country and didn't think much more about that until the following Monday morning. We got through the morning session all right, and when I came down to lunch, the lawyers wanted to see me. That was a very common oecurrence there. They wanted to have a little conference in the room behind the courtroom. So we all got in there, and one of the defendants' lawyers said, "We have got some questions here from Judge Leibell, because habeas corpus writs have been sworn out in favor of these five fellows you put in jail last Friday, and those were argued before Judge Leibell this morning. He has certain questions for you to answer.

"Well," I said, "What are they?"

Well, this fellow smiled and said, "They are in an envelope here, and they are in writing."

"Well," I said, "Let's open the envelope."

He said, "No, Judge Leibell has instructed that you open the envelope in open court on the bench and answer the questions there."

Well, at that moment my thoughts about Judge Leibell were not very complimentary. (laughter) It seemed to me like such a foolish thing to put me on the spot like that. Of course, I could have taken the envelope and opened it and looked at the questions and nobody could have prevented me; but I wasn't going to give those men the satisfaction of showing any white feather. So I said, "All right, we will go in." And I put my robe on, and I got on the bench, and I had that envelope there. And I tell you, ladies and gentlemen, the point of all this is to give you an idea of the feeling of isolation.

Think of a Judge with 14 or 15 colleagues, other Federal Judges right in the same building, that you would think you could talk with them and advise with them. But not in this case. I was alone. I had to be alone. What Judge Leibell had done was the only right thing to do, because otherwise it would have looked as though there was some connivance.

What was it all about? Well, I had merely said I remand you for the balance of the trial. I hadn't said for what or in the exercise of what judicial. And so when I opened the envelope, there was question number one. Did you remand the defendants so and so and so and so for a criminal contempt? Two, did you remand the defendants so and so and so and so in the exercise of your alleged power as a trial judge to cancel bail? Well, I thought a moment, and I said, "I remanded each of these defendants in the exercise of my plenary power as a trial judge, also for the commission of a criminal contempt of court in my immediate view and presence and also in the exercise of any and all other powers I have under the Constitution and Laws of the United States." (applause)

Well, they didn't smile so much at that. And I got through that one all right. They went up on appeal, and those orders were all affirmed. In fact, all orders that I made throughout the whole of the proceedings, from the beginning to the end, were sustained by the highest court and by the Court of Appeals where I now sit.

All I needed to do was to make one mistake, ladies and gentlemen. Just one mistake and the whole thing was for nought and all those things were tossed at me, those torpedoes were dropped here and there all around that courtroom during that trial, and they were designed to put me in a position, where, whether I said yes or whether I said no, it would be wrong in either event, that is the Russian method, as you all remember, in Korea. It would be wrong if we went in, and it would be wrong if we stayed out. I had that type of proposition tossed at me day after day after day, for all those months. And there wasn't time for me to look up the law on each ruling.

I don't want to make this preliminary part to long, but I want to give you the flavor. My whole life has been spent in concentrated effort. My professional skills, such as they were, were all revolving about a power of concentration. And you lawyers know how important that is. You can't do anything in the law without it. And so when a proposition would come up, I would get it down in my notes, and I would get my mind on it, and I would no sooner get my mind on it than

those men would charge off to another subject, and I would say, "Let's clear this one up." And they would look up at me, as much as to say, "Judge, don't you know what we are doing to you? You think we are going back to that other proposition? Oh no, don't fool yourself." So they would say that they were coming back to it, but they never would until they felt like it, maybe a week later. Change your subject. Change your subject. Change your subject. All day, all day, every day, every day. Until I thought the top of my head would blow right off. I would no sooner get my mind concentrated on one of these propositions than they were away from it and on another one. The minute I would get on that, they were off on still another one. That is the sort of thing that was going on.

Well, there was only one thing that they did that really got me, and they never knew it. Thank goodness for that. One day I was eating my breakfast, and I had this regular schedule that I worked on. And incidentally, it was like what you ladies do with the babies. You feed them at a certain time, put them to bed at a certain time and then do this and that at a particular time. Let me tell you, as far as the human being is concerned, you can't beat that system. I got that down so that I did the same thing at the same hour, at exactly the same minute everyday. Every day I would eat my meals at the same hour, go to bed at the same hour. I took that nap of mine after lunch at the same hour every day, and also I would go right to sleep just like that and sleep for just half an hour, and then go along that way. And the saving in energy, the saving in your own physical powers and mental powers by doing that, I tell you, is inealculable.

Anyway, one morning I was eating breakfast, and I saw a new picture of the pickets, they were carrying a big sign saying "Medina will fall like Forestall." It was only about a month before that Forestall jumped out of the window in the hospital there. Well, that was the touch-off for six weeks of that. Jump! Jump! You have got to jump! Forestall jumped! You will jump also! Postal cards! Telephone messages! This crowd out there in that little island in front of the courthouse chanting that, continually chanting "Medina will fall like Forestall" and they did it all day long, and you could hear it up in my chambers there. I would get home. The telephone would ring. I would pick it up. "Jump!" And the fellow was off the line.

It all sounds kind of funny now. Where they found that weakness in my armor, I don't know. I suppose they probably spent a large sum finding out everything that was to be found out about me. Maybe it is a lucky thing I was so busy as a lawyer that I didn't have much chance to get myself in trouble. But anyway, they must have found I had this fear of heights, and that I was a proper subject for this idea of jumping from a window. But wherever they got it from, let me tell you, it worked.

I will never forget the first two or three days after I began to react to it. We have, in our bedroom in our apartment, great huge windows, and Mrs. Medina would open them up to the top, and I would lie in bed, and I would say, "Get those windows down." She didn't believe it. She thought I was just putting it on. And I would lie there, and I would have this awful feeling of getting up from that bed and running for that window. And I tell you, if you want an awful feeling, that is it. I got so I just didn't dare go near a window. But finally they went off on another tack. They cut that one out. They never knew that it had affected me. But I tell you it really did. In fact, I am hardly over it now. I remember it down here at Twin Falls, when we were there just the day before yesterday. I could no more go out on those little contraptions that go out over the falls so that you can get a good view—It would be physically impossible for me to do it. I would have that

awful feeling eome over me again. I remember, after the trial was over, I was out in Los Angeles. And we were playing golf and maybe the fourth or fifth hole went over a ravine, and we drove over there. And to get aeross the ravine there was a footbridge perhaps three feet wide with a railing on either side going across the ravine. Well, I tell you ladies and gentlemen, I could hardly get across that bridge, and I was so ashamed of myself. The sweat just poured from every pore, and I felt so ashamed about it. I don't speak of it to the others.

Well, I will talk about just one more thing, and then we will get on to the other subject I am working up to. (laughter) We got around in August there, and I will tell you I was getting pretty well beaten down with these things going on outside the eourtroom and things going on inside the eourtroom, and it was hot as blue blazes. I just was going along there one afternoon, and I began to feel sick and dizzy. I kind of looked around, and I didn't know what I was going to do. I felt just kind of licked and I know if I just sat there that way, I might do something or say something that would spoil all that was going on. So I told them I was going to take a short recess. I told them I didn't feel well. Well, if you could have seen the look on the faces of those lawyers and those defendants, as much as to say, "We have got the son-of-a-gun!" I thought they had me too. I thought perhaps I would never go back.

Well, you know that is where the faith that I have had sinee the time I was a child really came in. You ean't do much praying if you don't believe, and you can't suddenly believe when you are in some trouble. And fortunately for me, I really had believed ever since I had been a child. I was brought up in the Episcopalian Church, and I always said my prayers, and boy, I tell you I certainly did some praying that afternoon. And after about ten or fifteen minutes of rest, I felt better, and I went out there and went on with the trial. And so it went to the end.

Well, while that was all going on, I was getting these thousands of letters from the commies calling me names, and they came from all over the United States with these different drives. The drive changed. And whenever the drive changed, the correspoudence changed. But I was getting cussed out by a lot of my friends, by a lot of other judges whom I knew well, by editorial writers who said I didn't know how to run a trial and I was leaning over backwards too far and I was being too easy on the eommies, and they even talked about impeaching me in Congress for going too easy on them. What I was doing was eondueting the trial in what I thought was the right American way, protecting the rights of those who were on trial, trying to be right in my rulings. I wasn't leaning over backwards, and I wasn't leaning forward. I was just trying to sit up straight and do the best I could. But everybody was cussing me out. And I had no idea of what was coming when the trial was over.

And just as I got ready to go away with my Eth, and take a little rest, the letters began to come in.

I couldn't believe it. The postman would come in with a couple of bales of them, thousands and thousands and thousands of these letters. They were not the kind of letters I had been receiving during the trial. These were different. These were letters from America, from the people who seemed to know that it wasn't right, while the trial was going on, to tell the Judge what to do. The people who waited and bided their time, and there I sat. I had three stenographers working in shifts, and I was reading these letters and throwing them away and answering mayhe two or three out of 100. A letter from some blind person or some old person or some person out of the mist of my past when I was a boy. Perhaps a letter would come

from someone who taught me in public school or some boy or girl that I scarcely remembered, except vaguely, who had been in school with me. Well, I wanted to answer all those, and I would answer a few, and I would throw them away, and I kept that up for four or five days. I don't know how many thousands I threw away, when all of a sudden I said to myself, "Why Harold, you are right in the midst of something big here. Stop and think for a minute. Why are these people doing this? What is the motivation for it? Why? Why? Why do they write letters that seem so intimate? They weren't telling me what a fine fellow I was. You might think of them as fan mail, but they weren't. Those letters were just as though the word America were written across the face of every one. They were proud of America justice. They were proud that our system of American Justice had prevailed over the forces of evil and the forces of disorder and that justice had been done in an atmosphere, insofar as the judge was concerned, of diginity and calm and lack of anger and shouting and all that sort of thing. It was in them all. And they came from all over America, not from just the big fellows, not from the bankers, not from the executives, but all the little guys, all the little fellows that you wouldn't think had sense enough to understand what a big thing had been going on. But they knew about it. There was one that came from a little Greek restaurant, and this was typical of many others that came from filling stations and beauty parlors and little shops of one kind and another. And every one in the Greek restaurant sigued. There was a man who was the dishwasher, there was the cook, the assistant cook, there was the boss, the porter and everyone with his name down and what he was doing there. Why? Why did they want me to know, that little so and so was the dishwasher or that he was the porter and what his name was and what he did there. Over 2,000 of them were signed by the man and his wife together. I never heard of that being done before. They didn't want me to get the letter without the two of them being down there together.

Now, I don't know whether you are beginning to get the impact here of a spiritual force, but that is what it was. There was another group of patients in a hospital that sent me a telegram, and as the head nurse was going out with the telegram, all the nurses put their names down, too, and when it got to Western Union, the girls in Western Union put their names on it. Why? These were so intimate. They were so close. They wanted me to know that this particular person was writing to me.

And so it was in my experience in going around the streets. And it wasn't just in New York, I remember the most touching thing happening to me in San Francisco. I was going along the street, and one of these cable cars came along, and a young workman was there with dirt and dust all over his clothes and his lunch box, and he jumped out of the cable car and came over to me and looked right in the eye and gave my arm a little squeeze. I never heard anything so eloquent in my life, and he never opened his mouth. He never said a word. But I knew what he wanted to tell me.

I had that sort of thing go on wherever I was. The day I was made Circuit Judge on the Court of Appeals, two of the carpenters working on a building up the street came running up, and one of them put his arms around my shoulder and said, "We are glad you got a raise."

I said, "Why, you fellows don't even know what the Court of Appeals is."

He said, "The hell we don't."

Well, I could go on telling you these incidents and stories by the hour, but I think you have been catching on to it now, and you have got the flavor of it, and I think you perhaps will understand it is important to us here in America.

Don't you worry about America. America is all right. And the people are all right. Don't you get worrying about finding a commie under your bed every night and behind every pillar and post.

These people of our country, not just in Idaho or Montana, where you are protected by nature—you are not, as the people of New York are, surrounded by infinite danger and infinite groups of people who are intent on working on you and getting you involved in some of these things,—but it doesn't matter. The people of the country generally know what this administration of justice means to America.

Now let me just tell you a couple of things. In the first place, our American democracy cannot function without judges and courts to administer justice equally to all and see to it that we get the benefits of our Constitution and our laws. Without justice and courts to do that, the whole system is bound to collapse. It must be so, because it is only through the courts and through the judges who must be men of integrity, men who are men of dignity, men who really believe in this system, that our American democracy will move; and here all these people all over the United States had sense enough to know, to understand it.

They understood that this judicial establishment of ours, upon which so much depends, was in peril and in deadly peril. Because, if they had broken up that trial, it would have been a signal to all that communists could not be tried in America, because they would have means at their disposal to break up trials and to prevent the administration of justice from functioning. And I tell you ladies and gentlemen, when all this mass of thousands upon thousands upon thousands of Americans reacted as they did, they understood that. They loved their country just as you and I do, and we are going to be all right. Don't get worried too much when you can have such reaction as that from so many people of all kinds and all races and all creeds.

Now, I suppose I have talked too long, but these things are very close to me. They make me so optimistic about our future, you know, those of us who go around developing this idea of the spiritual quality of justice. I began to have it work on me as a result of those letters and gradually the idea develops, and as I see it now, there are three tremendous spiritual forces that are very much akin to one another. And they should really be the guide of our lives. They are good will and freedom and justice. How wonderful it would be if we could have our daily lives guided and motivated by those three spiritual forces. Good will towards everyone else. You know, the Good Book tells us to love thy neighbor as thyself, but how seldom do we really do it. We mean to. We think we shall someday. We do a part of the time. But if we could do it all day, everyday, really sympathize with whoever the person was, another member of the human race in trouble, perhaps someone who is attacking me or you. And with a little thought we can see that they are misguided. They are in trouble. They need a kind word.

Oh, I could give you so many illustrations, but I will give you just one. A few years ago, I was vice president of my college class, alumni class. And there wasn't much for a class vice president to do, so I thought I would write the memorials or obituaries, when some member of the class died, to be published in the Princeton Alumni Weekly. One of my old friends died, and I wrote to the widow and sympathized with her. I had to get certain information, and I asked her a lot of questions. I got back a blistering letter from her cussing me out and informing me that I didn't need this information and all this and that. Well, I wrote back to her, and

I said, "Dear Dorothy: I understand. Don't you think about these things at all for another month or two." I might have written her a stinging letter cussing her out for cussing me out, but the poor woman was in trouble and distress. That was no time for me to think of myself and of her telling me that I shouldn't ask for this information and for that information. I understood and I wrote back and told her that. I told her to forget about it and maybe in two of three months we would sit down and talk about it, because I really loved her husband, and I wanted to write something that was worthy of him when it came to be published. Well, as so often happens when you do that, after a week or two she came in to see me, and she wanted to give me everything that could be given. It was just understanding. It is hard to do this when somebody is cussing you out. It is the time you want to be mean and fight back and snap back, and that is just the time when you must not do it. Anybody can be full of good will and geniality when everyone is having fun.

And so with the freedom and so with this justice. Freedom! That doesn't mean license for yourself. With freed it is mostly responsibility. If we are to have freedom for ourselves, we must make sure that that same freedom is afforded to other people, and yet that is just the time when we don't want to do it. We are always thinking of what we get for ourselves, and you turn it around the other way, and that is the way to beat these commies. It is the spiritual forces that are going to prevail in the long run. Not bombs. Not all this wonderful production of America. It is our spiritual wealth. And so, finally, with justice, to be fair all the time, to think of doing the right thing, being fair to everybody, and especially with lawyers and judges to have that also in their minds, always.

Well, I must not start preaching to you. I never intended to do that. But I wanted to leave something with you that is real and perhaps translate it into your lives. So thank you very much. (applause)

PRESIDENT ROBERTSON: Judge Medina, I can only let these people here tell you what this has meant to us. We will now be in recess for a few minutes.

(Whereupon a short recess was taken.)

Convassing Committee come forward and give the Committee report.

MR. KENT NAYLOR: The Canvassing Committee reports the following votes tabulated: For Rohert Smylie, one vote. For John T. Hawley, one vote. For Jess B. Hawley, Jr., one vote. William Galloway, one vote. Willis Sullivan, 111 votes. Peter Boyd, eight votes. (applause)

PRESIDENT ROBERTSON: Is there any objection to the report of the Canvassing Committee? If there are none, the report will be declared approved, and Mr. Sullivan is declared elected. (applause)

At this time we will he in recess until 9:30 a.m. tomorrow morning.

Saturday, July 10, 1954,

9:30 a.m.

PRESIDENT ROBERTSON: The meeting will eome to order, gentlemen. Those who were to report on the Prosecuting Attorney Section and the Judicial Section are not with us yet, so at this time we will have the report of the Uniform Commereial Code Committee.

MR. E. B. SMITH: Members of the Bar, diseussion had at the 1953 annual meeting of the Idaho Bar presented the question, and a eommittee was appointed to report whether the Bar should sponsor the proposed Uniform Commercial Code as part of the Bar's immediate legislative program. During the month of May, 1954, in Portland, Oregon, the matter of the proposed Code was given a prominent plaee on the program of the Paeific Northwest Regional Meeting of the American Bar Association, sponsored by that Association's Section of Corporation, Banking and Business Law.

REPORT OF COMMITTEE ON UNIFORM COMMERCIAL CODE

Discussions had at the 1953 annual meeting of the Idaho State Bar presented the question, and your committee was appointed to report thereon, whether the Bar should sponsor the proposed Uniform Commercial Code as a part of the Bar's immediate legislative program.

During the month of May, 1954, at Portland, Oregon, this matter of the proposed Code was given a prominent place on the program of the Pacifie Northwest Regional Meeting of the American Bar Association, sponsored by that Association's Section of Corporation, Banking and Business Law.

Panel discussions were presented by lawyers and by banking and trust company representatives. It was pointed out that, since a large part of the Uniform Commereial Code is designed and intended to apply to banking transactions, the attitude of banking institutions may very well control the matter of its ultimate adoption or rejeetion; that the California Bankers Association presently is opposed to the Code; also, that the American Bankers Association has the Code under consideration and study, but has not reached a conclusion.

Pennsylvania is the only State in the nation which has adopted the Uniform Commercial Code. It adopted the Code during April 1953 to take effect July 1, 1954.

The recommendations made at the regional meeting of the American Bar Association were, that the various states should adopt an attitude of watchful waiting and, that no state legislature should enact the proposed Code at this time, but should await the experience and report thereon of the State of Pennsylvania and completion of further studies of such proposed Code.

Your committee therefore recommends that any action of the Idaho State Bar relating to the proposed Uniform Commercial Code be deferred.

Respectfully submitted,

E. B. SMITH
RALPH R. BRESHEARS

PRESIDENT ROBERTSON: Thank you Mr. Smith. Does anyone want to interrogate the chairman of the committee further on the report? It was an excellent report, Earl, and it will be filed. I take it that it calls for on affirmative action.

De we have a report from the Court Reorganization Committee?

MR. FRED M. TAYLOR: Mr. President, Members of the Bar: Those of you who were here last year will remember that this same committee, composed of George Donart of Weiser, Perce Hall, of Mountain Home, John Daly of Twin Falls, and Charles Scoggins of Fairfield, and myself made a report as to what we thought should be done by way of a start of improving the justices in the Probate Court.

At that time we were asked to continue and make some speeific reeommendations this year.

During the past year we have given some consideration to this problem, and fortunately we were able to have a committee meeting of all tbe members yesterday to arrive at our final conclusions. You all remember that there has been several attempts to start doing something about these courts so as to improve them. It is going to take time. It all can't be done at once. Heretofore we had thought that perhaps we should amend–I think it is Section 2 of Article V of the Constitution in order to eliminate these courts as constitutional courts. In order to get this program started, your committee has decided that perhaps we should not amend this article at this time, leave them as constitutional courts, but amend two other sections of the constitution. Those sections are Sections 21 and 22 of Article V having to do with the jurisdiction of these courts.

It is suggested that Section 21 of Article V, which has to do with thc jurisdiction of Prohate Courts, be amended to read something like this: "The Probate Courts shall be courts of record and shall have original jurisdiction of probate and guardianship matters and shall havc such other jurisdiction as may bc conferred by law, except equity jurisdiction." Now, it is our thinking that by amending this article in that manner that then, by law, we can start to do something about this court, if it is so desired, later.

The same thing would be true as to Article 22 of Scction V, which we think should bc amended to read something like this: "There should be sclected Justices of the Peace in cach county of the state in such manner as may be prescribed by law, and such Justices of the Peace, shall have such qualifications and jurisdiction as may be conferred by law, except equity jurisdiction." Now, you will note that we have said "selected" and not "elccted."

Those are the only two constitutional amendments which we think would be nccessary, in order to commence a program of developing these courts into better courts. Then we would suggest, at this time at least, that thc jurisdiction of the probate court stay as it is, which is provided in Section 1-1202 of the Code.

With respect to the Justices of the Peace, we would suggest that that jurisdiction, in civil matters, be raiscd to $500.00, comparable to the Probate Court, but further than that, wc would suggest and recommend that these courts, the Justices of the Pcacc, be appointed rather than elccted. And we suggest they be appointcd by the Board of County Commissioners, of each county, to bc approved by the District Judge or Judges. Our thinking along that line is that wc will probably get better qualified men generally than we do now. Further than that we would suggest that instead of the law providing that there can be a Justice of the Peacc in each precinct, that there be at least one Justicc of thc Pcace in the county seat and such others as might bc deemed advisable by the county commissioners.

Now, we have men here on this committee who live and have practiced in the smaller counties, and most of us on the committec have, at some time or other, and we know that considerable practice is in the Justices of the Peace and in the Probate Courts of those counties. We think, as I said, that by appointing these people, we will get hetter qualified people, although wc know that wc do have, in some counties–I know we do in ours–wcll qualified Justices of the Pcace. Other than that I don't think we have any further recommendations to make so far as these Justices of the Peace Courts are concerned. We think that eventually it would be

advisable to put these courts on a fixed salary basis rather than the fee basis, but we are not recommending that at this time until we see how much progress we can make with what we might term a minimum program.

Now, in the statute providing for the eleetion of the Justices of the Peaee, there is also a provision for the election of eonstables. Your committee does not feel it is necessary to have eonstables at all. We feel that if you have constahles, they should be appointed. However, we feel that a deputy sheriff in the precinet, where necssary, could be appointed and act under the sheriff rather than the constable.

I believe those are all the speeific reeommendations we have. If I have forgotten any, I will ask any of the members of the committee who are here to suggest them, beeause frankly, I am in somewhat of a fog this morning.

I believe, from my experience in the Legislature on these matters, that it would be well if you could discuss and perhaps take some speeifie action on these matters so that your Leglislative Committee will know how to proceed in the next session of the Legislature. As you know, if these constitutional amendments are proposed, it will be two years after this next January before the people will have an opportunity to vote on them. And I believe, also, that with a specific program presented to the Legislature, and if they are told what the program is, that we will not encounter any difficulty in getting it throngh. Heretofore the trouble has been that we have attempted to amend the constitution without having anything speeifie in mind so far as the statutory law is concerned. Naturally a layman wants to know wbat you lawyers are up to, and I think, too, that one of our ehief difficulties was with the Probate Courts. They have their own organization, and they were afraid that they were going to be eliminated entirely. I don't think it makes much difference what you call them, if you amend these sections of the eonstitution, you ean still provide the jurisdiction which you might want to do. It would make them more flexible and over a period of time, these courts may and can be improved.

MR. RALPH BRESHEARS: May I ask a question? Does the eommittee have any recommendation with respect to the qualifications of Probate Judges?

MR. FRED M. TAYLOR: We considered that, and we thought we might have some minimum qualifications. But that might depend upon some future time. We felt principally that any Justice of the Peace that was appointed, and especially with the approval of the District Judges, would probably be better qualified men. It was suggested and discussed qnite at length. We thought we would put in a new section in the statutes, whieh I think you could do now, without the constitutional amendment, perhaps, and provide for some minimum qualifieations. At least there could be a minimum age and a maximum age and perhaps some educational requirements, such as at least a high school edueation or something of that nature. But yesterday, when we held the meeting, we decided to defer that until some future time.

MR. DALE MORGAN: Mr. Taylor, assuming you can separate law and equity under our constitution, what was the thinking of the committee or the reasons for excepting equity in Justice Courts?

MR. FRED M. TAYLOR: Well, I believe it is true, now, Dale, that they do not have equity jurisdietion. And we feel that sometime somebody might provide that Justices of the Peace and the Probate Courts could start foreclosing mortgages and things of that nature, and we don't believe it is the proper eourt for those things. They can not do it now under the constitution.

FROM THE FLOOR: Were there any other considerations besides the difficulty of getting the legislature to adopt it, in getting a distinction between Probate Judges and Justices of the Peace.

MR. FRED M. TAYLOR: The only reason for that was that if Probate Courts were appointed, which could come at a future time, you would have another constitutional amendment which would have to be amended, and we wanted to keep them at a minimum at this time. Now, if we get these things through, as I said, this is just one step to improving these courts. But it would take an amendment to another section of the constitution. The Probate Courts are listed as part of the county officers to be elected. I think it would be advisable and that is my personal opinion, to appoint them along with the Justices of the Peace. But we felt we better crawl before we walked. That is our thinking on this program. We term it a minimum program to start with.

PRESIDENT ROBERTSON: Thank you, Fred. I know a lot of work has gone into that. Your committee's report will be accepted and filed. I wonder if it calls for affirmative action now? Have you prepared any form of resolution or motion that we can act on? You might make the motion, Fred, because you know what you want the group to act on now.

MR. FRED M. TAYLOR: I move the recommendations of the committee be accepted and the Legislative Committee be instructed to draft legislation along those lines and submit it to the Legislature.

MR. RALPH BRESHEARS: I second the motion.

PRESIDENT ROBERTSON: It has been moved and seconded that the reports be accepted by this group and that this group's Legislative Committee be directed to prepare and submit to the Legislature legislation along the lines contained in the report. At this time we have got a rule here that says motions and resolutions relating to or affecting statutes of Idaho, rules of court, policy of the Bar, or government of the local Bar shall be determined by the vote of all the members of the Idaho State Bar east as follows: "Each local Bar Association will be entitled to as many votes as there are bona fide residents who are members of the Bar within the territorial limits." So we will have to into our Bar Association method of voting, and I suggest that each member of each local Bar Association group get yourselves seated together so the balloting may be carried on as required by the rules.

(Whereupon the motion carried unanimously)

PRESIDENT ROBERTSON: Does the Prosecuting Attorney's section have someone to give a report at this time?

MR. ROBERT REMAKLUS: Mr. President, Members of the Commission, and fellow attorneys: The most refreshing thing about the Prosecuting Attorney's report is its briefness. I do wish, at this time, to thank Paul Ennis for his cooperation and assistance in arranging our program. In case you wondered why we met early in the morning and at noon, it was in order that everyone would be allowed to attend the regular meetings of the association.

We called the meeting to order on July 9th, at 12:30, and had a discussion with reference to certain legislative changes that we wished to investigate and to do some work on. I can assure you that the changes were considered by all the members of the Association, and was not weighted with reference to any political party. (laughter)

We feel that it is good for the state as a whole. We appointed a committee to study the mental health law and recommend changes that the prosecutors felt should be made. On this committee were Hugh Maguire, Chairman; Wynne Blake, and Tom Roberts.

Another committee was appointed to study the Juvenile Code and recommend changes that the prosecutors feel should be made. On that committee were Louis Gorrono of Gem County; Blaine Evans, Jim McClue, C. Robert Yost and Cecil Hobedy of Gooding county.

A Committee was appointed to recommend changes in the Penal Code with particular reference to the problems of punishment and correction. On that committee were Howard Adkins of Lincoln County, chairman, C. V. Boyatt of Butte County, Wynne Blake of Nez Perce County, Charlie Scoggins of Camas County and Bob Remaklus.

A committee was appointed to study the narcotic law and recommend changes the prosecutors feels would be beneficial to the State of Idaho. C. Robert Yost, Blaine Evans, Bob McLaughlin were appointed on that committee.

Last, but certainly not least, a committee to study prosecutor's salary problems was composed of John Sharp of Bonneville County, chairman, Jack Furey of Custer County, Louis Cosho of Boise County, Wynne Blake of Nez Perce County and Watt Prather of Boundary County.

Our second section was held July 9 in the Redwood Room, a luncheon meeting. We discussed the selection of trial jurors in criminal cases. We were honored to have Clay V. Spear, of the Eighth District, and Gilbert Norris, of the Seventh District, to participate in our diseussions. I might add that it was most informative, and certainly we all had a nice time at that particular meeting.

Our third session was a breakfast meeting, on July 10th—if I seem to have any difficulty, it is because I can't read Bob Yost's writing very well, however, it is an improvement over mine. This morning we just adjourned a few moments ago. We were privileged to have meet with us the Honorable Harold Medina. We got an insight into the more intimate details of the communist trial, certainly to a higher degree than that which was discussed here yesterday.

I might say to the prosecutors that did not attend, that they certainly missed a very interesting section as far as I am personally concerned, I feel that this association is very fortunate in having Judge Medina here. I think we are all now acquainted with one of our very great Americans.

We voted to adjourn and to meet again in Boise during the month of January to complete our proposals to be submitted to the Legislature. At that time we will have the reports of the committees. And I might add, it is our usual midwinter meeting. That is one privilege that we bave over the Bar Association. We meet twice a year.

There being no further business to eome before the group, we adjourned. Thank you, gentlemen. (applause)

PRESIDENT ROBERTSON: The report of the eommittee will be aeeepted and filed. And, Mr. Remaklus, I think you sbowed admirable restraint in not appointing a committee to nominate and eleet tbe next Attorney General. (laughter)

At this time we will ask Mr. Jess Hawley for the report of the Resolutions Committee.

MR. JESS HAWLEY: Mr. President, Members of the Association: The Resolutions Committee met yesterday and submits the following proposals for your consideration. There are four or five stock resolutions that I will dispose of immediately. They should be provocative of very little controversy, but we shall see.

RESOLUTION I

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

MR. JESS HAWLEY: I move the adoption of the resolution.

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

MR. JESS HAWLEY:

RESOLUTION II

BE IT RESOLVED, That the Idaho State Bar Association express its most sincere thanks, appreciation and commendation to T. M. Robertson, President; Paul B. Ennis, Secretary; L. F. Racine, Jr., Vice-President; and Russell S. Randall, Commissioner, and the various committees appointed, for the very efficient and excellent way in which they have conducted and managed this convention, with particular emphasis upon the very fine selection of speakers and the entertainment provided to members, their wives and guests. Further that these officers be additionally commended for the thoughtful and earnest manner in which they accomplished their duties in behalf of this organization during the past year.

MR. JESS HAWLEY: I move the adoption of the Resolution.

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

MR. JESS HAWLEY:

RESOLUTION III

BE IT RESOLVED, That the Idaho State Bar Association extend to Judge Harold R. Medina, William J. Jameson, Arthur Dunne and Francis Price, Jr. our most sincere thanks and grateful appreciation for honoring us by their personal appearances at our convention, and delivering to us their inspiring, interesting and instructive addresses.

MR. JESS HAWLEY: I move the adoption of the Resolution.

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

MR. JESS HAWLEY:

RESOLUTION IV

BE IT RESOLVED, That the Idaho State Bar Association particularly thank Marge Ennis for the very efficient and charming manner in which she performed her duties as secretary to the secretary.

MR. JESS HAWLEY: I move the adoption of the Resolution.

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

MR. JESS HAWLEY:

RESOLUTION V

It appearing that the local bar associations do not favor the proposals submitted to the last annual meeting with respect to the disqualification of District Judges, disqualification of Supreme Court Judges, reciprocal admission of attorneys to practice and with respect to dismissal of cases by the Supreme Court, without remanding for retrial, and further consideration being given thereto:

BE IT RESOLVED, That all of said proposals be rejected.

MR. JESS HAWLEY: I move the adoption of the Resolution.

(Whereupon the motion was duly seconded, and on vote by the individual Bar Association, was carried unanimously.)

MR. JESS HAWLEY:

RESOLUTION IV

WHEREAS, the Idaho State Bar Commission has made certain recommendations wbieb are contained in the report of the Secretary here presented, now therefore

BE IT RESOLVED, That we approve said recommendations relating to: (1) revision of Idaho Rules of Civil Procedure; (2) reactivation of the committee of local bar association presidents; (3) amendment of procedure of the Examining and Admissions Committee; (4) the creation of certain standing committees to coordinate the activities of the American Bar Association and the Idaho State Bar; (5) the revision of Disciplinary Rules of Procedure; and (6) the bolding of local bar institutes.

(Whereupon the motion was duly seconded.)

ROBERT KERR: I am wondering if there are some of those matters to be submitted separately as a separate resolution?

PRESIDENT ROBERTSON: Do you wisb to have any of those particular items segregated?

ROBERT KERR: For the benefit of some of us wbo didn't hear the report, maybe we could bave a resume of them.

PRESIDENT ROBERTSON: Well, I will ask Paul to state briefly the matters contained in his report.

SECRETARY ENNIS: The first thing that was mentioned there were the rules of Civil Procedure—

FROM THE FLOOR: Maybe I misunderstood. This is merely voting for the further study of those subjects, or is it a motion to adopt it, or wbat is the resolution?

PRESIDENT ROBERTSON: The resolution is to approve the recommendations made in the secretary's report. I take it you would like to know wbat the recommendations are.

FROM THE FLOOR: I wonder if the recommendation was merely one for further study or was it one to adopt?

PRESIDENT ROBERTSON: Well, I will have the secretary read the recommendations.

(Whereupon, the Secretary reviewed the recommendations contained in the report.)

PRESIDENT ROBERTSON: Does that answer your inquiry? Do you bave any remarks or debate you wish to address to the question? Is there any further discussion on the matter? The vote is on the motion to adopt Resolution No. 6 approving recommendations that Mr. Ennis has just reviewed.

(Whereupon the motion was put to vote, and on vote by the individual Bar Assoeiations, was carried unanimously.)

MR. JESS HAWLEY:

RESOLUTION VII

BE IT RESOLVED, That the Idaho State Bar Commission and the Legislative Committee be authorized to foster legislation providing that the annual lawyers' lieense fee shall be in an amount not to exceed $25.00 giving the Commission power to fix lesser amounts based upon the length of time that the attorneys shall have been admitted to practice law.

(Whereupon the motion was duly seconded, and no vote by the individual Bar Associations, all Associations voting Aye, with the exception of the Ninth District, which voted Naye. The motion was declared carried.)

MR. JESS HAWLEY:

RESOLUTION VIII

BE IT RESOLVED, That the Idaho State Bar Association is opposed to the creation of any new circuit court whieb would remove Idaho from the Ninth Circuit as it now exists.

MR. JESS HAWLEY: I move the adoption of Resolntion No. 8.

(Wherenpon the motion was duly seconded.)

PRESIDENT ROBERTSON: I will give yon a little history on that resolution. There appeared to have been some movements—I think it is now in retrogression, bnt it had a number of the attorneys in the state concerned for a time—that the Ninth Appellate Circuit shonld be divided, pntting Idaho in a separate circuit with Montana, Washington, Oregon and Alaska. A nnmber of attorneys were quite concerned that Idaho would be removed from a circnit with California, and that Idabo's traditional dependenee on California jurisprudence, might, to some extent, be weakened. That was the background of the resolution. Are yon ready for the question?

MR. McNICHOLS: If it be in order, at this time we move to table this resolution until we bave had further opportunity to study it and know something about it. We feel there might be some advantages to it, or it might be a bad thing.

PRESIDENT ROBERTSON: A motion to table is always in order and not debatable. Is there a second to the motion?

(Whereupon the motion was duly seconded and was put to a vote of the individual Bar Associations. The motion to table lost by a vote of 420 to 179.)

PRESIDENT ROBERTSON: We will return to a consideration of the motion to adopt the resolution. I will reread the resolution.

RESOLUTION VIII

BE IT RESOLVED, That the Idaho State Bar Association is opposed to the creation of any new circuit court which would remove Idaho from the Ninth District as it now exists.

(Whereupon the motion was put to a vote of the individual Bar Associations and carried by a vote of 534 to 65.)

MR. JESS HAWLEY:

RESOLUTION IX

WHEREAS, President Eisenhower has submitted to the United States Senate the name of Fred M. Taylor as an additional United States District Judge for the District of Idaho, now therefore

BE IT RESOLVED, That it is the sense of the Idaho State Bar Association that the United States Senate be advised that the Idaho State Bar Association urges the early confirmation of the appointment of Fred M. Taylor as United States District Judge for the District of Idaho.

MR. JESS HAWLEY: I move the Resolution be adopted.

(Whereupon the resolution was duly seconded.)

MR. E. B. SMITH: I move the Bar cast a unanimous vote for that resolution.

PRESIDENT ROBERTSON: I take it you are moving for a vote?

MR. E. B. SMITH: And that it be unanimous for the entire Bar.

PRESIDENT ROBERTSON: I have one matter to add here. This morning my office called me to tell me there was a telegram down there from Senator William Langer of the Senate Judiciary Committee, which reads as follows: "The nomination of Fred M. Taylor of Idaho to be U. S. District Judge for the District of Idaho has been referred to the Senate Judiciary Committee on which public hearing has been scheduled Friday, July 16, 1954, at 10:00 a.m. in room 404 of the Senate office building. It is requested that any opinion or recommendation that the Bar sees fit to make be submitted on or before that date." In view of that communication, Mr. Hawley, perhaps you may want to amend this resolution.

(Whereupon the motion was put to a vote and carried unanimously.)

MR. JESS HAWLEY.

RESOULTION X

BE IT RESOLVED, That the Supreme Court of the State of Idaho adopt a rule requiring district courts, in civil cases, to conduct the preliminary voir dire examination of jurors, with the right in counsel to interrogate the individual jurors as to matters particularly concerning the case in litigation, and pertaining to the individual personal qualification of the juror.

(Whereupon the motion was duly seconded.)

MR. WILLIS MOFFATT: May I ask the purpose or the background of the resolution, where did it come from and why?

PRESIDENT ROBERTSON: I take it that is a matter of personal privilege, Mr. Moffatt, you are entitled to ask for an explanation of the resolution, but I don't know that that extends to where it came from. I will, however, ask Mr. Hawley to explain it. If it is not to your satisfaction, we can resume our disucssion.

MR. JESS HAWLEY: Actually, I believe the source of the resolution or the suggestion came from a letter directed to the Bar Association. It has its foundation in the fact that in Civil actions the voir dire examination of jurors, the stock questions asked by the attorneys of each individual juror, consume a great deal of time. It was thought, by the resolution and the recommendation of Mr. Merrill and others, that the practice as adopted in the Federal Court, and I believe in some District Courts of this state, where the court conducts the preliminary examination, would expedite the selection of the jury. The resolution, of course, gives to individual counsel the right to interrogate the individual jurors as to personal qualifications and also as to particular matters in connection with the case in litigation.

MR. E. B. SMITH: Does the resolution go to the aspect of court rule or legislation?

MR. JESS HAWLEY: Court rule.

PRESIDENT ROBERTSON: Is there any discussion on the motion? Since it involves a court rule, we will vote by the whole unit rule.

MR. JESS HAWLEY: I might make this one statement. The committee yesterday understood that the Judiciary Committee had approved this resolution in substance, and I understand now that that is not the case, that it was just passed off by the Judiciary Section to the lawyers to determine it without any recommendation.

MR. MARCUS WARE: In the Federal Court now, as it is in the north, an attorney is jumped on if he asks any question of a prospective juror.

PRESIDENT ROBERTSON: The resolution as read, reserves the right of counsel to interrogate individual jurors as to matters particularly concerning the case in litigation and pertaining to the individual personal qualifications of the juror.

MR. GEORGE DONART: Mr. President: I am wondering what is expected that this rule would accomplish. They say too much time is taken up in qualifying jurors in civil cases. How are we going to save any time if the court first interrogates the jurors and then each counsel is given the right to interrogate each juror.

Now, that says on the matters pertaining to the question in litigation. That is just about the extent of any voir dire examination of jurors in a civil case, because personally, I don't like that idea of anyone asking questions of jurors, collectively, because when that is done about eleven of those men feel that question doesn't pertain to him. Now, I would favor a rule on the part of the court that a time limit on the time counsel can take to interrogate the jury panel, if that is what they have in mind, but I don't see how this is going to accomplish anything.

The court may have all those questions, and then if either attorney wants to, he can turn around and ask the same questions with just a slight variation. I think, instead of saving time, it is going the opposite direction. And frankly I believe we have got along fairly well in our civil jury trials for the last sixty years without the necessity of that.

PRESIDENT ROBERTSON: I am sure you have, Mr. Donart. Do any of the proponents of the motion wisb to engage further in debate?

FROM THE FLOOR: In view of the fact that this is to be a controversial issue, and I know that in our Bar Association we haven't discussed it, I move we table the motion.

(Whereupon the motion was duly seconded.)

(Whereupon the motion was put to a vote of the individual Bar Associations and carried by a vote of 338 to 261.)

MR. JESS HAWLEY:

RESOLUTION XI

BE IT RESOLVED, That the Supreme Court adopt a rule wbereby peremptory challenges to an individual juror be made by writing such challenge, and tbat the same be submitted to the court in sucb a manner that the source of the challenge to the juror is unknown, and not publicly disclosed in the proceedings.

MR. JESS HAWLEY: I move the adoption of this resolution.

(Whereupon the motion was duly seconded, was put to a vote of the individual Bar Associations and carried unanimously.)

PRESIDENT ROBERTSON: Mr. Hawley and the other members of the committee. Please accept the gratitude of all of us for your excellent and conscientious work that you have done on this matter of the resolutions. I think it is the only way that our Bar can function properly. (applause)

Are there any resolutions that any member desires to offer from the floor?

MR. E. B. SMITH: Mr. President and Members of the Bar: I have a resolution that I desire to present, reading as follows: Resolved that the Idaho State Bar continue the position heretofore adopted and continue to maintain that no person be admitted to practice of law in the State of Idaho unless that applicant passed the required examination for admission to the practice of law in this state.

I move the adoption of the resolution.

PROFESSOR BROCKELBANK: I would like to say a word about it. There has been an idea that—this motion is in opposition to a recommendation—

PRESIDENT ROBERTSON: Professor Brockelbank, a point of order bas been made. The moving party, I think, generally has the right to speak in favor of his motion. I take it, you, as seconding party will be recognized thereafter.

MR. E. B. SMITH: Well, I want it clearly understood that I do not criticize the Bar Commission. I don't criticize the Court. I don't criticize any members of the Law School. I am merely here to have this Bar Association continue in its previous position, which it adopted and continued from the time the integrated Bar became the law of the State of Idaho. The first time this matter came up was during the time Mr. Eberle was president of the Bar, when an effort was made to have law school graduates admitted to the Bar on a diploma. Again the matter came up during the presidency of Clarence Thomas. By the way, Mr. Eberle served on this commission from 1936 to 1939. It came up during the time when Mr. Thomas was president. He served on the commission from 1939 to 1942. It came up also during the time that A. L. Morgan was president, 1935 to 1938. He served on this commis-

sion. It again came up when I served on this commission in 1942 to 1948. I understand it has now come up once more. One of the younger professors at the University has made the suggestion that the members of the law school by virtue of the theory that they are state officers, by virtue of being a professor at the University of Idaho, that law professors should be automatically admitted to the practice of law in the State of Idaho without an examination.

Now, I cannot verify the next statement, but I make it on hearsay that the Supreme Court, through its justices, the Chief Justice, has asked this Association, in general assembly, to indicate its position on this question by virtue of this request having been made. I take the position that by reason of the fact that we have fought this thing through time and again, the last time through the Supreme Court of the State of Idaho, and what we call Senate Bill Number One, which was enacted four years ago, where the University of Idaho graduates would be admitted on diploma without an examination. And the Supreme Court upheld the position taken by the Idaho State Bar that that law was unconstitutional and continued the position that all individuals, whomsoever they may be or whatsoever classification, should be required to take an examination for the practice of law in the State of Idaho.

I take the position, too, that this is a matter which the general assembly of the Idaho State Bar is entitled to pass upon in a recommendatory aspect at all times. It is entitled to reiterate the position it has taken heretofore. That is my position, gentlemen.

Now, I am going to pave the way for Professor Brockelbank, because he is going to present a resolution, after you have voted upon the one that I have presented. It is to this effect, and I am in favor of it, that the Commission, and perhaps the Supreme Court, working in conjunction with the Commission, could invent some kind of a rule whereby members of the University of Idaho Law School could be granted an affiliate membership in the Idaho State Bar, and, of couse, in their local Bars, whereby they could participate in all the programs or whatever may be presented. But that membership would in nowise carry the right to practice law in the State of Idaho until and unless they had successfully passed the prerequisite Bar examination.

PRESIDENT ROBERTSON: Do you desire to speak on this motion, Professor Brockelbank?

PROFESSOR BROCKELBANK: I have very little to add to Earl Smith's resolution except possibly you are expecting some explanation. Just reading the resolution you might not know what it is all about. The matter originated at the suggestion of one professor on the faculty of the University of Idaho that the professors at the College of Law be admitted to membership of the Idaho State Bar. His idea was simply this: It was to permit professors to come to the Idaho State Bar Association meetings, participate in the work of the Association, be members of the committees and be thoroughly at home in the work of the Idaho State Bar. That idea seems to me an excellent one and one that we should further by every means possible. I think I speak for the College of Law faculty when I say they want to do that, and they would be anxious to do it. But there is a little bit of hesitancy about the matter.

Some of the professors there are members of the Idaho State Bar. Some are not, but are members of other Bars, sometimes two or three other Bars. And when, a week or so ago, I tried to get one or two of the other professors to come to this meeting, I got the response from one of them saying he didn't believe he should go.

He said he was not a member of the State Bar and he might not feel at home and there might be some hesitancy on the part of the State Bar in accepting anything that he might say. He thought he might be like somebody from Chicago or New York or somewhere else.

Well, it seems to me the professors should be allowed to participate in the work of the Association, and their desire to do so is perfectly genuine. But the recommendation that was made that they be permitted to be members of the Bar and practice law doesn't hit the right target. We are hitting a target entirely different than the one I intended to. The professors do not want to practice law, and they don't need to practice law. And even if they wanted to practice law, under their contracts with the University, they are not permitted to practice law. The very thing suggested by the letter from the professor that they be allowed to practice law is something that they cannot do without violating their contract, or at least making a new contract on a part time basis. A professor, at the present time, engages to use all his time in the teaching of law.

Therefore I have seconded Earl Smith's motion, which is simply a motion stating that no person be allowed to practice law unless he has passed the Bar examination, and it harmonizes and goes along, with the former position of the State Bar, a denial of reciprocity for attorneys from other states and a denial of the diploma privilege, as it it called, of being admitted to the State Bar by virtue of the fact that you are a graduate from the State University.

The order of procedure would simply be that we passed this resolution first. When we have done so, I intend to propose a resolution that some sort of membership be worked out along the lines of what the professors want without carrying the right of the professor to practiee law. But we will come to that in its own time.

PRESIDENT ROBERTSON: Perhaps, before further discussion or voting, a further explanation should be made. On behalf of the Bar Commission, I would assume to give you a little more of the background that is behind the resolution of Mr. Smith.

Last winter, a letter came to me from one of the professors saying that he thought it would be a good thing if the law school professors were admitted as members of the Bar. The matter was discussed at the Commission meeting, and the Commissioners took the view that the Idaho Law School is a source of a large majority of the members of this Bar. The Idaho Law School is the fountainhead of research and study and learning on an academic basis of Idaho jurisprudence, that Idaho jurisprudenee is something rather large, that it embraees the practice of the profession in consultation and litigation. It embraees the court, and it embraces research and education, and that is as far as the Bar Commissioners were concerned. They felt that the unit of our whole jurisprudence system could best be served by having everyone in the same organization, that we were not going to put a fellow on the spot and say, "Sure, you can come down and take the examination with the boys, and you might flunk. Ha ha ha." So the Commission adopted the following resolution and sent it to the Supreme Court. Resolved that any person who is a graduate of a law school fully approved by the council of legal education of the American Bar Association and who has been engaged on a full time basis as an instructor of law at a law school so approved for not less than five years in the seven years next preceding, including not less than one year next preceding the time application for admission is filed, at the College of Law at the University of Idaho as a full time instructor, and who in all other respects meets the requirement of the Board governing admission to the practice of law

in the State of Idaho, may be admitted upon motion filed with the application for admission and without examination." We figured that any person who was a graduate of a law school approved by the American Bar Association and had been teaching for five years at a law school fully approved by the American Bar Association, is probably an expert in jurisprudence and should be one of our group. We didn't concern ourselves with the economic factors. We felt that the jurisprudence of Idaho would be advanced by that step.

The proposed court rule was forwarded to the Supreme Court, I think in February. We have heard nothing from the Supreme Court from it other than the intimation that Mr. Smith mentioned that the court didn't want to take any action unless the Bar Association did. The Resolutions Committee offered no resolution on it, which was all right, too, and unless the court takes some action, maybe the thing will die there.

But I am just giving you the action that your Commission took and why it was taken. Now the motion is to adopt Mr. Smith's resolution that the Idaho Bar reaffirm its position heretofore adopted that no person shall be allowed to practice law in this state without an examination.

Unless someone wants to ask permission to debate further, we will vote on the motion. This involves a court rule, and within the spirit of the rules, we will vote by Bar Associations.

(Whereupon the motion was put to a vote of the individual associations and passed unanimously.)

PRESIDENT ROBERTSON: Are there any further resolutions to come from the floor?

PROFESSOR BROCKELBANK: I would like to make the resolution I mentioned a moment ago.

PRESIDENT ROBERTSON: Very well, you will be recognized Professor Brockelbank.

PROFESSOR BROCKELBANK: A few of us have discussed this matter and worked out this resolution together. It is a very simple matter. It attempts to hit the right target. The recommendation that was spoken of by President Robertson seemed to us, did not hit the right target and here is an attempt to hit it.

"Resolved that the Idaho State Bar work out and report for action, at the next meeting, a plan for membership in the Idaho State Bar for professors in the faculty of law of the University of Idaho which will permit participation by the professors in all of the work of the Bar without carrying the right of the professors to practice law in the State of Idaho."

(Whereupon the motion was duly seconded)

MR. E. B. SMITH: Professor Brockelbank, I would like to move, at the very end of that resolution, the addition of this clause, with, of course, the consent of the second. "Unless he shall have previously passed the requisite Bar examination in order thereby entitling him to the practice of law."

PROFESSOR BROCKELBANK: If I may say a word. I originally added a phrase, "Otherwise than by passing the usual Bar examination." I thought that was unnecessary, but if you care for it, that makes the assurance doubly sure.

MR. E. B. SMITH: That is the point. We have had this up so many times.

PRESIDENT ROBERTSON: Do I understand you amend your motion?

PROFESSOR BROCKELBANK: Yes, and that is agreeable with the second.

MR. RALPH BRESHEARS: I wanted to move to table the amendment, but I suppose it can't be done now. It has been incorporated with the consent of the second, personally I think the amendment is redundant and doesn't have any meaning or any purpose. The question is on the resolution and not on the amendment, which was made by the moving party, and not through vote.

MR. E. B. SMITH: I will make this concession to Mr. Breshears, again with the consent of the proponent of the resolution and the man who seconded it. Mr. Breshears may be right on the matter of redundancy, which I concede, and I will consent that it be stricken.

PRESIDENT ROBERTSON: Are you suggesting now that the moving party state his motion in the form it was first given? Very well, if that is agreeable with the second. Very well, the second has agreed, and the motion is in the form as first stated.

MR. EARLE MORGAN: I would like to speak in opposition to the motion.

MR. FRANK MEEK: Did you understand me to say yes? I am the second, and I said no.

PRESIDENT ROBERTSON: Exeuse me. Now we are in a situation where the moving party has changed his motion, and the second has not accepted. The resolntion is now before the house, and it awaits a second, if someone wants to second it.

MR. E. B. SMITH: I second the motion.

PRESIDENT ROBERTSON: The resolution, as amended, is now before the house. I think this involves a court rule and should be voted on by the local Bar groups.

MR. EARLE MORGAN: It is my opinion this organization is essentially a trade organization, and I qnestion the qualifications to belong to this organization simply because some law school, the University of Idaho, has seen fit to grant them the privilege of teaching one or two subjects in law. I see no reason why, if we do this, it should be restricted to the University of Idaho. Why not Notre Dame and the University of Washington? I believe we have always had our publications open as a forum to professors for any articles they wish to insert. We have always been open to their suggestions, and we have courted them. If they want to come to the meetings, for their own information, I think that is fine. But I believe we should keep this on the basis of a practicing attorney's association and if they want to belong to the organization, they sbould pass the examination the same as the rest of us.

MR. WILLIS MOFFATT: May I ask a question? Do yon feel it necessary, Professor Brockelbank, in order to get members of the faculty down here, that the Supreme Court make such a rule?

PROFESSOR BROCKELBANK: I don't know the answer to that particular question. I didn't feel so until President Robertson spoke and Earl Smith agreed with him, that that seemed to be necessary. I thought that this resolution was

simply a resolution for action at a subsequent meeting to work out a program of membership of some kind. I didn't want to specify the plan here, because I didn't think we had enough discussion of it. I have heard talk of honorary membership. It seemed to me too high. I have heard talk of associate membership or some other kind. That might be either too low or strong and different, and I didn't feel keen on that. But I thought the matter should require some discussion, and therefore, my resolution was simply resolved that the Idaho State Bar work out and report aetion, at the next meeting, a plan for membership, without specifying what kind, in the Idaho State Bar, for professors on the faculty of law at the University of Idaho.

MR. J. L. EBERLE: I am rather shocked to hear that the faculty in the College of Law has not been invited to these meetings. This matter has eome up historieally so many times, and I know at one time we discussed an advisory council that would make the faculty a part of our meetings, but not as members, but as an advisory council. At that time I remember the faculty said that was not necessary. We always invited them down. They were always free to discuss everything with the eommittees and with the organization at our annual meeting, and they turned that down. It wasn't necessary.

Now, if some of the members there feel that there should be some official eapaeity so that they would feel freer to eome down here, despite our invitations, whieh I have always understood were given—and the lawyers have been very happy to have their suggestions, and I know they have made suggestions. I know that from time to time we have had proposed legislation submitted to us, eonflict of laws, various acts, and it is really incredible to me that there should be any feeling up there that they haven't always been welcome. And, as one counsel has said, we courted them and ask for their help and assistance. Why should they feel reluctant or that we may not welcome them? That seems incredible to me.

If again we should create some offieial eapacity such as an advisory council, I think everyone would be most happy. But membership is a different thing and always has been in this organization. Why should they want a membership when we ean create any kind of a eouncil, or whatever you might eall it, to make them freer to eome down here, beeause we want and need their help. I can't understand what it is all about.

DEAN STIMSON: I would like to say that the faculty feels very welcome here. They have always been made welcome. But that is not the point. We have enjoyed associating with the members of the Bar. We come down here and learn what is going on in the State of Idaho with refcrence to proposed amendments to statutes etc. But we have a staff of men up there who are experts in special fields. We would like to cooperate with the Bar and serve on committees. A man who is not a member of the Bar, is not entitled to serve on any committee of this Bar Assoeiation. The members of the faculty up there are members of, sometimes, many Bars. I am a member of four different Bars, but not Idaho. I belong to the Missouri, New York, Ohio and Massachusetts Bars.

The thought behind this was that the faculty members would like to offer their services and their cooperation and would like to be on committees of the Idaho State Bar Association. They are not numerous enough to outvote anybody, and it is not the thought we would be in any way pressuring the Bar Association, but useful suggestions might eome from members of the faculty on many matters

which are considered by the Bar Association. Furthermore, the members of the faculty could learn of some of the current problems of the Bar Association and be better informed themselves.

PRESIDENT ROBERTSON: The question has been moved. I will read the resolution again. "Resolved that the Idaho Bar work out and report action at the next meeting a plan for membership in the Idaho State Bar for professors of the faculty of law of the University of Idaho, which plan will permit participation by the professors in all the work without carrying the right of the professors to practice law in Idaho."

MR. McNICHOLS: "Will you reconsider the ruling that the unit rule must be impressed here, in view of the fact that this merely calls for appointment of a committee to make a recommendation?

PRESIDENT ROBERTSON: I think your point of order is well taken, and the chair will reserve its ruling and submit the question to the assembly.
(Whereupon the motion was put to a vote and the "Ayes" carried.)

PRESIDENT ROBERTSON: Are there any further resolutions to be offered from the floor?

MR. JOHN CARVER, JR.: Mr. Robertson, I didn't have this preceding discussion in mind when I wrote this out. It may be a little apropos: "Resolved that the Idaho State Bar, in order to execute its responsibilities for effective legal education and efficient examination of law graduates for admission to the Bar, appoint a continuing or permanent committee on law school education to perform such functions of consultation and visitation with the College of Law of the University of Idaho, and other law schools and other institutions of higher education, as the Board of Commissioners of the Idaho State Bar may, from time to time, determine.

MR. DAVID DOANE: I second the motion.

MR. JOHN CARVER, JR.: Now, gentlemen, the point on this is that some of us have felt, at least there was a discussion of it when we gave the examinations, or the one time I participated, that if a committee or group of practicing lawyers, from time to time, representing the Bar, might actually go to the location of the University and consult with the professors—in this specific case evidence or something like that, or convey the results of the findings of the grading committee as to deficiencies in certain subjects and efficieney in others, that might help the University and also might help the caliber of the Bar. I don't propose anything far reaching. I don't propose that we do anything dramatic or drastic, but I do think a committee of this Bar should have that continuing responsibility to consult with the administration of the law school, not only here, but perhaps in other states. It would be to the good of the Bar.

MR. E. B. SMITH: Am I to understand, and is the Bar to understand, that this Bar commission has failed in its public relations with the law school?

PRESIDENT ROBERTSON: You will have to ask the law school about that.

MR. E. B. SMITH: I remember that in the six years I was on the Bar Commission, we established a liason committee composed of the Bar commissioners, and we met twice a year with the law school professors. We discussed all these things that are included in this motion. We also urged, for instance, that the law

school bear down upon certain subject matters such as mining law, irrigation law and I don't know what else. I remember accountancy was another one, and English language was another one.

MR. J. L. EBERLE: How about writing?

MR. E. B. SMITH: And they might come up again with something about the English language, as far as I am concerned, but that is not the point. The point is this, we have that committee, as I understand, that meets twice a year with the law school, and it performs all of those objectives that were intended by this resolution. Am I correct in that assumption, Mr. President?

PRESIDENT ROBERTSON: I think there is such a committee. I will say that the members of the Bar Commission visit the law school annually. We have devoted most of our time and money to conducting examinations, and as far as I know, our relations with the law school are all right. In fact I am wondering if they haven't been better with the law school than they have with the members of our profession in that we don't seem to have taken the proper view that we only have a trade association here and I thought it was something bigger.

MR. E. B. SMITH: I take this viewpoint, gentlemen. The committee best qualified to carry out the duties that are indicative of this resolution is the Bar Commission. And the Bar Commission has the power and authority to appoint any sub-committee it desires. I therefore move this resolution he tabled.

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

MR. J. L. EBERLE: I assume this should not require a motion, but inasmuch as the study and the formulation of the plan with reference to the University will not be consummated until a year from now, may we be assured that the Commission will personally invite every member of the faculty to come to our convention meeting and that the committee extend an invitation to them to give such advice and knowledge that they may have with respect to their specialized subjects. (applause)

PRESIDENT ROBERTSON: I will not be on the Commission next year, but I think that we will certainly endeavor to make the professors know that they continue to be welcome here.

MR. WILLIS MOFFATT: I presume the Commission will advise the Supreme Court that the resolution which you read and which has been transmitted has been somewhat amended.

PRESIDENT ROBERTSON: I would think the Commission would send over to the Court and ask it to withdraw its proposed rule. As I say, my time is going out pretty fast.

Are there any other resolutions to come from the floor?

FROM THE FLOOR: I move you introduce the next president.

PRESIDENT ROBERTSON: If there is no further new business to come before the meeting I wish to announce that the Commission has reorganized and that Mr. Louis Racine has been elected President and Russell Randall has been elected Vice-President, and that Mr. Paul Ennis has been retained as secretary for the coming year. (applause)

MR. LOUIS RACINE: I think you have had all the speech making you desire to hear. I will assure you we will return here next year. Arrangements have been made for the convention for July 7, 8, and 9th next year, and we will attempt to have some prominent speakers once again for you.

MR. FRED M. TAYLOR: May I have just one moment? I know you are in a hurry to get going, but I certainly want to express my deepest appreciation for your support and your confidence. As you all know, those of you with whom I have come in contact during the 27 years of my practice, have been very kind and considerate. I hope you will continue to do that if and when I advance to that higher court. I sincerely want your cooperation, and I want your help, because if God is willing, I want to be a good Judge. Thank you very much. (applause)

PRESIDENT RACINE: I am certain your Honor, that we all wish you the very best of suecess in your new duties.

I think it is in order that all of you be complimented for your wonderful turn-out here. It seems to me that the last meetings of the Bar have been more and more successful in the turn-out at least, and I think possibly the calliber of the program has been higher than any earlier meetings I can recall. I know that I assume that you desire to continue the legal educational program type of meeting that we have attempted to adopt in the past few years. By that I mean having specialty speakers such as the tax institute and the like for the coming year. If you are in accordance with that program, we will attempt to further it next year.

If there is no further business, this 28th annual meeting of the Idaho State Bar Association will be adjourned.

(Whereupon the meeting was adjourned sine die.)

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