PROCEEDINGS

of the

IDAHO STATE BAR

VOLUME XXVII, 1953

Twenty-Seventh Annual Meeting

SUN VALLEY, IDAHO

July 9, 10, 11, 1953

PROCEEDINGS

of the

IDAHO STATE BAR

VOLUME XXVII, 1953

Twenty-Seventh Annual Meeting

SUN VALLEY, IDAHO

July 9, 10, 11, 1953

Past Commissioners

WESTERN DIVISION

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

EASTERN DIVISION

N. D. JACKSON, St. Anthony, 1923-25.
A. L. MERRILL, Pocatello, 1925-28.
E. A. 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

T. M. ROBERTSON, Twin Falls, President
L. F. RACINE, JR., Pocatello, Vice President
RUSSELL S. RANDALL, Lewiston
PAUL B. ENNIS, Boise, Secretary

Local Bar Association

Clearwater (2nd and 10th Judicial Districts) – Ray McNichols, President, Orofino; John Maynard, Secretary, Lewiston.

Third Judicial District – Karl Jeppesen, President, Boise; Robert Miller, Secretary, Boise.

Southern Idaho (5th and 6th Judicial Districts) – Wesley F. Merrill, President, Pocatello; Gerald Olson, Secretary, Pocatello.

Seventh District – Lou Gorrono, President, Emmett; Frank Meek, Secretary, Caldwell.

Eighth District – James W. Wayne, President, Coeur d'Alene; E. L. Miller, Secretary, Coeur d'Alene.

Ninth District – L. H. Merrill, President, Idaho Falls; Boyd Thomas, Secretary, Idaho Falls.

Eleventh District (11th and 4th Judicial Districts) – Jack Murphy, President, Shoshone; Howard E. Adkins, Secretary, Shoshone.

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

PROCEEDINGS

1953 Annual Meeting

IDAHO STATE BAR

Sun Valley, Idaho

Thursday, July 9, 1953

PRESIDENT BROWN: Members of the Bar and guests: I appreciate we are small in numbers to get this meeting under way, but we are on a rather close time schedule, and it requires us to get this meeting going right on the dot.

On behalf of the State Bar Commission, I welcome you to the twenty-seventh annual meeting of the Idaho State Bar Association. We feel we have an entertaining and instructive program in store for you. If we are mistaken, have mercy on us.

The entertainment end of the program is more or less under the management of the facilities here, but we have the Chairman on Arrangements who is present and will tell you what the entertainment picture is. I introduce Mr. George Kneeland of Hailey, Idaho. (applause)

MR. GEORGE KNEELAND: Thank you, Bob. There aren't very many here for me to tell you about the program we have arranged, and I must say that I didn't do a great deal about arranging it. I saw in the State Bar News that I was the Chairman of General Arrangements Committee. I called Mr. Roubicek, who is the Assistant Manager here in charge of conventions, and told him my capacity in this matter. He said that it was all arranged and that I could forget it. I notice there is a smorgasbord this evening. Ordinarily, we have had a barbecue at the Trail Creek Lodge. I think you will find the smorgasbord just as much fun and substantially more interesting food. Tomorrow night the cocktail party will be in the Red Wood Room in the Lodge, and I suppose there will be a larger attendance there than there is here now. There will be a golf tournament and trap shoot Saturday afternoon. Last year I think we had about three contestants in the trap shoot. It's a lot of fun, and I hope a lot of people get over there. We have one of the best trap ranges in the county here. The management puts on about 50 of these conventions a year here, and they surely do a good job, and I know you will all have a good time while you are here. Thank you. (applause)

PRESIDENT BROWN: Thank you, George. I am sure we will have a good time here. We have never failed.

At this time I would like to announce the appointment of the Canvassing Committee to canvas the results of the election of a Commissioner for the Northern Division for our Bar. Hugh Maguire will act as Chairman of the committee, and John Carver and Ralph Jones will serve with him. The report will be returned tomorrow afternoon. You will obtain the ballots from the Secretary, Mr. Ennis.

At this time we will have the report of the Secretary, Mr. Ennis.

SECRETARY'S REPORT

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

Customarily, the Secretary to the Board of Commissioners of the Idaho State Bar each year makes his report which includes a statement of the financial condition

of the Bar and statistical information with respect to its membership and to some of the activities of the Board of Commissioners. If you will bear with me, I will give you a full report in manner as concise as possible so that your time may be taken up by other matters which lend themselves to more pleasant listening.

All monies collected in the form of license fees, examination fees, sale of publications and all other miscellaneous sources are deposited with the State Treasurer to the credit of the Idaho State Bar Fund. All expenditures from this Fund are made by way of State Warrant after approval by the Board of Commissioners and the State Board of Examiners. From the books maintained in the office of the Secretary, audited periodically by the State Auditor, the following receipts and expenditures are shown for the period June 1, 1952, to June 1, 1953.

EXPENDITURES—June 1, 1952, to June 1, 1953:

Personal Services	$ 3,864.90
Travel Expense	2,956.02
*Other Miscellaneous Expense	4,085.33
Refunds	50.00
Social Security Fund	48.35
	$11,004.60

RECEIPTS—June 1, 1952, to June 1, 1953	$11,362.00
Balance, June 1, 1952	14,620.51
	25,982.51
Less Expense	11,004.60
Balance, June 1, 1953	$14,977.91

This balance checks with the State Auditor's records.

REPORT OF TRUST FUND
IDAHO STATE BAR COMMISSION

Assets:	6/1/52	6/1/53
Accounts Receivable (Due from State)	$ 85.04	$ 13.42
Deposit in First National Bank	1,457.06	1,794.69
Cash	10.00	.10
	1,552.10	1,808.20
Gain	256.10	
	1,808.20	

Gain:		
Sale of Nixon-Schooler Abstract of Title		$ 23.25
Unexpended Bar Registration Fee—1952 meeting		303.50
		326.75

Expense:		
Loss on Sale of Publication	$ 16.50	
Secretary's Bond Premium	5.00	
Bar Legislation Expense	37.50	
Miscellaneous	1.65	60.65
		$ 256.10

*Printing, Publications, Supplies and Other Miscellaneous Expense.

If at this time you had before you a copy of the financial statement as given at the last annual meeting, you would observe an increase in expenditures during the past year as over against the year before of $3,590.02. This difference is almost entirely a reflection of increased activity on the part of your Board of Commissioners and the office of the Secretary. We trust that this increased activity has manifested itself in some material service and benefit to you and to the public generally. The difference is, in part, made up of the cost of publishing the Idaho State Bar News Bulletin, the purchase of a public relations radio program that will be shortly demonstrated to you; in part, by an increase in the amount of travel expense including the expenses of the Board and the Secretary in attending the Interstate Bar Council meeting in Reno, the Secretary's attendance at the National Conference of Bar Examiners; in part, by the increase of convention expense to bring distinguished speakers to you to conduct institutes and the increase in the cost of administering the bar examinations under the revised procedure.

In any event, receipts during the past year exceeded expenditures as of June 1, 1953, by approximately $357.40, so that notwithstanding the increase in expenditures, the Bar has not adopted the practice of deficit spending. By reason of careful administration of funds by past members of the Commission and the former Secretary, Sam S. Griffin, a comfortable surplus of funds sufficient to meet almost any unforeseen eventuality has accrued. There is no necessity to increase this surplus. The existence of a surplus does not relax the requirement of spending funds of the Bar solely for its legitimate objects, and subject to the careful scrutiny of all members of the Bar to the end that full value is received for every dollar spent.

I submit to you, however, that there is neither the necessity nor justification for enlarging that surplus. Our annual expenditures should, as nearly as possible, equal our receipts. If they are substantially less, then either the organized Bar is failing to carry out the objects for which the Bar has been created and for which funds have been made available to it, or license fees are too high—either situation is indefensible. Those of you who have been interested in Bar work and have participated actively in its work are fully aware of the many worthwhile undertakings, needed changes, improvements and extensions of program which can be justified as desirable, if not as indispensible. In addition to a maximum contribution of time and energy without monetary compensation on the part of those willing to work, these things also require money. I am not suggesting to you that any expansion of Bar program with its attendant expense is meritorious, but I am prepared to say that even with maximum efficiency and economy we can and should spend our entire annual income which at best is sufficient only for a minimum Bar program.

The figures showing membership in accordance with Divisions of the Idaho State Bar are as follows:

	1952	1953	Increase
Northern Division	131	131	
Western Division	304	312	2.6%
Eastern Division	142	141	.6%*
Military Service	15	**	
Out of State Memberships	30	29	.6%*
	622	613	1.4%*

* Decrease.

**Accurate information is lacking as to the number of members now in

the service at this time. Most of those shown as in the service last year have not paid their annual license fee for 1953 and are not therefore shown as active members for the current year.

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	23
Clearwater Bar Association	63
Third District Bar Association	164
Southern Idaho Bar Association	92
Seventh District	58
Eighth District	45
Ninth District	49
Eleventh (And Fourth) District	90
	584
Out of State	29
	613

Since the last Annual Meeting of the Bar the following deaths have been reported:

DEATHS Since 1952 (July)

Henry Z. Johnson, Pasadena, Calif.	John D. Ewing, Caldwell
Phillip J. Evans, Boise	Issac E. McDougall, Pocatello
Collier H. Buffington, Gold Beach, Ore.	James E. Gyde, Jr., Wallace
Arthur O. Sutton, Weiser	P. E. Stooky, Lewiston
Peter C. O'Malley, Pocatello	Robert H. Elder, Coeur d'Alene
Frank L. Stephan, Twin Falls	Charles T. Finegan, Boise
Emery A. Owen, Idaho Falls	Hugh F. Smith, Washington, D. C.
Clarence W. Thomas, Long Beach, Fla.	Thomas G. Daugherty, Wilder
Ross B. Haddock, Shoshone	Charles C. Cavanah, Boise

In respect to admissions to the Bar, two examinations were administered during the past year, one in September, 1952, and the other in April, 1953. In the first examination there were a total of 26 applicants, 19 of whom passed, 7 of whom failed. In the April examination, 14 took it, 4 passed and 10 failed. Of the total of 40 applicants, 23 or 57½%, successfully passed the examination. I might add that this percentage of success is near the average percentage of success on bar examinations given throughout the nation, covering the years 1932 to 1949, of 55.3%. Last year's percentage of successful applicants, nearly all of whom were graduates of law schools approved by the American Bar Association, is somewhat below the national average of 73.8% for the years mentioned for those who were graduates of American Bar Association approved law schools.

You may be interested to know that there is an amazingly close correlation between an applicant's bar examination grade and his general grade average in law school. Statistical analysis shows only slight variations between an applicant's relative ranking on the basis of his bar examination grade as compared with his relative ranking based on his law school grades. These results would indicate that present bar examination procedures are fundamentally sound as a testing

device. Whether or not there should be some revision of the system of grading is a matter now being studied. There is the further difficult problem of classifying a bar examination grade as passing or failing. What grade, which must necessarily be arbitrary, will fairly indicate when an applicant possesses the necessary learning and ability to enter the practice of law? These problems are now being considered by the Board in cooperation with the Idaho Supreme Court and the faculty of the University of Idaho Law School.

During the past year the Board has held a total of six meetings including the meeting held yesterday, July 9, 1953. These meetings are from two to five days duration of concentrated effort on the part of the members of the Commission and of members of the Examining Committee at those sessions when examination papers are graded. At this time I wish to express the appreciation of all the members of the Bar to those who have served on the Examination Committee with the Commissioners during the past year namely, Clay V. Spear, Russell Randall, Willis Sullivan, Joe McFadden, Gilbert St. Clair, William Furschner, Robert Green, Don J. McClenahan, George R. Phillips and J. Morey O'Donnell.

I reported at the last annual meeting that the Board then had pending before it a total of five complaints. Since that time six new complaints have been filed. Of this total of eleven complaints, six have been dismissed after preliminary investigation and report to the Board thereon, formal hearings have been ordered with respect to two, and three are yet in the process of investigation. Two attorneys have been reinstated after suspension upon recommendation of the Board of Commissioners and order made by the Supreme Court. The Board investigated one claim of unlawful practice on the part of a non-resident attorney with the result that the activities complained of were immediately ceased.

The office of the Secretary is responsible for handling all of the necessary office work connected with all of the foregoing activities, and, in addition, must be in more or less constant touch with the members of the Commission which involves a great deal of correspondence. These duties require more than half the working hours of your secretary and one stenographer and bookkeeper. The work is most pleasant and the satisfaction of some small measure of accomplishment is in itself rewarding.

PRESIDENT BROWN: Thank you, Paul. Is there any comment or discussion with respect to the Secretary's Report? If not I will order it filed.

PRESIDENT'S REPORT

Members of the Bar and Guests:

At the approaching conclusion of four years of serving as a member of your State Bar Commission I find it difficult to express in words to you what a truly refreshing experience I have had in this work. The considerable satisfaction that is had in serving the Bar comes, I believe, from the fact that the cooperation of the members of the Bar called upon to assist in the activities necessary to the functioning of this organization is indeed remarkable. If the Commission, during this period, has accomplished any constructive results, it is due in the main to the unstinting effort given by so many members of our Association when called upon to assist in matters of concern to the group.

I am gratified at the good influence I have felt in the close association of working with the members of the Commission who have served during my time, Claude Marcus of Boise, Ralph Litton of St. Anthony, Tim Robertson of Twin

Falls and Louis Racine of Pocatello, and with our past secretary, Sam S. Griffin and our present secretary, Paul Ennis.

It is just now thirty years since this association was organized as an integrated Bar by legislative enactment. During that period of years the Bar has made much progress and brought about through organized activity a number of reforms resulting in the improvement of legal standards. These improvements, at first glance might be considered in the selfish interest of the profession, but in actuality they were accomplished for the public good. As an integrated Bar we have definite statutory prerogatives and responsibilities, but our greatest responsibility is in the protection of the public and the public interest. The fine character and quality of the membership of our profession in this State is such that the assumption of this responsibility and the continuing improvement of the judicial process in the public interest is, I believe, most assured.

Public Relations

I was much interested to read an article on public relations published in our last Bar Bulleton—that is, the Bulletin so ably edited by our secretary, Mr. Paul Ennis. The article, entitled "Confidentially, Mr. Attorney, Public Relations Begins With You," deals with the improvement of public relations by attorneys in the conduct of their individual activities within their offices and in the conduct of their relations directly with clients and their conduct in their communities. The article is splendid; if you haven't read it, I suggest that you do. But aside from the improvement of public relations by the individual conduct of each of us as attorneys, there is a field for the improvement of public relations by our organized Bar which has become a matter of great interest to most of the Bar Associations throughout our country. This great interest in public relations by the legal profession has been generated by an increasing belittlement of our profession by members of the public either in the form of direct criticism or in the nature of contemptuous jokes and cartoons. It is needless to point out to you as practicing lawyers that the great bulk of such opinion does not come from those individuals who are frequently seeking and relying upon legal advice. Rather it stems from the disgruntled few who have been dissatisfied with the services rendered, and that *great* number of the public who have no immediate contact with the lawyer and who have no real conception of the services he is rendering and performing for his clients. We are all conscious, nevertheless, of the fact that this public attitude has had a great influence in breeding a timidity into the public towards approaching the lawyer at times when he could probably be of his best service. There has been a consciousness within this Bar of the need for an improvement of our public relations and from time to time it has been a matter of serious consideration by your Bar Commissioners seeking for some type of program that would be of material benefit. The members of the State Bar Commission in attendance at a meeting of the Interstate Bar Council at Reno, Nevada, in March of this year, by reason of our participation as a member of such organization, had made available to us a series of radio programs that have met with tremendous success in those areas where the programs have been tried. This radio project was originally undertaken by the Bar of the city of Denver, Colorado, with assistance of other local bar associations in that state; Colorado not having an integrated bar. After starting forth on the program and appreciating that to do the job in a really fine manner it would take more funds than were at hand from the local groups, soliciation for assistance was asked of the Rockefeller Institute. That organization came forward and joined in assisting the Denver Bar in the preparation of a radio public relations program. At a cost of some $17,000 raised by the Bar of the city of Denver and approximately $40,000 in assistance given by the Rockefeller

Institute, a series of thirteen professionally written, acted and directed radio programs were produced. The first experience of the Colorado Bar in seeking free radio time for the programs on the theory of their being of public service and in the public interest was not good. However, soon after the commencement of the broadcasts the experience was reversed and in due time radio stations were writing to the secretary of the Denver City Bar requesting the use of the program and offering free time as a public service for it was found that the reaction of the public to the programs was excellent. The response to these programs in the State of Colorado has been so beneficial in the improvement of public relations that the sponsoring Bar Association of Colorado came forward in the finest tradition of our profession and unselfishly made the programs available to the member bar associations of the Interstate Bar Council. The Bar Commission purchased the recording tape of the thirteen programs at the ridiculously low cost of $300.00 with the fixed purpose of making the programs available to each locality within our state and it is our hope that this project will be in full swing early in the fall of this year. Contact will be made with all local bar associations within the state advising them of the availability of recording or of the tape to make recordings for their own use. It is the hope of the Commission that each locality, through its local bar associations, will avail itself of the opportunity of presenting these programs to the public. The Commission is well satisfied that they are very worth while and will have a beneficial effect in improving the relations of the Bar and the public. At the conclusion of my remarks this afternoon there will be a demonstration of one of the programs to give you a better idea of what I am talking about.

Interstate Bar Council

In my preceding remarks I have made reference to the fact that our planned radio public relations programs came to us by reason of our participation in the Interstate Bar Council. I am now aware that we have inadvertently neglected to inform our lawyers of our membership and participation in the Interstate Bar Council and the purposes of that organization.

The Interstate Bar Council, organized in 1948, is an unincorporated association in which membership is limited to the bar association of the eleven western states.

In its inception the first objective undertaken by the organization was that of endeavoring to find a method of giving uniform bar examinations in the eleven western states. At first there was considerable impetus to the movement for uniformity in the giving of examinations upon the same dates and with the same questions upon basic subjects, reserving only to each state the right to furnish questions on law that was peculiar to the given jurisdiction. Somewhere along the line, objections from various member states were raised which seemed insurmountable and in 1952, Mr. Robertson, of our Commission, who had attended the meeting at Portland, Oregon, reported that the objective of uniform bar examinations seemed to have become a lost cause. A question arose as to the advisability, in view of the failure of the uniform bar examinations project, of whether it was worth while for Idaho to continue as a participating member in the Council. It was determined that as a matter of policy it would be well for the entire Commission to attend the meeting at Reno, Nevada, in early March of this year, with the purpose of evaluating the present objectives of the organization and to determine whether or not we considered it of sufficient value to continue membership. We had a pleasant surprise in attending one of the most interesting and informative meetings that it has ever been my experience to attend. Each of the state delegations present gave at first hand the experience of the particular state bar with

relation to some program of activity undertaken by that bar. Thus it was that we became acquainted with the radio program of public relations in Colorado. We heard in detail the comprehensive plan undertaken by the Oregon State Bar for the enactment of bar legislation and the improvement of the bar's relation with the legislature. California laid before us its experience in an extensive program for continuing legal education and the reception it had had in testing various types of educational clinics from the workshop luncheon to the comprehensive three day school. We heard from Wyoming on action taken for the improvement of its judiciary and its success in finally raising judges' salaries to a respectable level. We had reports on the success achieved in the modification of rules of civil procedure, on the federal pattern, and were advised of the successful adoption of such rules in the states of Utah, Colorado, Nevada, Wyoming and Arizona. It appeared to us all that this excellent interchange of experience and information between the officials of the various state bar associations can be invaluable to our organization in making forward strides in the improvement of the judicial processes and the public activities of this association. At the conclusion of that splendid meeting we were honored by having T. M. Robertson of our Bar Commission elected President of the Interstate Bar Council. We then extended an invitation to the Council to hold its next meeting here in Idaho in 1954. We were met with competition from our sister state of Washington but the delegates giving us a kindly eye indicated the choice of Idaho and immediately Washington asked if it might join with our Bar Commission in jointly sponsoring the meeting at Sun Valley, Idaho. Consequently, the meeting will be held here, immediately after the mid-winter meeting of the House of Delegates of the American Bar Association in late February or early March of 1954.

Your Bar Commission has under consideration at the present time the development of areas of activity learned of at the meeting in Reno and the organization of committees within the Bar to put such ideas into effect for the over-all good of the Bar. We believe the Council's objectives are excellent and that we have much to gain by remaining in membership.

Legislation

Later in the course of this program you will hear a report from the chairman of our legislative committee with respect to the 1953 session of the legislature. I cannot pass the subject of legislation without paying tribute to Mr. Jess Hawley, Chairman of that committee, and the members of his committee who so diligently gave of their efforts on behalf of the betterment of our relations with the legislature and in seeking to achieve the legislative goals this body had set for accomplishment. That we did not obtain all of the legislative objectives sought by this organization was certainly through no lack of effort or fault upon the part of our legislative committee.

It is here that I wish to express some personal comment with respect to legislation that is ear-marked as Bar legislation and which is actually sponsored only after consideration, vote and approval of this association.

After full opportunity for consideration by the individual members of the bar, and debate and discussion both at the 1951 and 1952 conventions, certain legislation proposed by our committee on Judicial Selection and Tenure was recommended for passage by this association. The purpose of the legislation was separation of judicial offices of the same class. The proposed legislation required a candidate for judicial office to state in his declaration of candidacy the name of the incumbent he was seeking to succeed in judicial office, and the separation would have continued through the nominating and general elections. The Bar Commission was directed

by resolution of the Convention of 1952 to arrange for the introduction of this legislation as Bar approved and sponsored legislation. Following that directive the Bar Commission placed the legislation in the hands of our able and conscientious legislative committee and the legislation was in due course introduced in the legislature and with the good assistance of our lawyer members of the House of Representatives the legislation was passed by that body. When the bills reached the Senate it was soon apparent that we were in for a harder fight if we were to obtain the passage of these measures. In fact the legislation seemed to have gotten into a deep freeze in the Senate Judiciary Committeee. At first it was not clear just what the reason was for our legislation not being well received, but it soon became clearly evident that we had run into the toughest kind of opposition that bar legislation can have. We were met with this type of comment from individual members of the Senate Judiciary Committee and individual members of the Senate, "It is my understanding from a member of the Bar that this legislation is generally not favored by the lawyers" and "I am advised by a member of the Bar that this legislation was approved by the Bar only after a very, very close vote and that undoubtedly if more members had been present the legislation would never have been approved." To sum it up simply, we were confronted with influence exerted by attorneys who, because of personal opposition to the legislation, had used their personal influence with the individual members of the Senate to effectively block the legislation.

I believe under any circumstance, it would be difficult to get all of the lawyers in Idaho in agreement on legislation which directly related to the election of judges. However, when after fair consideration and debate legislation is approved from the floor of our convention as Bar sponsored legislation and the Commission is directed to make every effort to pass that legislation, it is indeed frustrating to find that the selfish interest of individual lawyers can prevail over the actions of a majority of this group. I too, am sensitive to the independence of thought and action that we as lawyers all feel. Nevertheless, if we are to go forward with progressive success in the passage of legislation that we as a group from time to time feel is necessary in the public good, it behooves us, and becomes necessary, that we submerge our personal interest and set aside our individual independence of action so that the will of this association may prevail.

Continuing Legal Education

Our program for this year which has been so spendidly arranged by our vice-president, Tim Robertson, is a further expansion of the institute type of program—another experiment in continuing legal education.

Today there is a great awareness among the members of the legal profession that continuing education for the lawyer is necessary. Many new developments in the law have taken place in recent years and are taking place now. Lawyers are called into fields of activity where the subject matter as a course of study was never dreamed of when many of us attended law school. But even the law schools are under handicap in training embryo lawyers in the basic subjects of the law and attempting likewise to keep abreast of the demands that have arisen from areas of commercial and administrative development in the law.

Continued professional training by self-help has many obstacles, including lack of time, and sense of direction and finally lethargy. It just doesn't work out well and is expensive for clients.

In 1948, as a joint operation of the American Law Institute and the American Bar Association, a Committee on Continuing Legal Education was organized to

develop a program for continuing legal education of the bar on a national level. The function of that committee is service. It exists to stimulate national, state and local lawyer groups in organizing and conducting their own projects for professional training and to assist in the administration of such projects. Today it has developed a panel of some five hundred lecturers, for the most part lawyers, each qualified to lecture on a particular subject or subjects. It has brought about an ever increasing interest in the institute or clinic type of program with education as its purpose. The committee is equipped not only to furnish lecturers, but to provide lecture outlines, hand books, advertising circulars, and experienced advice on administrative problems in handling institute programs. There is available through the committee an abundance of material on subjects ranging from taxation to medico-legal problems. Throughout the country institutes are being held under local sponsorship in ever increasing numbers. I feel we should avail ourselves of the facilities offered for there is a greater need in Idaho, it seems to me, for the institute program than is met by just our annual convention. Short institutes on an area basis, given in several localities in the state would afford opportunity for wider participation by our members. Sponsorship and expenses could be shared by two or several district bar associations, and the subject selected on a local demand basis. To that end I would recommend the creation within our bar of a standing committee on continuing legal education to assume guidance and assist the local bars in the organization of educational institutes. Authorization to the Commission for the use of bar funds for the committees' needs should be given. The institute type program on a local basis is meeting with tremendous success in every state where it has been tried and I think it would meet with equal enthusiasm in this state and be of material benefit to the members of our bar.

Before completely leaving the subject of education, I feel that we cannot overlook the education that precedes admittance to the Bar. At the present time our rules do not specifically require an applicant for admission to be graduated from an approved law school; actually there is required only satisfactory completion of study "substantially similar to the course of study outlined in Rule 109," which is the rule detailing the subjects which must be studied in supervised law office study. It seems to me that we are behind the times in continuing such a rule.

With the ever increasing complexities of modern day law practice the need for more formal education appears to me to be a must. The American Bar Association recognized this fact when it approved the action of its council on Legal Education in requiring that law schools receiving its approval must require three years of pre-legal education before admittance to law school. I do not believe the standard too high. I would recommend that our rule 108 be amended to henceforth require graduation from a law school approved by the Council on Legal Education of the American Bar Association as a necessary qualification for bar examination in Idaho.

It is impossible for me to discuss with you all of the subjects which become of interest to the Bar Commission, likewise it is impossible to discuss the work done by all of our committees. They do a tremendous service to the Bar. Our committee members are not paid—they are compensated; yes, by the personal satisfaction of duty well preformed in the interests of the profession. They have earned and deserve the sincere thanks of our entire membership.

I thank each of you who have assisted me in office—it has been an exhilarating experience and I cherish it.

At this time I would like to name to the Resolutions Committee Mr. Adonis Nielson, as Chairman, Clay Spear, Raymond D. Givens, Joe Blandford and Earl

Morgan. You will report to the convention on Saturday morning. In the meantime you have available room 233-A in the Lodge for your meetings.

At this time our Secretary, Mr. Ennis, will give us a demonstration of the radio public relations program which I spoke of in my report.

MR. EARL MORGAN: Mr. President, before you go on, I think that somebody should say we have just listened to a couple of very fine reports showing a great deal of work throughout the year for which we are all grateful. (applause)

MR. PAUL ENNIS: Mr. Brown asked me to announce that in connection with his remarks about continuing legal education you will find, over on the registration desk in the Challenger Inn lobby, copies of the publication of the Committee on Continuing Legal Education together with order blanks, and you are entirely free to look any of those publications over. We invite you to do it, and if you are interested in ordering any of them, you can take one of the order blanks and send it in and you will receive your publication immediately.

Now in connection with the public relations radio program that Mr. Brown also discussed, I would like to point out this: These programs are not made for listening by lawyers. They are intended to reach the public generally. They have used professional tactics and procedures of showmanship to gain the audience's interest and to retain it. I know that when you hear the first remarks on this record that we are going to demonstrate, you are going to think that it is not very profound, and as a matter of fact, it isn't. But I think that it does demonstrate the type of record that all thirteen are, and this one happens to be on the subject of divorce. Without further introduction, I will let you listen to the record.

(Whereupon there was a demonstration of public relations transcriptions dealing with the law and lawyers.)

MR. EARL MORGAN: What do these cost?

PRESIDENT BROWN: I was going to inject that. As I previously stated to you, it had been the hope of the Commission that various local Bars of the state would take hold in making these programs available and go ahead on a local basis with the public relations program. The whole series of thirteen records is available to the local Bars through the Secretary of the State Bar Association. The cost of cutting the recordings of a complete set of thirteen programs is $41.00. The great cost, of course, comes in actually getting the broadcast time from the local radio stations. As I informed you, the first experience in trying to get free time in Colorado was not good, but subsequently they had requests from stations for the program. They likewise found, in Colorado, that once these broadcasts had started, other groups and institutions were willing to come and actually solicited to assist in the financial support of the programs. For instance, banking institutions came forward and offered, in some communities, to assist the local Bar in financing these programs considering they were in the public interest. And there is no reason why two or more associations couldn't get together, at least on the initial cost of the records, and have the programs going in several communities at the same time, one starting a week or so ahead of the other and just send the programs on around.

It is our understanding that the Third District Bar is going to start a program in the early fall, I believe in September. And I have been advised, just from talking to the owner of the local radio station in Shoshone County, and after explaining the programs to him, that he will put the programs on as a public service for the Shoshone County Bar Association free of charge. And he hasn't ever heard them yet.

So I think that with a little local work in the various localities that these programs could be put on very easily.

MR. EARL MORGAN: What are you going to do with these thirteen disks between now and September? Can we get hold of one and take it home and say to our local radio station, "How about this? Can this run as a public service?"

PRESIDENT BROWN: As a matter of fact the first group of recordings purchased by the Commission—that is, we purchased the tape originally and then have had a series of programs cut on the records—the purpose of the Commission in securing these records was for demonstration purposes not only here but to let the local Bar association, for instance, borrow it, not only for the purpose of demonstrating it to the radio station but also to demonstrate it on a local basis to the members of the Bar who were unable to be here and have the program demonstrated to them.

I think that at this time we will have a ten minute recess. At 3:00 o'clock we will have Mr. Jamison of California who will talk on a matter of considerable interest to the lawyers of Idaho. We will want you all in attendance, because I am sure you will not want to miss it. We will have a little break and start at 3:00 o'clock sharp.

PRESIDENT BROWN: The meeting will please come to order. At this time I will present Mr. T. M. Robertson, Vice President of our State Bar Association who will introduce the next speaker.

VICE PRESIDENT ROBERTSON: In formulating our program for an institute type of a meeting, it was determined that taxation was one of the fields that many of us had received little or no education on in law schools, and it has become a field that favors, I think, most every transaction that involves property that goes across the desks of most lawyers in the state. Thorugh the facilities of the American Law Institute and the State of California's Committee on Continuing Legal Education, we were able to obtain the services of Mr. Oliver M. Jamison of Fresno, a young man who comes to us very highly recommended as a legal scholar and one who has been very active in the continuing legal education field in the State of California. His subject this afternoon is The Special Taxation Problems Peculiar to the Agricultural Industry and to the Mining Industry. Mr. Jamison. (applause)

MR. OLIVER M. JAMISON: Thank you very much, Mr. Robertson and Chairman Brown. I appreciate very much your kind invitation to come to Sun Valley. It is one of the very few things we don't have in California that is desirable. (laughter) As a matter of fact, I feel somewhat a native of this area, because I lived in Baker, Oregon, and Enterprise, Oregon, when I was a boy, and that is the same type of country that you inhabit, and it certainly brings back memories to come back into this area.

As Mr. Robertson has said, the subjects that I plan to cover today are the tax problems of the farmers and a brief survey of some of the problems that a lawyer should look at if he is advising a client who has mining interests or proposes to have mining interests. In the San Jouquin Valley we deal mostly with oil and gas, although there is some mining. The provisions of the code are quite parallel on both types of interests.

From the standpoint of the farmer, most of what I have to say will be directed to an attempt to give you the tools to recognize and to handle the prob-

lems that come up. I know that Idaho is a great agricultural area. Mr. Russell and I are partners, and our practice is in a very large agricultural area, and most of the problems which we handle are handled for farmers. Most of the cases which we litigate in the tax field are ones in which we represent farmers.

As I think of the problems of the farmers, I am reminded of a joke which you have probably heard. It was quite current in the depression. It was about the trainer who had three new dogs that he was going to train as retrievers. His first problem was to name the dogs and then proceed to train them. He named one Banker. He named one Lawyer. And he named the other Farmer. Well, after he had them trained, he took them out for a field try, and he came in that night, and his wife asked him how the dogs had done. "Well," he said, "Banker was really good. He ran right out there. He got the bird. And then Lawyer took it away from him. But Farmer just sat there and howled." (laughter)

Well, some of his howls have borne fruit. I think, when we get through, you will see that in some respects the farmer is a favored taxpayer.

My discussion this afternoon will be concerned with giving you some idea of the farmers' accounting methods, some of the options that are available to a farmer that perhaps permit him to level his income or to at least defer taxation by methods that are not available to other business men, and second, to give you an idea of some of the problems which you, as lawyers, must face in handling transactions where a farmer either acquires or disposes of property.

Now a farmer, as far as accounting is concerned, is in a relatively unique position. A merchant or a manufacturer who has the same type of business where he invests money and supplies and labor and materials, and brings into being something which he sells to someone else, would be required to operate his business and account for his income under the Internal Revenue Code and Regulations on what is known as an accrual basis. This means he must account for his income by the use of inventories. He must make a cost of goods sold computation. He may have to pay income tax on items receivable which he hasn't collected in cash and on items which are in his inventory which haven't been sold. Well, a farmer may follow the same method, if he wishes, as a merchant, but he doesn't have to. A farmer is permitted the option of reporting his income on what is called the cash receipts and disbursements method. That is the method which is usually reserved only to those who operate a relatively simple accounting system, salaried employees or professional people who don't carry any inventories of goods and whose income is mainly from personal services. They may report on a cash basis, and it clearly reflects income. But those who have inventories simply, in the opinion of the Internal Revenue officials, can't clearly reflect their income unless they carry inventories and report on an accrual basis.

But because of the conditions that are thought to be peculiar to farmers and the very great difficulty of working out a sitisfactory cost accounting system so that the farmer can accurately determine the cost of goods which will go into his inventory, the farmer is permitted to elect to adopt a cash basis. This means that when he purchases his seed, his fertilizer, supplies of various types, he may deduct the cost at the time he pays for them. And in administrative practice he is permitted and even required to do this even though the actual use of these supplies he purchases may be deferred until a future period. He realizes no income until he sells his crops for cash.

About the only place where a farmer is required, in effect, to go on an accural basis is where he atempts to prepay rent. There is a rule that has been applied

uniformly to all cash basis taxpayers that if you rent a piece of property and you desire, because you have a high income that year and high tax rates, to prepay two years of rent even a cash basis taxpayer is required to prorate the rent so that deductions for the rent are attributed for the period for which the rent is actually paid. Even the cash basis farmer is not supposed to be able to accelerate deductions by prepaying rent although in practice revenue agents have often permitted it.

There is one other situation where the cash spent by a farmer on the cash basis may not be deducted at the time it is spent. In the San Joaquin Valley the main crops are grapes, tree fruits, cotton, barley, vegetables, mellons, and potatoes. During and immediately after the war there was a tremendous demand for grapes. The distilleries had been making industrial alcohol instead of whisky, and wine had a good market at that time, and there was quite a market for table grapes. People had difficulty in obtaining other foods, and grapes were very high priced. Well, there were some farmers who thought that the way to avoid a high income was to buy the grapes of others. They said, "I made a lot of money this year, and I will buy my neighbors' grapes, turn them into raisins and hold them over until the following accounting period. I will deduct the money which I have spent for those raisins," Although that was done, it was improper.

Definite regulations apply to this situation with respect to purchased livestock. If a cash basis farmer purchases livestock, he can't deduct the cost. He is required to capitalize it and set it off against the realization from it when he sells it.

The same thing should be true if a farmer purchases crops for resale. When he does that, he is not in the farming business. He is a merchant. He is buying and selling. He is not growing and selling.

So there are those two situations where the cash basis regulations do not apply—prepaid rent and purchase of livestock or crops.

How is the cash basis advantageous to the farmer? Mainly because it permits him to regulate to some extent the period in which he realizes income because of his control over the time of payment for deductable items and the time of sale of income items. This is particularly true if he is growing storage crops. If he has perishable crops, he may not have as much control over the time of realization of his income, although, as we will see, there may be some latitude here also.

If he were on an accural basis, the use of inventories would largely require realization of his income in the year in which crops were produced. It would be in his inventory and reflected there. He would have to make his cost of goods sold computation, and he would not have the same opportunity by deferring sale to defer income and to regulate the time for realization of income. But on cash basis, he deducts the money as he spends it for his crops. He controls the time when he sells it. If he thinks he has sold enough and his crops are storable or he is otherwise able to defer the realization of income, he simply holds it over until the following accounting period. He does that partly because farming has historically been a business of violent fluctuations. A man's crops are subject to the hazards of weather, insects and prices, and the farming business has historically fluctuated widely.

Well, if he has a good year, he may put a lot of money in fertilizer, because he doesn't know what will happen next year, and he may hold over some crops, figuring that will be insurance. He figures that if he has a bad year next year,

he will sell this year's surplus and won't have to pay much tax on it. So he has a means of leveling income by utilizing the cash basis.

There is one brake on his leveling of income. That is what is called the doctrine of constructive receipt. If he sells crops under circumstances where he is in a position to reach out and get the income and take the money for his crops but he voluntarily turns his back on it, then, even though he hasn't received the cash, and even though he is not on an accrual basis, the courts and Treasury Department have applied the doctrine of constructive receipt.

Actually there are hundreds of cases on this constructive receipt problem, but there are very few involving farmers. There have been enough cases within the last five years, however, to give us some principles which I think will prove of value to you is advising your clients. We may contrast the situation in three different cases.

The first case is one in which Mr. Russell and I were the representative of the taxpayers, the case of John Rossi, a Tax Court memorandum decision that was decided in 1950. In this case we were endeavoring to establish that the farmer had constructively received the purchase price for a crop of figs which had been delivered to a cannery. It is unusual for the taxpayer to try to establish constructive receipt, but in that particular case the formula under the current tax payment act, where three-quarters of the tax for one year was forgiven, meant quite a bit of money to this particular taxpayer.

The facts were that he had originally entered into what is known as a profit sharing contract where the price had not been definitely determined within the year in which he delivered his crops. Had he actually delivered under that contract, we couldn't prove constructive receipt. But prior to the beginning of the season, by agreement with the cannery, the profit sharing agreement was superseded and he was to get a set price which was to be paid on delivery. Well, he delivered the figs in accordance with that agreement. The credits were entered on the books of the cannery. Not all of the money had been paid on completion of delivery, however, and he went up to talk it over with the cannery, and the cannery people said, "We have the money, and you are welcome to it. If you want it, we will go draw a check right now. We'll have the treasurer draw a check, and you can walk out with the balance of about $30,000." Rossi thought it over. They said, "Of course, if you draw it, you will have to pay taxes on it. Maybe you would be better off to leave it here. But you can have it if you want it."

He thought it over, and he said, "I don't think I want it. You keep it, and I'll draw it next spring."

So he went back and talked to his accountant, and his accountant asked him what had transpired, and the accountant said, "Well, I think that is a constructive receipt, and you had better report it in this year's income.

So that is the way it was reported. The Treasury Department came back some years later on the audit and claimed it was not constructive receipt. On the establishment of the facts I have outlined by the evidence introduced at the hearing, it was held that it was a constructive receipt although the farmer didn't get the cash until the next year. The critical points were that he had a contractual right to get that money that year. The debtor was able to pay and had even told him it would pay it. The farmer could have collected but he said, "Keep it. I don't want it." Well, on those facts he still has to report the income, and that is true of any farmer in this area or any other. It is a rule of law that has been developed by the courts. That money is income even on a cash basis.

Well, contrast that with the case of J. D. Amend, reported in 13 T. C. 178, where prior to the delivery of the grain crop it was agreed that the purchase price would not be paid until the following year. As an integral part of the contract, it was agreed the money would not be paid until the following year. That was held not to be a constructive receipt, although the circumstances more or less showed that probably the farmer would have been paid if he asked for it, even though he made a contract otherwise. The fact that his agreement with the man to whom he sold those crops was to the effect that he couldn't have the money until the following year, and had he asked for it, that man could have said, "No, you can't have it. You are not entitled to it," kept it from being a constructive receipt.

Well, a recent case came out in March of this year, a Tax Court memorandum decision, where, at the beginning of the season, when the crops were being grown, the farmer and the buyer entered into a written agreement which provided for payment within that year. Then, within a month or so, there was an oral modification of the agreement, and they agreed that part of it would not be paid until the following year. Well, the court, in that case, held that since the agreement had been modified before the crops had been delivered and accepted and before the right to the money became established, constructive receipt did not apply, even though it was very plain that the purpose of that agreement was to defer the income.

Those are principles that should be borne in mind in advising farmer clients, because the legal relationship of buyer and seller as evidenced by their agreement is all important in determining the tax effect.

The accrual basis has some peculiarities when applied to the farmer. He may account for his income by ordinary methods of valuing inventories, or he may adopt a farm price method. This is, in effect, nothing more or less than a method of bringing income into constructive receipt. Because all he does is take the market value of the crops on hand at the end of his year, less the cost of selling the crops and getting them to market, and that is used as his closing inventory. This creates the same effect as constructive receipt.

Livestock raisers are permitted a peculiar method of inventorying stock which, in effect, allows them to add to inventory a certain amount each year representing the cost of raising young animals which is based on an average cost of bringing the animal to each stage of development. It is called the unit livestock method.

However, I think you will find that 90% of the farmers report their income on the cash receipts and disbursements method. And if you have a man that is going into the farming business, it is a problem for the ordinary farmer to find what is most satisfactory. The cash basis is not an accurate way of reflecting income, but it does give the farmer more control, if he knows what he is doing, over the period in which he realizes income.

Now, suppose you want to change from one method to the other. The regulation at one time provided that without getting the permission of the Commission, a farmer could not change from a cash receipts basis to an accrual basis upon the filing of certain adjustment sheets. Well, that became quite common on the advice of accountants during the period when taxes were going up, because the effect was to throw income back into the prior period when taxes were lower, and it was done a great deal around 1940, '41, and '42. The Treasury changed its mind about what the regulation meant and litigated the question, but the taxpayer won and the treasury changed the regulation. After 1948 you must have

secured the permission of the Commissioner and file a request for it within 90 days from the beginning of the period for which you want to change. You must file a request with the Commissioner and secure consent in order to change from an existing cash basis to an accrual or to change from accrual to cash—either way.

There is one case that has been handed down by the Ninth Circuit Court of Appeals which can prove very useful in advising a man who has been in some other business and who wants to become a part-time farmer. Suppose you have an incorporated automobile dealer who has to report his income from his dealership on an accrual basis, and he buys a ranch. He hears about capital gain on breeding stock and decides he will offset some of his income by the expense of raising cattle, some of which may qualify for capital gains treatment. So he buys a ranch and goes into the livestock business. Well, there is authority in the Ninth Circuit, the Birch Ranch and Oil Company case, 52 Federal 2nd, which holds he may set up the ranch as a separate business within his automobile dealer corporation. And the corporation may account for income in the farming operation on the cash receipts and disbursements basis. If that is desirable, and it often is, I strongly recommend to you that you do everything possible to segregate that phase of the business. I don't know if you have a fictitious name statute here in Idaho. We do in California. If you have, it would be advisable to have a separate fictitious name in this farming business and file and publish the certificate and to set up separate books and have it clearly segregated as a separate subdivision of the corporation.

Another problem is concerned with cooperatives. There has been quite a history of litigation there on whether a man who has received a revolving fund certificate or credit on the books of a cooperative or instrument evidencing rights to a revolving fund credit is required, on a cash basis, to bring the value of the credit or certificate into his income in the year in which the right becomes fixed or in the subsequent year when the cash has actually developed out of the cooperative. There is still quite a bit of litigation going on. The courts so far have adopted the attitude that he must receive something that has a fair market value. If he receives a certificate of some kind which the courts find has a value, then he reports it even though no cash is received until later. The problem isn't wholly settled yet, and the Treasury Department has come out with a new set of regulations.

As you may be aware Congress quite recently passed a law taxing coorperatives at normal and surtax rates. The Co-op may deduct, however, amounts which are set aside for members, even though such amounts are retained, if they are set aside and credited on the books and a letter of advice or other evidence of credit is sent to the member entitled the credit. The question still is: At the time the letter or revolving fund certificate goes out, is income realized by the cash basis farmer who has not actually received cash? The new Treasury regulations say it is. That remains to be seen, since there was no new law passed on that subject. We will have to see what the courts will say about it. The Commissioner of Internal Revenue may have a good chance of prevailing on this point. Another place where the cash basis is important to lawyers is with respect to decedents' returns. Under Internal Revenue Code Section 113-A-5, property which is acquired by devise or inheritance from a decedent acquires a new cost basis of fair market value at the time of the decease. On the other hand there is Section 126 of the Internal Revenue Code which provides that income in respect of a decedent will be taxed to his estate or to any successor in interest. The question is: Suppose a farmer dies befor ae growing crop is harvested. He has a lot of the expense of his crop in already. He is on a cash basis. The decedent's return must cut off. His

period ends when he dies—his taxable period. What about those expenses and what about the value of the crop? I am now referring to a growing crop. There could be a crop that would be pretty well made and nearly all the expenses would be in it. Is that something that is going to be accounted for under Section 126 as if the decedent had lived, or does the estate get a new cost basis on the crop and still get to deduct in the decedent's final return the expenses which went into it on a cash basis while the decedent was alive?

Well, that question can't be regarded as wholly settled, but in administrative practice to date, the deductions for farming expenses incurred and paid up to the date of death have been allowed in the decedent's return. The common practice is, where it is community property and the husband dies, to report the wife's income for the entire year. The decedent's income will be for the short period ending when he dies. We file a joint return including the decedent's income for the decedent's short period and the wife's income for the year. The wife, under our community property system, is entitled to one-half of the total income for the entire year, and the decedent one-half the income for tax purposes so that she reports one-half of the total income for the entire year, and the decedent one-half of the income or loss for the short period ending with his death. A joint return is filed and the combined income is split for computation purposes. File another return for the estate and report one-half of the income from the period of the date of death to the end of the accounting period selected for the estate. In that way is obtained the maximum division of income, lowering the surtax rate brackets. To date case law and administrative practice have generally conceded the taxpayer a fair market value at the time of death, and you should have the crop separately appraised, if you are representing the estate. In the case of community property, this has been beneficial in cutting down the wife's one-half share of the income and has kept the estate's income low, because of that new basis and still the deductions are allowed in the decedent's return. The effect is that income-tax-wise the taxpayer gets a stepped-up basis for gain or loss on the crop notwithstanding deduction of the expense of growing the crop.

I might warn you about hobby farms for any automobile dealers that want to operate a farm at a loss for a hobby. The law and regulations have been applied so that any loss in excess of income from the hobby farm is not deductible. But if you can show, even where you have other businesses, that you are bona fidely entering into a transaction for profit and that you mean to make money on the farm but can't do it, then you may deduct the loss.

Well, so much for the problems that are concerned with the accounting methods of the farmer. Incidentally, if there are any questions from time to time, as we go along, I would certainly be glad to answer them.

I plan, for the balance of the first hour, to talk about the disposition of farm property. Are there any questions on accounting methods?

MR. ABE GOFF: I am concerned about the separate appraisals of farm crops. What do you mean? You have the land appraised and then appraise the crops separately, and then the gain on the crop is the difference between the appraised value as of the time of appraisement and what it sells for when the crop is sold?

MR. OLIVER M. JAMISON: Difference between the appraised value plus the additional expense of growing and harvesting it and what it was sold for is the gain or loss. Incidentally, in setting up those appraisals at death, because of this

new basis for gain or loss, it is important not only to segregate and appraise the crop for whatever value it may have at that time, but also any depreciable assets. If you have orchards or tractors or equipment, fences, barns, it may have a value in excess of the depreciated cost on the decedent's books, and if you have it appraised at that value it will become the new basis for computing depreciation. It is wise, in handling decedent's estates, to have your appraisor appraise the bare land and each improvement separately and to appraise separately the crop, if any is growing or on hand at the time of decedent's death.

The subject I am now going to take up is the disposition of farm property. There are many ways to dispose of it. We will discuss sales, leases, gifts and options. There are many different consequences that may happen from the manner in which livestock and crops are handled for tax purposes.

First I will discuss sales. If you have a farm which is sold as a whole, the first problem that you have is to determine the character of the assets that are sold, because under the Internal Revenue Code there are basically three classifications of assets which may have different rules as far as the reporting of gain or the deduction of the loss is concerned.

First you may have capital assets. Well, a capital asset is basically defined as anything, any type of property which isn't held for sale to customers in the ordinary course of business or isn't the type that would be included in inventory, or is not land used in the trade or business or is not depreciable property used in trade or business.

If a capital asset has been held more than six months the gain or loss is referred to as "long-term." Long-term capital gain is taxed at limited rates and a limited deduction is allowed on capital losses. If property is a capital asset and has been held for less than six months, the gain or loss will be short term. If it is a gain, it is taxed as ordinary income. There is a formula for offsetting gains and losses from property, but to simplify it, we will assume this is the only property sold, and you make a short term gain. It is taxed as if it were ordinary income at full surtax rates. If you incur a loss on it, the deduction is limited to offsetting capital gains and, in the case of individuals, one thousand dollars of net income property which is held for sale to customers is non-capital asset and if you are in that category, then it is either ordinary gain or ordinary loss. A farmer's crops ordinarily fall in this category. But a farmer's land is used in his trade or business. His equipment is depreciable property used in the trade or business. If it has that classification of property, the gains or losses are calculated under Internal Revenue Code Section 117-J. You balance out the gains and losses from such property used in the trade or business, and if the net result is a gain, and the property has been held for more than six months, it is treated as a long term capital gain. And that, as you know, is very limited top bracket. The effect of it is that cuts in half your gain on the property, and then the remaining gain is taxed at a limited rate. The maximum federal tax you pay is 26%, and it may be less, depending on your bracket.

If the result of offsetting these is a loss, you may deduct the loss entirely under Internal Revenue Code Section 23-E.

The main litigation that has come up in relation to farmers has concerned the sale of growing crops. Had the farmer grown the crops and harvested them and sold them, what he realized would have been ordinary income. But suppose he sells them, before they are harvested, with the land? There has been a great deal of litigation. The Supreme Court, just three weeks ago, in Watson v. Commissioner,

a case that involved an orange grove and held that on pre-1951 sales the amount of the purchase price allocated to growing crop had to be treated as ordinary income and could not be a Section 117-J type of asset permitting capital gain. That settled the law on pre-1951 sales, and Congress has settled it on everything after that, because as a result of the Treasury's attitude on these sales of growing crops, Congress passed a law which applies to any sales that take place after 1950 which provides that if a farmer sells his farm with the crop as a growing crop before it is harvested and both are sold to the same person—then the entire consideration for the growing crop as well as the land will be considered to be 117-J type of gain on which he can take long term capital gain, if he has held the land for more than six months. It doesn't matter if the crop has been in the ground only three months. If he has held the land for six months, he is entitled to long term capital gain.

The Treasury has inserted two limitations in the regulations which aren't in the statute. I don't know what the end result will be. The regulations say that the law does not apply to any leasehold or estate for years. If you are a farmer on leased land and you sell your lease, the lease is treated as a 117-J asset or capital asset under the code, but the gain on the crops is ordinary income, if it is a leasehold. They also say that if you have any option to reacquire the property, other than a mere security in it, then you can't get capital gain on crops. What the treasury is afraid of is, I suppose, that a man will sell one year and take capital gain and have an option to buy it back from the fellow he sells it to next year, and he will take a capital gain, and they go back and forth like that. Well, the regulation isn't restricted to that. The regulation says any option to recover the property other than a mere security interest will destroy the taxpayer's position.

Under the old law taxpayers were attempting to deduct all the expense of growing the crop and then selling with a zero basis on the crop and reporting everything they got for it as capital gains. When Congress passed this law permitting them to take capital gains on growing crops, all the expenses that went into that crop are disallowed as a deduction against ordinary income but allowed as cost basis of the crop. The regulations provide that even if expenses were deducted in a prior year, you have to go back and file an amended return and pay the additional tax, but the disallowed expenses become a part of your basis on the crop when it is sold, so it will reduce the amount of capital gain you would otherwise have. That is the situation now on crops.

I might mention, in passing, that one thing that is important to you as a lawyer is being sure that when you are involved in one of these transactions, you are sure of the time when it is a closed transaction. Because you can get into an ambiguous situation from a buyer's point of view particularly. The Treasury and the case law so far, and there has been very little on it, have permitted the buyer to allocate the fair market value of that crop as a part of the buyer's costs, reducing his ordinary income when he sells it. He may buy it at a time when it is virtually made, and there will be nothing but the harvesting expenses against it. But whatever it is worth, he has been permitted, under the old law—and I am quite sure it will continue under the new law—to take the value of the purchased growing crop as an offset to his selling price when he sells the crop.

It is important, if you represent the buyer, in order to fix that fair market value at the figure you want, to have the time of closing of the transaction—that is when there is a transfer of the benefits and burdens, a transfer of the possession and an unqualified right on the part of the seller to receive the price—at a time

when the crop has value. If you do it too early in the season, you may never get that cost as a buyer.

As far as the seller is concerned, if it is one price, it doesn't make much difference to him. He may have a problem on how much expense he has in the crop, but if you represent the buyer, you want to be sure of the time the transaction is closed so that the buyer can determine what the fair market values of the growing crops are in order to allocate them.

Another thing is that you should get an appraiser to appraise the value of that growing crop. If you can, get a good fair figure set up in your contract with the seller. Before this '51 law, you had a situation where the seller didn't want to do that, because he wanted to take a capital gain on the whole works. Now he gets it anyway, so it should not make any difference. Although there is a possible argument that it might amount to a severance of the crop under some local law theory, so you still find sellers reluctant in that respect. But the buyer should get a favorable allocation to the crop in the contract, if he can, and support it by an appraisal. Those are the main problems in a sale.

Now, on leases you have problems from the standpoint of both the lessor and the lessee. The lessor's problem is this, from a tax point of view: The agricultural property may be pretty raw when it is leased out. The lessee of the property may expect to install pumps, grade and level the land and spend a lot of money on it. Perhaps he will dig wells and install a complete irrigation system on the land. To the lessor that is desirable, because the land becomes more valuable.

Suppose the lessor says to the lessee, "Well, I will give you a lease for five years, and you move in there and level the land and put in a well, pump and motor, fence the property and install a suitable irrigation system, put in a pipe line and so on, and I won't charge you any rent for five years." Well, at the end of five years he gets the property back, and it is all improved and the other fellow hasn't paid any rent. He has just put in these improvements. There has been a law which says that improvements by a lessee are not to be treated as income to a lessor at the time of termination of the lease. However, the law and regulations state that anything that is done in lieu of rent is taxable as rent. Well, the problem, when you are drafting an agricultural lease, is to try, from the lessor's point of view, to work out the lease in such a fashion that whatever improving is done by the lessee is not considered rent to the lessor. That means, certainly, that in drafting an agricultural lease, you should never put in that this will be done in lieu of rent. You should never put in any provision for a specified sum as damages, to be paid if the improvement isn't done. And if you can, keep to a minimum any requirements that are at all specific as to the work of the lessee. The best practice is to try to create a situation where the very circumstances are such that the property, to be valuable to the lessee, must be improved by the lessee without specifically requiring him to do anything. It is hard to find that situation sometimes. Sometimes you can work it out through a provision for an option to renew the lease. But you always have the problem where the lessee is putting improvements in and you don't want the lessor charged with rental income.

From the lessee's point of view, his problem is to get amortization, get a write-off of the improvements he puts on the land. Of course, if he just pays rent, he gets to deduct that. But suppose he is going to put in expensive improvements? Usually he can see only so far ahead, and he thinks his income is going to be good for a time, but ten years from now he doesn't know what is going to happen. He wants to make a short lease, but he wants to have a grip on the property so that after those improvements are made, he can keep holding it. Well, that is a pretty

touchy situation, because the Treasury regulations are framed so that if there is an option for renewal which appears with reasonable certainty will be exercised, then the write-off period must not only be the initial term but the renewed term.

If there is no reasonable certainty that the option will be exercised, you must write off improvements over the initial term. Well, in drafting a lease from the lessee's point of view, if you can, you want to leave out an option to renew. But that may not be practical. There are certain situations where the lessee as a practical matter will never have any other lessor available. He can't lease it to anybody else. There the lessee doesn't have to put in an option to renew. If he doesn't like the rent, he just tells the lessor that he will not take it and just let it sit there. The lessor can be stubborn and let it sit there, but usually he takes reasonable rental, and, in fact, a good deal less than reasonable rental rather than let it sit there. But if you don't have that factual situation, then you have to try to be careful in framing your lease so there won't be that certainty of renewal. Which would require amortization over the extended term. I would advise this, however, if there is any doubt in your mind, advise your client to write it off over the initial term. Then, if he is required to readjust, a valid claim will not be barred by the statute of limitations.

There is one other problem that can come up in handling property transactions. That is the situation with respect to options to buy property. If you pay money for the option and then drop the option, the loss you suffer is a short term capital loss with a very limited deduction. If you take an option, so far as the optionor is concerned, and you pay him money for it, the rule has generally been that that it is a suspense item. If it is to apply on the purchase price and the option is in the future, the option doesn't take the payment for the option into income unless it exceeds his basis. But in the year in which the option is either dropped or applied on the purchase price, then he takes it into account. If the option is dropped, it becomes an ordinary income item to him that year even though he received it several years before. If the purchase is made, it is applied as a part of the purchase price in determining his gain on the transaction.

There is one other device that commonly comes up in farming and has elsewhere which is important to you as lawyers to know something about. That is the situation where a man leases property. He pays a very high rental for the property, but he has an option to buy for a very nominal price. What is the situation? Can he deduct the rent? Well, there has been a lot of law on that developed over the past ten years, and the answer still is not entirely clear. The Revenue Code permits him to deduct rent, if he is the lessee, which is required to be paid for the use of the property to which he is not taking title or in which he has no equity. For a time the courts used the approach that where there was a very nominal end price, he must be acquiring title, that nobody but a fool would drop the option at the end of the period. So they said, "You can't deduct it. You are taking title here." To the lessor they said, "You called it rent in this lease, so you pay ordinary income tax on it." Well, about 1947 or 1948 the Tax Court developed what was a reasonable consistent rule, particularly as applied to depreciable property. On depreciable property they said, "If the rental payments exceed the normal depreciation rate, it will be purchase price both ways. The seller will take capital gain, if the property is a capital asset. And the buyer or lessee will have to capitalize the rent as his cost and take depreciation on the equipment." Well, that was acquiesced in by the Treasury Department, and it seemed to be a fairly well settled rule. But recently there is perhaps a new test in the law which is, what did the parties intend? Did they intend this to be a lease, or did they

intend it to be a sale? And we look at all the facts and determine whether or not there was in the agreement the intention to be a lessor or the intention to make a sale.

In one recent case the property was leased for 66 years at very high rental and the purchase price was $10.00 at the end of that time. The Tax Court said that the intent was a lease and not a sale. So the lessor took the rent in as ordinary income, and the lessee was permitted to deduct it. But for 28 years the lessor there had treated it as ordinary income, which may have influenced the decision.

My only advice to you is, as a practical matter in this state of the law, that wherever you have that situation and you represent the lessee—and you find it coming up often in a farming situation where a man wants to go and develop property, and he will pay a high rent because he wants to deduct it and buy at a low price—state that this is intended to be a lease and not a sale. Do everything you can to make the intent clear. And if you can do it, I would even place the obligation on the lessor to take that rent in as ordinary income and make him agree that is not a part of the purchase price but ordinary income that he will report as rent. I think that if you did that, you might succeed in having the agreement construed as a true lease, permitting deduction of the rent. If you represent the lessee, make sure that the intent is clear that it is a lease and not a sale.

Another problem that comes up is on gifts. The farmers want to make gifts to their children. Suppose they are on a cash basis and they deduct the cost of growing sheep, and then they make a gift of the sheep to the children. The Treasury's point of view is that they must take the value in as income. The Treasury says they can't deduct that expense and give away the income. The same thing appliees if you make a gift to a charitable institution. The Treasury has rulings out on it. To date the Treasury has been singularly unsuccessful in the courts. They haven't won one yet. I don't know what would happen in the Supreme Court though. I am inclined to think the Treasury would win that if it gets it up there, because there is plenty of precedent on assignment of income. The Tax Court and one Circuit Court, as I recall, has held that making a gift of this property, even though it is the type that would be income if sold, does not result in income to the donor. It is given away and still unrealized. So the donor in that situation, so far, is going to have to litigate it. Apparently he has an excellent chance of winning in court, but what the end result will be once the Treasury gets it into the Supreme Court is an open question.

One other point in the disposition of farm property that I want to mention in passing is the very singular set of rules that have grown up on partnership interests. The courts and Treasury have acquiesced and now classify a partnership interest as a capital asset under Internal Revenue Code Section 117(a), and if you have held the interest more than six months, you can take long term capital gain if you sell a partnership interest. If you sell at a loss, you take a capital loss, which is very limited. You don't want to sell a partnership interest at a loss. Dissolve the partnership.

The principle isn't too important with respect to farms now, because of the rule on growing crops. But suppose the farming enterprise had harvested crops on hand, it would be better for partners to sell the partnership interests than for the partnership to sell out its assets. The Watson case, the Supreme Court said gain was ordinary income on unharvested crops pre-1951. During that same period a five man partnership holding an orange grove sold their partnership interests, all of it. There was no more partnership. They sold all five partnership interests to

one man. Still they were held by the tax court to have sold capital assets. Had they set up their transaction the other way and sold the grove, they would have fallen within the rule of the Watson case. So the rule on partnership interests can be critical to a lawyer as a draftsman as to which way he wants to cast the transaction.

Now you have a certain amount of control over that. If you are going to take a loss and the partnership is selling out, dissolve that partnership and get it out of the way so there is no question but that it is finished, and then sell the property. Otherwise you have a capital loss. If you are going to sell at a gain, then it just becomes a question of analyzing the benefits of selling a partnership interest, which is a straight capital asset against the benefits under 117-J of selling the farm property and having to offset the expenses on the growing crop.

FROM THE FLOOR: Assume that the partnership has a lot of undivided profits, and they sell out.

MR. OLIVER M. JAMISON: Well, as far as the profits are concerned, the courts have been consistent there. And that has been particularly true in cases coming up in partnership where there is an element of personal service. If one partner sells out in midyear he is required to account for his distributive share of the partnership profits up to that time.

FROM THE FLOOR: Wasn't it a lawyer who sold out and had some undistributed profits in one of the firms back east? Didn't he sell out?

MR. OLIVER M. JAMISON: There have been cases that look both ways on that question of sale of personal service partnerships. If there was work in process, my recollection is that there was no requirement that he report any income on it. But as to any income that had been closed up to the day he sold out, the courts have been fairly consistent in holding that anything that has been realized up to that date he must report as his distributive share. Of course, if there are accumulated profits, he would have had to report those in the previous accounting periods in which earned.

Occasionally the courts are inconsistent on this entity theory of partnership. In a recent case one 50% partner sold out to the other, and they had an installment obligation in the partnership. The partnership had reported a gain on the installment basis. The code requires if you dispose of an installment obligation, you must accelerate that deferred gain and report it immediately. The question was this: Where he sold the partnership interest and the partnership held the obligation, was he required to do that? The court held he was. The courts haven't followed this entity theory consistently all the way through partnership tax law, and I don't know what the last word will be. It hasn't gone to the Supreme Court.

The Treasury has acquiesced in the holding a partnership interest is a capital asset. There are some advantages to the Treasury. If the partnership interest is sold at a loss, it is a limited loss. If the economy turns downward, people take losses on these interests, and the Treasury benefits. Also the man who bought into the partnership at inflated prices has no right to write up the assets of the partnership to reflect the cost on his partnership interest.

FROM THE FLOOR: In many cases your profits are tied up in partnership assets.

MR. OLIVER M. JAMISON: That is true, and if you don't get a new basis —it is like this crop business. You pay a high price and still you have to use the

old low basis that was in the partnership. You don't get the full benefit of what you paid for. If you bought the assets outright and paid, we will say, $100,000 for it when its book value was $50,000, then if you sold it, you wouldn't have any gain, or you could depreciate it, if it was a depreciable asset. You can't do this to partnership assets if you buy a partnership interest unless the partnership is terminated. That is the way the rule has developed to date. It never has gone to the Supreme Court.

(Whereupon a ten-minute recess was taken.)

MR. OLIVER JAMISON: Before we get into a brief survey of some of the problems a lawyer needs to watch in mining tax law, there are two things I want to mention: One mainly because there is a serious problem there that I can't solve for you. The law hasn't developed. It is the problem of incorporated farms. A good many of them are in our area, and I suppose there are here, too. There are unsolved problems related to the incorporation of the farm and the dissolution of an incorporated farm. As you may realize, these problems are concerned mainly with how you account for income which is represented by either growing crops or crops that have been harvested but not sold.

I don't know what the ultimate answer will be. Take a farm in the middle of the year, with a growing crop, and the man has been on a cash basis and decides to incorporate. What is the result? Like what has been followed so far in the decedent's case, he deducts all his expenses on a cash basis. Certainly the corporation should assume none of the unpaid expenses. Never have the corporation assume any unpaid expenses of a cash basis farm. It is all right on accrual.

What is the effect of that crop that may be nearly made at the time of the incorporation? I don't know. One theory, supported by interpretation of general principles in the regulations, would be that it goes in at a zero basis. When it is sold by the corporation, the entire proceeds is all taxed as corporate income. Another theory would be to set the value of the crop in the individual return as income of the farmer who incorporates. A third theory is that the expenses should be capitalized as cost of the crop to the corporation. The expenses should be disallowed to the farmer even though he has been on a cash basis and capitalized at cost and permit that cost to be offset against the ultimate realization of the corporation. There just isn't any final answer at the present time as to what will be the end result there.

We do know that if you are representing a cash basis farmer, and I want to emphasize it again, don't have the corporation assume any of the unpaid expenses. The farmer is liable to lose the deductions, because he has not paid them. The corporation may lose them because when incurred they weren't corporation expenses.

Another problem which is somewhat related is that which occurs at dissolution where you dissolve a corporation with growing crops or perhaps harvested crops on hand. We have had a number of cases in our practice of that character. There haven't been so many lately, but we had several war-born dissolutions to avoid excess profits taxes of World War II and somewhere there were crops. If you applied the strict rules of the regulations, the way they were written, you would pay a capital gains tax on the difference between your basis on the stock that was turned in in complete liquidation and the value of the property you received, including the value of that growing crop or harvested crop on hand.

In the case of a growing crop, the Treasury ruling for many years has been that it can't be inventoried, and there has also been a regulation saying there is no gain or loss to a corporation as a result of a distribution in complete liquidation.

Applying all those rules, you should get a new cost basis on the crop, and if sold, you pay no tax on it unless the price exceeds the value plus expense of harvesting and selling. The only tax paid is a capital gains tax on getting it out of the corporation.

I remember three cases, and each of them was settled on a different basis. The Treasury Department essentially tried to use Sections 45, 41 and 42 against us on the problem. In one district they conceded the case and even allowed an operating loss carry back to the corporation based on the crop expense. One case was settled on the basis of simply disallowing as deductions the expenses of the corporation on the crop. And the other was settled on a purely compromise basis.

Not much has developed to give us much light even today, and just exactly how this new statute making a growing crop a 117-J asset, when it is sold to the same buyer, will affect the ultimate rules on this, is a question.

There is another problem. I know that you have a lot of livestock in this country, and I want to give you the picture on livestock before we leave farming.

One problem that led to a lot of litigation and a lot of political lobbying on the livestock tax problem grew out of the fact depreciable assets used in the trade or business were treated as 117-J assets and were susceptible to capital gains treatment. Well, a draft, dairy or breeding animal is not an animal which is held for sale in the ordinary course of business necessarily. It is something which, if you handled your accounts that way, could be set up at cost and depreciated. It has a limited life for breeding. I guess it is about eight or nine years, usually, that a beef animal is fit to breed, and there is a certain period that varies in various parts of the country that a dairy animal is suitable for milk production. I don't know how long the period is for draft animals. I am no farmer myself. But they are depreciable assets. The question came up as to how we were to treat this. The Treasury Department, for many years, permitted cash basis farmers to deduct all the expenses of raising such livestock although it required them to capitalize the cost of purchase. It did permit them to deduct the cost of raising them. So in the hands of a cash basis tax payer, raised animals would have a zero basis. He had nothing to depreciate. He just deducted the cost of raising it. What do you do when this man says, "I want capital gain on this," and he has deducted all the cost of it against ordinary income?

But the Treasury had a real problem there. They came out with this ruling: The first ruling said, "Yes, we will treat those as capital assets under 117-J, but animals that are culled from the herd in the normal process of maintaining your herd will be treated as held for sale to customers in the ordinary course of trade or business." In that way, you see, they give it to you with one hand and take it back with the other. Because in the usual situation you have to practically start selling off your herd to get any capital gain. That was fought through the courts, and the Treasury took a complete whipping on it, so it reversed itself and came out with another ruling.

On this one the Treasury said that any animal that is held for draft, dairy or breeding purposes, will be treated as a capital asset, under Section 117(j) providing it is held for its full period of usefulness. The effect now was that the culls were going to be capital assets, but unless you held it long enough to be a cull, you weren't going to get capital gain on it. That was the attitude there. Well, the Treasury started to take a whipping on that one in the courts.

In the meantime a very potent lobby, the National Livestock Tax Com-

mittee I believe it is called, brought a lot of ammunition to bear on Congress. An attorney in Denver is its attorney, and he has done a very capable job there. The effect of it was that the committee got written into the law substantially what the livestock men wanted. In other words, Congress threw out this Treasury rule, and the statute was drafted so that it now reads that 117-J assets shall include draft, dairy or breeding animals, and the committee reports show that Congress intended that you need not go by any of these prior Treasury tests. It doesn't have to be held for the full period of usefulness. It doesn't even have to drop a calf or anything like that if you can establish it actually was a breeding animal.

There was one thing about it that I thought was unfair. At that time I had a case in the Tax Court in which I was representing a turkey grower who had sold breeding turkeys. The custom in the turkey business, as some of you may know, is that the eggs are hatched in the spring, and the poults are raised. Those for market are sold off in the fall, and the breeding stock is held over until the following spring. After the breeding turkeys lay the eggs, they are sold for slaughter, and the breeders are replaced completely out of the stock for the next year. The same practice has been current in the hog-raising industry in some sections of the country. And the courts have held that the hogs were capital assets under Section 117(j). But we had a case involving turkeys. While the case was pending, this new statute was passed, and poultry was excluded. The poultry men just didn't bring in enough ammunition, while the cattle men and hog raisers did. Congress excluded poultry, but didn't make it retroactive. For the years after 1951 the holding period has to be 12 months instead of six months, but for years prior to 1951 the holding period need be only six months. So in our turkey case the statute didn't say anything about prior to 1951. So we went ahead with it in court and established that at least before 1951 a turkey on your table may have been, while alive, a capital asset under Section 117(j). Since that time, if you are a turkey grower, no.

So you won't have any illusions about how the Treasury feels about it, I might mention that the new regulations not only excluded poultry, which is excluded by statute, but also excluded all types of fish and reptiles from the word livestock, including snakes and frogs and fish. So if you have a trout farm, you can't take capital gain on your breeding trout. All types of mammals, however, hogs, fur-bearing animals, cattle and others, are considered by the regulation to be livestock for the purpose of this new law.

Now, even under the new law you may have run into some confusion. Suppose you are raising registered stock to sell to the cattle raisers, and in order to prove that they are good for breeding, you have them drop a calf before they are put up for sale. But your purpose is to sell them. Well, under the regulations—and it will probably be supported by the courts—that is held for sale to customers and not a capital asset even though the animal is bred.

Another situation that will probably turn out the same way, and the regulations have nothing specific on it, is where a man is developing springers. He sells his cow as a springer and has no dairy herd of his own. Actually, even though the animal may drop a calf or be just ready to, he has those animals for sale to customers. At least I feel that will probably be the end result there. But if it can be established, even if it hasn't dropped a calf, that it was put into breeding or that it was a dairy or a draft animal, you may now take capital gain. And it means a good deal, because if you are on a cash basis, you can deduct the entire cost of raising the animal. If you buy it, that is different. You have to capitalize the cost

there. If you deduct the cost of raising it, and you can sell it off as a capital asset, you have converted ordinary income to capital gain.

Because of this, those farmer-livestock raisers who have gone on an accrual basis have put in numerous applications to switch over to cash basis. Some of them are on unit livestock basis, some on other inventory methods, but all have put in their applications. That was quite natural, because on their method they were taking into ordinary income a certain amount of the cost of raising the animal. On a cash basis they took none of it in. For awhile the Treasury simply would not grant permission to anybody to change under those circumstances. But since the new Commissioner of Internal Revenue went in, he has issued a letter stating that hereafter those applications will be granted, providing that the taxpayer and the Commissioner agree on an adjustment that will be necessary to convert to a new basis.

That is the situation on livestock. Are there any questions on livestock?

FROM THE FLOOR: I would like to have you amplify that. I have a man who is a sheep man. What is the advantage of going on a cash basis?

MR. OLIVER M. JAMISON: If you buy feeders and then sell them, there is no advantage. But if you raise your own breeding stock, that is, if you keep animals to breed the animals that are added to your herd, if you do that, you will have a certain number of animals at all times that are used for breeding primarily. They are not raised for sale. They are not held for sale or slaughter or anything like that. I think it would be particularly true in sheep, although I haven't had any experience in representing sheep men. You pay for stubble for the sheep to feed on. You buy them feed and pay sheepherders to take care of the sheep, and that all costs money. If you were in the manufacturing business, you would have to capitalize it as cost of goods in the inventory. But a farmer on the cash basis can deduct every nickel, if he is raising the animal, and even though the animal is being raised for the purpose of only producing other animals. Then the breeding animal if held for one year may be sold and the gain taxed at long term capital gain rates.

FROM THE FLOOR: Do I understand, on an accrual basis, you have to carry that on as inventory?

MR. OLIVER M. JAMISON: The usual method of handling it, at least in years past, and it is partly a matter of convenience for the farmer, was to permit the farmer to include his breeding animals in his regular inventories. If he used the unit livestock method, he would keep them all in there. Over a period of time, it would all wash out at the same place, if it was ordinary income, that wasn't being converted to capital gain. The result of it was that by taking it in as an inventory value, you were, in effect, increasing your ordinary income and paying more tax as you went along. When the animal was sold, you had less gain. But if the gain is ordinary income, and the accrual method works better for you to more thoroughly reflect your income, it hasn't hurt you at all. But if you may deduct the expense of raising your breeding animals against income which is ordinary income from sale of animals that you are raising for sale or slaughter, then you can turn around, later on, having deducted all of that, with a zero basis and convert the entire realization to capital gain on the breeder. Then, to the extent you have built up a basis on the accrual method, you have lost money.

MR. T. M. ROBERTSON: Mr. Jamison, in Idaho, most of the sheep men, I think, have bought their breeding stock. They buy ewe lambs from somebody

else for breeding stock, and they have not benefited from that recent enactment. I think some of them are now getting wise and are starting to raise their own breeding stock.

MR. OLIVER M. JAMISON: To me that would certainly be a tremendous incentive to learn how to raise them as distinguished from buying them, because the advantages are fantastic. It really isn't fair. It hasn't been fair to the man on an accrual method who is using inventory. That is the reason they wanted to switch to the cash basis. If you can set up your operations so that you can raise them instead of buying them, you are better off, because there has been no change at all in the regulations as to buying. There are operations where, because it has been done over a period of years and has never been picked up—and if it were the statute of limitations would bar some tax money—where cattle men have deducted the cost as they bought animals, and just because they have gotten away with it over a period of years, it is hard to detect. But if you start fresh and try to deduct the cost of purchased animals at the time of purchase, you will have a revenue man in your books.

FROM THE FLOOR: You have a farmer set up on the accrual method in the cattle business. He goes into partnership with his son. Can that partnership be set up on a cash basis without permission?

MR. OLIVER M. JAMISON: Ordinarily, if you set up a bona fide partnership, that is recognized. But if you have a father-son deal, you have peculiar problems. If it is a bona fide partnership, that partnership is entitled to elect its own accounting method and to elect its own fiscal year. It is a separate tax reporting agency, and the answer would ordinarily be yes, they can switch to a cash basis that way.

FROM THE FLOOR: What about fur raisers? They keep animals for breeding purposes, but when he wishes to retire them, he pelts them out. Do you pay capital gains on those pelts?.

Only if the animal is sold alive. The statute applies to livestock.

MR. OLIVER M. JAMISON: That is the way the law reads. If he is a snake raiser, he can't do it, according to the Treasury Department. Poultry is definitely excluded. The thing would hinge, in litigation, on whether a snake is livestock. Or, assuming it isn't livestock, it could be brought within the broader purview of 117(j) nevertheless. There is a little bit on that in the case we handled on turkeys.

I think all we will have time for on mining is to give you some idea of what the incentive deductions are, what the tax breaks are for people engaged in the mining industry, and some of the main problems that you, as lawyers, should watch for in advising any individual investor in mining. I will have to hit the highlights here. If you want to ask questions afterwards, I will be glad to have you do it.

In the mining industry there have been certain benefits that make very attractive, particularly to the high bracket taxpayer, for investment purposes—oil and gas exploration or mining exploration and production. The first one is the benefits that grow out of the way that the Internal Revenue Code permits the calculation of your depletion allowance.

If you took a strict accounting concept, a mineral deposit is a depletable natural resource. You take so many units out, and they are irreplacable. It is plain accounting to say that if you take whatever it costs to buy that deposit or develop

that deposit, and you spread the cost over the number of units that are produced, and you deduct the proportionate part of the cost each year as those units are produced, that is cost depletion. And that is allowable in any event, and if it gives you the most favorable type of deduction for tax purposes, you have the unrestricted right to take cost depletion on any mineral deposit. But there are certain alternatives under the statute applying which make possible deductions for depletion that can exceed many times your investment in the acquisition of that mineral deposit.

With respect to solid minerals, there are two types. One is called discovery depletion, and the other is called percentage depletion. There are a list of minerals, which I won't go into in detail, in the Internal Revenue Code which are entitled to the benefits of percentage deductions. The rates range from 5 per cent up to 23 per cent on minerals, 27½ per cent on oil and gas. On uranium it is 15 per cent. A ruling was issued on that just the other day. Fifteen per cent of the gross income from mining operations may be deducted even though that exceeds your cost depletion allowance. And you can keep right on deducting it every year, even though you have your cost back many times. Gross income from mining is considered to be not only what you could sell the bare mineral for, but certain processing and transportation that is necessary to get it in shape for selling.

Then there is a discovery depletion which is applied to those minerals that don't qualify for percentage depletion. It provides that on the date you discover a new deposit, or within 30 days thereafter, the fair market value at that time becomes a substitute, you might say, for cost—if it is more than cost. To qualify for discovery depletion the deposit must not be a purchase of a proven tract. It must be a new discovery. The fair market value must be disproportionate to the actual cost, and the minerals in an existing deposit must not be just an uninterrupted extension of a deposit but must be something entirely new.

On discovery depletion, if any of you have a client involved in that type of mineral, the most important thing you can advise him to do is to get right in there and establish all the proof he needs on each one of these things. Many have run into trouble because they were unable to provide the proof. He must prove the date of discovery. He has to prove what the fair market value was then or within 30 days. And he has to prove the fair market value is disproportionate to the cost. He must prove all those things.

Both discovery depletion and percentage depletion have only one limitation in that the amount that you get from those sources cannot exceed 50 per cent of your net income from mining the property, in any particular year. It is quite possible that when you figure your net income, after all allowable deductions, that your depletion would wipe it out if it weren't for this limitation. It can't exceed 50 per cent of your net income from mining the property. Up to that point the sky is the limit.

Those are the basic incentives there—the opportunity to recover, out of discovery or percentage depletion, far more than your actual cost in income tax deductions.

There are two other things that have gone into the law in recent years. There is an opportunity on exploration expense. There are four years that you can deduct up to $75,000.00 a year currently out of the items that ordinarily would be capitalized as costs. It may be deducted, or it may be set up as a deferred item and written off ratably over the life of the deposit. The value of it is basically this: That would normally go into your cost depletion account, and you would have to figure out whether your percentage depletion would be better or, considering all these

costs, whether cost depletion would give you a larger deduction. With this exploration expense deduction, in your development stage, if you have high outside income, you can write it off for four years—no more than $75,000.00 per year, or you can defer it and write it off in later years. But you get that write-off in addition to the percentage depletion. It is an additional write-off. Of course, if cost depletion would still be more advantageous than percentage depletion, it won't make any difference.

In addition to that there is another deduction which doesn't have this four year limit or $75,000.00 limit on it which is for development expense. In the period after discovery, but before the mine becomes a producing, self-supporting, economic operation, it may be producing some ore as a natural consequence of developing the shaft and operations that are necessary to bring it to its full stage of development. These expenses, which normally would be again capitalized to your cost depletion account, may again be deducted currently as you go along, or you have an election as to the excess of those expenses over what ore is produced and sold. You may defer such excess just like the exploration expenses and take it as a write-off over the life of the unit in addition to your percentage depletion.

Those are definite tax incentives to give you a chance to get more than your money back and not pay taxes on it. Without going into all the ramifications of how those operate, that gives you the basic idea, and they should be looked into in determining for any client whether it is a good tax deal to help some prospector to get a mine started.

The third thing that can make it attractive tax-wise is the opportunity, notwithstanding having deducted a good part of the cost against other ordinary income or having maybe recovered more than your cost from percentage depletion, to sell out your interest and take a capital gain on it. Because you can have the interest treated as a capital asset or a 117(j) asset and sell it and take a long term capital gain, if you have the requisite holding period.

So those are all things that make what otherwise would be quite speculative opportunities attractive propositions tax-wise.

There is one thing you must watch in making a sale—in fact there are a number of things, but one thing in particular I want to tell you about. If you sell under circumstances where your payments depend on production in some way, you may not have made a sale. There is an awful lot of law on oil and gas cases and solid mineral cases more than I could go into in the time allowed to me. But be careful. If you want to make it a sale, make it as clean as you can. Don't make payments dependent on production if you can help it. Some cases like that have gotten by, but it is tricky business. It might even be a deed, but the reservations of certain interests that are dependent upon production of that mineral might result in it being construed as a lease, and whatever cash you get would be treated as ordinary income, subject to depletion allowance. It is treated as ordinary income instead of capital gain, and anything you get out of this reserved interest that puts you in that category would also be treated as ordinary income subject to depletion, because it is royalty income. There is a lot of law on that which time does not allow me to go into. But I warn you to watch that particular point.

I know there is no time left, but I want to mention one other thing.

PRESIDENT BROWN: May I ask a question? On the production payment theory, does it change the picture if you set a minimum payment to be made?

MR. OLIVER M. JAMISON: Not necessarily, no. Minimum payment in and

of itself won't. It's hard to give a simple answer, because there are so many factual variations that come into the way these mineral interests have been disposed of. It is hard for me to be specific. There are cases in which a very large minimum payment paid at the beginning has been one factor helping to convince the court it was a sale, and there have been cases where the minimum payment has not prevented it from being construed as a sublease because of retained rights in production. You might say that, in itself, a large initial payment can be a favorable circumstance that points towards a sale, but you can reserve enough otherwise so that it still won't be a sale.

One other thing I want to bring to your attention before we close that is important to you, as lawyers. That is when you have clients come in, and they have a mineral deposit, and they want to develop it, but one or two men can't do it by themselves, and they have associates. The question comes up as to whether or not it should be developed in corporate form. Bear in mind that if you have a corporation, the corporation pays tax on any income that comes into the corporation. It takes the depletion allowance on any depleted minerals. If it sells, the capital gain is that of the corporation. To get it to the individual, you must distribute it in dividends, ordinarily, or you have to sell your stock out.

Now, if it is distributed in dividends, there is no more depletion allowance on that. You pay the tax on the full amount. If the thing turns out to be a flop and you just lose your money, quit claim back the mineral lease or something like that, it doesn't prove out, you take a loss in the year in which you do that. The loss may antedate the actual quit claim, too. You have to watch that. You had better quit claim out just as soon as you know it is worthless. But if you have incorporated the thing, the loss you take is the corporation's loss and the corporation may never have made a nickel. If it has been incorporated for this purpose, the corporation can't use a loss. The stock becomes worthless, but a worthless security at the time it becomes worthless is not an ordinary loss. It is deductible as a short term capital loss, which is very limited. So in the usual case of an individual investor, it is very important that the attorney properly set up the structure of any group of investors that are going into an oil deal or a mineral deal. And it is very important to see that they don't get taxed as a corporation. It is only occasionally that it will pay a small group to be incorporated. Of course, there are things besides taxes you have to consider. But taxwise it usually pays to do something else.

I don't know what the local law of Idaho is on this, but most states that have any mining law at all have a provision on mining partnerships which, in essence, makes a mining partnership the equivalent of a corporation as far as taxes are concerned. The Internal Revenue Code makes an association which has the attributes of a corporation—centralized management, joint profit objective, continuance of the eistence of entity beyond death, there are others, but those are the key attributes—anything that has those characteristics is taxed as a corporation even if it isn't. In a mining partnership, the attributes, as I understand them, are that you have a mining partnership that lasts for the life of the deposit and will go on even though some of the partners die. There is transferability there of interests. There is continuity beyond death. There may also be centralized management. Now, in applying this law to oil and gas, the Treasury Department has ruled that certain types of joint operating agreements, notwithstanding some of these attributes, are not taxable as a corporation. That is in a joint operating agreement where all the rights are defined, but individuals retain the right to dispose of their share of production, and a bona fide commercial partnership not having mining partnership attributes is not taxed as a corporation. Now the thing that you have

to watch out for as lawyers is that people who get together in form of groups like this may find that without any papers at all they have a mining partnership, unless you keep them from having one. If you are called upon to set them up as a group of investors, and you decide to put them in a partnership form, be sure first, if you use limited partnership, that it does not have the attributes of a corporation which pushes it over the line. Be sure you are careful on that score. And be sure to put in your articles that this is a commercial partnership organized under the uniform partnership law, if that applies to the particular case, or under the uniform limited partnership act, if you have that and it is so worded that it doesn't automatically make you a corporation in your state. It does in some states. Be sure to put that in. Negative any inference that this has any of the attributes that would push you over the line into a corporate form, if you want to preserve for your investor the right to take his loss without being limited by this short term capital loss privilege, the right to take as an individual the income and the percentage depletion deduction, the right to take as an individual the exploration and development expenses and the right as an individual to sell out and take capital gain.

Well, I want to express to all of you, to Mr. Robertson and Mr. Brown, my great appreciation for your invitation to Sun Valley. It is a real experience, and I thank you all and appreciate it very much. (applause)

PRESIDENT BROWN: Thank you, Mr. Jamison. We appreciate the courtesy you have shown in coming all the way from California and giving us this very interesting and practical discussion. We have all benefited, I am sure.

This concludes the serious part of our program for today.

(Whereupon various announcements were made.)

Sun Valley, Idaho

Friday, July 10, 1953, 9:30 A.M.

PRESIDENT BROWN: Will the meeting please come to order? Good morning. I think the Smorgasbord proved to be a little heavy on the eating side for so many people who probably spent a restless night. I see some faces missing here this morning.

We are honored to have with us Mr. Raymond G. Stanbury from California. Mr. Stanbury, who has been so courteous in coming here to speak to us today, has a marvelous reputation for his ability to talk on the subject of Trial Practice, which is the subject of his talk to you this morning. He is a special lecturer at the University of Southern California Law School on the subject of Civil Trial Advocacy. He has something really interesting to tell us this morning, and I am very happy to present Mr. Raymond G. Stanbury. (applause)

MR. RAYMOND G. STANBURY: Mr. Chairman and members of the Idaho Bar, the early birds at least, and their friends: This is the second time that I have had the pleasure of speaking in Idaho. The other time was so many years ago that it preceded the discovery by the world, or even by Idaho, of Sun Valley. It was almost before I had learned to master the use of the razor. In 1926 I was in Boise on a debate for the University of California against the University of Idaho. I have identified myself to you now in that connection, and if there is anyone here who represented Idaho or had any connection with that debate, I do trust he will identify himself to me, because that was a very pleasant experience.

I have a client at home in a personal injury action whose case goes to trial

on the fourth of next month, and I was careful not to tell him where I was coming during this week's absence of which I informed him, because he is lying in the hospital in Long Beach permanently paralyzed from the neck down. He doesn't know it is permanent. And I never see him when he does not express the hope that it will only be next spring now or next summer before he will be back in Sun Valley. Because this is the place where, before his frightful injury, he used to come and ski as often as possible.

But now, the subject that is up for discussion. I am glad it is Trial Practice. I came up here thinking it was Trial Technique, and I was going to rewrite the title into Trial Practice, because a technician is a tactician, and a tactician is a skilled maneuverer, and when applied to the trial of law suits in which the layman's ideal, at least, is that the truth shall emerge triumphant, the idea of being a skillful maneuverer or even an able tactician has a sinister suggestion. I never like to discuss this subject without pausing, by way of introduction, to acknowledge the fact that I am aware of the moral implications of any discussion of how best to improve one's chances of winning a law suit. Because it would seem that in order to be justified in discussing that subject at all, we should add, "providing your client is right." Because otherwise it becomes a discussion of the art of winning an argument in the temple of justice whether you are right or wrong.

Less than two months ago I had some correspondence with a Texas doctor who had given a description in a personal injury action which I was defending. And this doctor, in his deposition, had appended to his answers, time after time, voluntary statements that his patient's alleged injuries were caused by the accident in question. The truth of the matter was that the man had had another accident of which the doctor had not been informed. The jury heard this man's case, and after hearing it brought in a verdict "We find for the plaintiff and assess his damages at no dollars." And then to make sure, they added in writing, "nothing." (laughter) This doctor's testimony was such an outstanding example of the abuse to which certain experts lend themselves that I, for the first and only time in my life, wrote such a letter. It was courteously worded, but I knew, of course, that it would offend him. And I received, very soon, a three-page dissertation upon the lack of ethics and morality of my profession and your profession. And he pointed out those things of which we are fully aware and to which I have already alluded by way of introduction. And he concluded with this statement: "Of course, as a trial lawyer, you are unable to understand what I have written. But if you could understand it, you would have only two choices. Either to stop trying law suits or to commit suicide." (laughter)

Now it is perfectly true that there are, in our branch of the profession, certain lawyers who should be curbed once and for all by the courts, because it is the judges, and the judges alone, who have the power to take away from piratical practitioners of law the fruits of their victories. As long as upper courts find misconduct but in their opinions state that it was not prejudicial we will continue to have certain lawyers trying lawsuits in that way. There is nothing you or I can do about it.

Some of the books on trial practice are written as if the subject were boxing and the art of hitting below the belt. This is a matter that has received comment quite recently by a legal philosopher who sits on the Second Circuit Court of Appeals and with whom you are familiar, Judge Jerome Frank.

This is not a documented talk and I am not going to cite any cases but this one. But the case of Skidmore versus Baltimore and Ohio Railroad, 167 Federal 2nd at page 54, is an interesting handbook on how not to violate the ethics of our

profession. I want to read just a brief statement from that opinion. In the course of this opinion, quoting another author with whom we are all familiar, Thayer, Judge Frank refers to a well-known book on trial practice. I am not going to name the author. As I read this I will call him 'Mr. G———,' which may suggest his identity to you. It is a matter of public record anyway. Judge Frank says: "Many books on trial tactics, written by experienced trial lawyers, which give advice as to how to arouse juries' emotions, make the point that a jury tries the lawyers rather than the case, and that the lawyers, in jury trials, must recognize themselves as actors or stage managers engaged in theatrical performances. In a series of pamphlets on trial practice, recently published under the auspices of the American Bar Association, one author writes that the advocate must always recognize that the jury is judging the lawyer as well as the witnesses, quick to take sides because of the protagonists rather than their opinion of the testimony'; another says that the jurors' reaction to trial counsel 'may be more important than the reaction to the client, for the client appears on the stand only during a relatively brief period, while the lawyer is before the jury all the time'; this same author gives detailed suggestions of means by which a lawyer may 'ingratiate himself' with the jury. Harris, in his well known book on advocacy, says, 'It may be that judgment is more easily deceived when the passions are aroused but if so, you (the lawyers) are not responsible. Human nature was, I presume, intended to be what it is, and when it gets into the jury box, it is the duty of the advocate to make the best use of it he fairly can in the interests of his client.' This is no laughing matter. For prejudice has been called the thirteenth juror, and it has been noted that 'Mr. Prejudice and Miss Sympathy are the names of witnesses whose testimony is never recorded, but must nevertheless be reckoned with in trials by jury.'

"Small wonder that Thayer commented that jury trials are 'a potent cause of demoralization to the Bar,' or that Morgan, well versed in trial tactics, in reviewing a book on jury trial techniques, recently wrote; 'If only some lawyer could rise up and honestly denounce Mr. G——— as a defamer of his profession. If only a reviewer could assert that this book is a guide not to the palaces of virture but to the red light districts of the law. But a decent respect for the truth compels the admission that Mr. G——— has told his story truly. He has told it calmly, without a pretense of shame and (God save us) without the slightest suspicion of its shamefulness. He has shown by his own unpreturbed frankness with what compliance the profession, which would smile the superior smile of derision at the suggestion of a trial by battle of bodies, accepts trial by battle of wits. In all innocence, he has produced a volume which is a devastating commentary upon an important aspect of our administration of justice.'"

Now, the truth, as I see it, is this (at least it is the method whereby I placate my own conscience in a branch of the profession in which I am constantly called upon to prevail for my client without being able to judiciously appraise the merits of his case): In the first place, a lawyer's conscience, the Canons of the American Bar Association, the Code of Idaho, the Code of California, tell all of us that we should not espouse worthless causes except in the defense of persons charged with crime, all of whom are entitled, guilty or not, to the utmost diligence and effort by their counsel. That eliminates, or should eliminate, cases that have no place in court at all.

As to the others, I am satisfied that in over 90% of them, the truth is not known. It takes a higher judgment than ours to know who is right. It isn't a question of black or white. And until the jury or the judge has spoken, the law being nothing more or less than an effort to do as well as we can in deciding disputes

without sending people out to take daggers and guns in the streets or fields, we have no right and no reason to condemn ourselves because we do our honest utmost to prevail on that side of the case which we happen to represent. I don't want to cause anyone anxicty or alarm. I didn't come here to talk on legal ethics. I do, however, as I said before, feel it necessary, before critical audiences pass upon me the same judgment which the Second Circuit Court passed upon Mr. G———'s book on trial advocacy, to tell you I am fully aware of the moral implications of this subject. And although I didn't come here to talk about ethics, and I am not going to do so, I do want to say this: It is basic to my own personal philosophy, and it is a deep seated conviction, that every trial lawyer can be just as formidable an advocate as any case requires, or any client has a right to expect, without ever transcending one single rule of decency, violating any of the canons applicable to any branch of the profession promulgated by the American Bar Association, and without giving any adversary any excuse for leaving court and saying he has been in any way taken unfair advantage of.

I know that some young lawyers sincerely think and say, and it has been written, that rules of ethics are devices of us older lawyers to keep them from getting any business. I think it is the other way around. As we get older, we become more mellow and more considerate of our fellow men. It is the young man, full of originality, who needs the code of ethics more than we do. I look back at some of the things I did, when I was a young man, and I am amazed at the temerity I had. I would have neither the disposition nor the nerve to do such things now.

I know a young lawyer who was trying a hopeless case, knew that it had to be settled, but couldn't settle it. The lawyer decided the only thing he could do was to frighten his opponent into a settlement, so at five dollars apiece he hired five nice looking acquaintances of his, mostly middle aged ladies, to come and sit in the court. When he moved to excuse the witnesses, they got up and marched out. At the close of the first day of trial it turned out precisely as planned and the young lawyer's adversary came to him and said, "This case ought to be settled; I see you have a lot of witnesses here." And the case was settled. (Laughter) An older lawyer wouldn't have the audacity to do that because his imagination would be too active with the thought of what would happen if the case weren't settled. The jury would have seen those people and none of them would have testified. But when one is young and energetic, he doesn't always think through to the end.

Now, I know that the man who tells a group of professional men how he would advise doing things is apt to sound pontifical. I want you to know I am giving one man's opinion. I have some eccentricities, and I imagine most of you have. I am bound to say some things to cause some of you to wonder how that fellow can entertain such views. But I am just telling you the things which work for me. A least I think they work for me.

Back home, less than two weeks ago, a lawyer and a man known well to Mr. Rosenthal and me, and whose stock and trade is pretending to be bucolic and who deliberately uses bad English all the time before a jury, although he is a well educated man and doesn't do so in personal life—and I don't understand his idiosyncrasy—said, "I was talking at such and such a Bar Association the other day, and one of the members said Stanbury was out here a couple of years ago, and he said we ought to have fat jurors when we represent the plaintiff and thin ones when we represent the defendant." I don't remember having said that. Maybe I did. Maybe at that time that is what I thought. My friend said, "I never got so

good myself that I can pick them on a tonnage basis yet." (laughter)

So in telling you those things which I find, or I think, are effective for myself in improving my clients' opportunity to win a lawsuit, I know that I am talking about controversial things, and somebody is going to disagree with me. I hope there are some who agree. In any event it is one man's point of view, and at least I am not going to talk about those more controversial but powerful factors that influence a lawsuit such as black cats and ladders, which have a considerable effect in my judgment.

Less than thirty days ago my wife and I were driving along one evening when I was trying a case which had me worried, and a cat I would swear was black ran across the street, and I jammed on my brakes, but I couldn't stop in time. My wife tried to console me. She said, "It was a gray cat."

I said, "It looked black to me." But when we won the case, I knew that it was a gray cat. (laughter) I hadn't been able to see in the semi-darkness. That is enough nonsense. I want to get down to business here.

My advice to every young lawyer who contemplates taking up the trial branch of the profession would be that he will greatly help himself in the first place by selecting causes that are worth prosecution. And I would advise every young lawyer to adopt a skeptical attitude. Personally I don't believe anything that anybody in a lawsuit tells me, whether he is my own client or not, unless I have checked on it. I have found that for some strange reason the mere fact that a man wants to retain my services, which endears him to me, often is not a valid basis of elevating his moral standards above that of the next fellow's client. (laughter) I learned that early in my career.

The first plaintiff I ever represented gave me two lessons. He told me he was earning a certain income, and I politely said that it seemed awfully high for his work. He insisted that it was so. I said, "well, they will subpoenea your employer's records." He worked for the Santa Fe Railroad.

"Well, that is my income," I couldn't budge him. We tried the case. I hadn't learned then to check myself with the employer. They brought in the records, and he was lying about his income. He nevertheless won the lawsuit, and I well remember, when I handed him the check for his share of the proceeds, that he grabbed it out of my hand and stood up and said, "Mr. Stanbury, there is not a darned thing wrong with my arm. If they had been watching me while I was on my farm, I was carrying buckets of swill for my hogs. There is nothing wrong with my arm." The result is that I now check everything everyone tells me, and such an attitude keeps a lawyer out of a lot of trouble.

Within the last two or three years a doctor came up to me in a Los Angeles Court. He said, "I have been sitting back there. I came up to see how you handled a case. I would like you to handle my case. I have a tremendous lawsuit.". I listened to his story, and I thought that his was not a genuine case. I didn't want it. This man came back to the office a couple of times, and he finally offered me a fee instead of a contingent contract, and I wouldn't take it simply because I was skeptical by nature, and I have plenty of reasons to be glad I didn't, because the lawyer who was naive and simple and uninquiring enough to have taken the case was so embarrassed during the trial that he went to the judge in the chambers and said, "please don't make me argue this case to the jury. Let me out of it. Of course the judge declined at such a late hour, and this attorney had to go out and make an unsuccessful argument to the jury on behalf of a man who was shown,

by motion pictures, to be strolling uninjured through the West Lake Park until he saw the camera and ducked into some bushes. The photographer pretended to be taking scenic views of the park. The man then came out limping and using his cane instead of carrying it on his arm.

My advice to young lawyers is to be careful of cases they select, and that is half the battle. I don't mean a man shouldn't take a so-called long shot case. There is a difference between a worthless case that looks as if you can't believe the people you represent and the case one would call a long shot case. There was a case going around Los Angeles for at least a year. The statute nearly ran. It was turned down by four firms, firms competent in the negligence field. Another firm took it. There was no clear road to success, nothing but a faint trail disappearing and lost in the legal thickets. Such a cause had never been maintained before. They won it and got a big judgment. The District Court of Appeals reversed it but the Supreme Court of California affirmed it, and the lawyers and their clients collected $204,000.00.

So I am not advocating trying only sure things. I am advising the young lawyer to be careful in the selection of cases, and also pointing out the fact that there is a difference between a worthless case and a case involving honest people whom you believe should be entitled to a judgment, although their case is without precedent in the books.

Now I come to the main thesis towards which all the rest of my remarks will be directed. It is this: That I believe that the big thing in the armory of any trial lawyer is his ability to create around his case a favorable atmosphere. It has been said by an English judge that every judge is one-third juror, and by an American judge that the other two-thirds aren't much different if you get underneath the ermine.

We know that people are more influenced by what they feel than by cold logic. In fact it is a painful process for some people to think, and they jump readily at conclusions. And I think it is elementary that the reason good cases are lost and bad cases are won, with regretable frequency, is because something may go wrong with the atmosphere surrounding a good case.

I look back at the last four cases that I have lost, and this is a remarkable thing but it is true. In three of them the cases were so worthless that the trial judges granted new trials for insufficiency of the evidence to support the verdicts, and in the fourth one, where a motion has not been heard, I am confident the same ruling will be made. That means the last four cases my clients have lost should not have been lost at all. It means that something went wrong with the atmosphere of the case, and that I didn't see it in time to effect settlements, and that is what we have to guard against. The best way to win a lawsuit of couse is to get one with a built in atmosphere, such as a client with a leg off with a case against a railroad company. We can't always do that. And now I am getting to the main line of my remarks—but we are obligated, as long as we call ourselves trial lawyers, to see what we can do to improve the atmosphere surounding a case, and therefore to improve our chances to win it.

And the first sub-section of the subject that I would like to talk about is us lawyers ourselves. What can we, as trial lawyers do? And I have some odd ideas on that. I see Mr. Rosenthal has just come in. Mr. Rosenthal and I have been trying cases against each other for twenty years. He has cross examined many of my clients, and many of my witnesses, and I always sit with a silent prayer on my lips to shore up that witness or that client, because he knows how to cross-examine.

Once one client retained both of us to defend a case, but the doubled up effort was too much. It cost the client $110,000.00. (laughter)

Now what can I do as a trial lawyer myself, within my own personality, to improve my clients' chances to win a lawsuit? There isn't any magic formula. Down home, we had for a long time, a lawyer none of us were able to understand. Never, up to the time he died of old age, were we ever sure whether he was unbelievably stupid or whether he merely acted like it. But he would go into court and behave like a green boy from some second class law school, knowing no rules of evidence, asking the most preposterous questions, getting himself rebuked on by the judges, driving his adversary to exasperation because of the necessity of constant objections to his improper questions, but winning lawsuits all the time. (laughter) If a real or similated idiot can win lawsuits and on the other end of the scale a brilliant lawyer can win lawsuits, it is obvious there is no formula of success so far as personality of the advocate is concerned.

Many believe that every trial advocate should try, by his manner and even by his clothing, to suit his client, but in reverse. By that I mean that in representing the underdog, who ordinarily, in a personal injury action, is the plaintiff—not always but ordinarily—some think that the lawyer representing such a client can afford to wear his best clothes and be as brilliant as his capabilities permit. He need not attempt to modify any ability he has unless he is so exceptional that he comes within a category I am going to discuss separately. But if he is representing a powerful concern, a railroad company or anyone else that may be said to have the upper hand in the case, some believe that the lawyer should play down his personality and that he should dress very simply.

But I believe that every lawyer, however he dresses and however he displays his personality, should at all times be alert, earnest, interested and never nonchalant. I once defended a worthless case, and I asked my adversary, who was an able man, what he was doing in trying a case like that. "Well," he said, "I thought they might send it over to so and so to defend, and I could see him leaning back in his chair, with his legs crossed, half asleep, and I thought I might surprise him." I believe that the trial lawyer should be interested even when the trial judge is reading, for the fifteen hundredth time, the ordinary stock instructions to the jury. I think it is very important.

We are talking about atmosphere. A nonchalant, sleepy looking lawyer, who doesn't appear to care how his case comes out, makes a very different appearance and impression upon the jury than an alert, earnest one who acts interested in everything that goes on and acts as though he will be personally wounded if his client doesn't win the lawsuit.

Next on the subject of how should a lawyer behave in order to improve the atmosphere around his client's case, I want to comment upon the exceptionally brilliant lawyer. I have in mind a lawyer who is so brilliant that he is almost beyond belief. This man has polished every facet of his personality until he shines with a dazzling brilliance. He seems never to return from a cross examination without heavy scoring. When he argues a case, it is with apparently a knowing, overpowering, hypnotic persuasiveness, and he is in every way a brilliant man. When he cross-examines a doctor, although improperly, he refers to the latest findings of the profession and asks if the doctor doesn't agree with them. He has glib use of polysyllabic names of the nerves and the complete nomenclature of anatomy, and when he is disporting himself on the popular side of a case, he is effective in everything. If a case has a built-in atmosphere, the lawyer needn't

worry. He is contending for the underdog. But in many cases one doesn't have the popular side. When one does that on the side that does not have that advantage, the jurors may sit with their mouths open. They may comment favorably upon the lawyer's brilliance, but very frequently it is like the well-known story of the English law Sargeant who was a brilliant lawyer, but a jury said of him one day, summarizing the whole psychology of the matter, that he was the most wonderful lawyer that they had heard, but that it was too bad that he was always on the wrong side of the case. (laughter)

Now, if a man is appearing in a case that requires special preparation, such as one involving the explosion of a boiler or anything of that kind, I believe he helps his case by showing that he has done intensive and able preparation for that case. But when we come to medical knowledge in general, legal knowledge in general, in the case of a lawyer who displays too much brilliance and behaves as if he were strutting on a stage as a leading man or matinee idol, I am convinced that the jury's psychology, the dominant one, is sympathy for the less able lawyer on the other side. So the lawyer might be better off not to appear to have such exceptional medical or legal knowledge. If the doctor on the stand appears to be dishonest it would be well to put one question that lets him know that the examiner knows something about the subject, and then perhaps it is more effective not to display the exceptional medical knowledge that the other lawyer displays.

After the lawyer to whom I refer completed a masterful cross-examination of a doctor recently, the lawyer on the other side, who had called the doctor, asked three questions: "Doctor, how long have you been practicing?" And the answer was 26 years. "Do you know any more medicine now than when you came in here?" And there was a chuckle from the jurors. "No," he said, "but I have had quite a review." The last question: "Have you heard anything here which has caused you to change the opinion you expressed in the first place? He said, "No." I think you will agree that the laurels in that particular episode of the trial went against the very able counsel.

Next I believe that the lawyer, to increase his client's chances of having a favorable and successful atmosphere around the case must always behave as if he expected to win. A Los Angeles judge told me, within the last thirty days, about a young lawyer trying a Federal Employer's Liability Act case for a certain railroad. And if you have had any experience with them, you know they are the most hopeless cases there are. The atmosphere is bad. The law is definitely against the defendant. And if ever a lawyer has a right to say that a defense is useless, it is a man defending that type of case. The judge made this point: He said, "So and so was in my chambers, and he said to me, 'you know it is no use trying any of these lawsuits. It is just a matter of how much'." The Judge said, "How can he ever win with that atmosphere?" It is like the old story of the young relief pitcher in the bull pen. They called him to pitch while he was eating a sandwich and he put his sandwich down and asked who was coming up. They told him Ruth, Gehrig, and Musial. "Well," said the young pitcher, "Don't nobody touch my sandwich, I'll be right back." (laughter)

If the lawyer does not expect to win, he does not infect the jury with the idea that he should win.

There are several other suggestions on the same phase of the subject. The old lawyer against a young lawyer is one. That is an unfavorable situation.

W. I. Gilbert, one of the best known and beloved lawyers we have had at home for a long time (he is dead now) once said, in a talk of this nature, "Heaven

save me from the young eager lawyer with a one-third interest in someone's fractured pelvis." I still think of myself as a boy, but I look in the mirror and I know the jury doesn't think that, and when I go in against a young lawyer, the amount of misconduct that young fellow can commit without my opening my mouth is remarkable. Because I have enough sense not to make it appear that I am taking advantage of him. And the worst thing that can happen, as far as I am concerned, is to have the Judge rebuke the young man, because sympathy for him will do a lot for his client. That is a sad commentary. But it is the way it is. Very often another lawyer will bring me a case to try, and he wants to sit right at the counsel table with me. I always tell him that if he wants to be in court, sit behind the rail and don't come in while we are picking a jury, because they will point him out to the jurors, and I don't want two lawyers against one—unless it is the other way around. If there are more on the other side, the better. They get in each other's way and create a bad atmosphere, and they create sympathy for the man sitting there alone.

The next thing I advise the lawyer is to keep out of trouble with the judge, wherever it is possible to do so. A lot of lawyers have a combative spirit. I want to remind you that ninety-nine out of every one hundred jurors think the judge is right. He is impartial. He is in a high office. And a lawyer who fights with the judge unnecessarily is making a mistake. I have learned that. There are exceptions, of course. There was a judge down home who died of apoplexy after he had lost the election and tried to practice in the same place in which he used to abuse the lawyers. He used nearly to have apoplexy on the bench where he treated me so terribly. I even went into chambers and asked him to disqualify himself. I didn't enjoy his treatment, but after I did that, he was worse. It became so that once when I was trying a case before him, he told me to stop asking a certain question. I shook my fist at him and told him I intended to ask it until he made a proper ruling. And he became, as usual, as red as a tomato, and I am sure Mr. Rosenthal knows who I am talking about. More than once I have shaken my fist at him and said, "I demand that you again instruct this jury that the controversy between you and me has nothing to do with the merits of this case." But this is an exception. I mention it only because a lawyer should not sit down under real abuse that the jury can see and appreciate. Twice in that man's court the foreman—and the remarkable thing is that I have never seen it happen in twenty-five years anywhere but in two cases in his court—the foremen stood up to make little statements indicating how right they thought my clients were. So there are exceptions.

But when a judge rules against a lawyer on an important point, my advice to him is not to take a bulldozer and try to force his way through, but to go around to the back door and try again. There may have been something in the way the problem came up that the judge didn't quite see. Retire. Come back again from another angle. If you get the same ruling, ask to be heard on the matter.

There was quite a vogue, for a time, of lawyers learning jurors' names and standing up without any notes and questioning them on voir dire examination by name. It never fails to impress the jury. But I think it is recognized as a device, as a trick, as an exhibition of the lawyer's own personal excellence, and that it may react the other way. Mr. Rosenthal may or may not agree with me. I never heard him do it. I did it for a while, and I had the worst results I ever had during that period. I can't say that is why, but I certainly discarded it on the idea that it wasn't helping me. Now, though I learn each juror's name, I will not disclose that I know his name. I go to the table and even look at the papers I have, although I know their names very well. That is just a little example. If you want to hit them hard, hit them easy. Don't overdo it. Play it down.

I believe nervousness inflicts young lawyers. I had it to the point of nausea for ten years. When it is gone, one might simulate it a little. (laughter) I remember taking the oath of admission in the United States Supreme Court with about twenty other lawyers, and all I had to do was hold up my hand, and I looked at these nine men of whom I had heard so much, and my hand shook so much that I took the oath with my fist closed. The next day I stood up before that same court to argue my case. You would think my knees would give away. Instead of that, such a completely unnatural calm developed, such an utter poise came over me, that after I delivered one sentence I thought perhaps I had better hesitate a little or somehow or other simulate a little awe or they would think I was precocious. Such strange things are nerves.

We have, in our office, a young lawyer some of you may know. He is a University of Idaho man. Sam Dunford is doing very well. Sam was arguing his first jury case, and he was so nervous that he was fiddling around in his trouser pocket with his keys, and he had his lighter in there, and he accidentally lit the lighter. (laughter) "Ouch" he said, right in the middle of his argument. That is an outstanding example of nervousness. But I say it is better to be nervous, or to appear to be nervous, than nonchalant, but I don't mean the nervousness that comes from the lack of preparation. That is the best road to insomnia. If a lawyer is prepared, a little stage fright helps. It keeps him on edge and is certainly better than being nonchalant.

I don't think that a trial lawyer ought to be preoccupied with what the old timers called, "making a record." I don't know how it is here in Idaho. Down in California, fewer and fewer errors are reversible, and a lawyer who is making objections just to have points in the appellate court is losing his case in the trial court.

And I would advise every aspiring young trial lawyer to start keeping a black book of important authorities bearing on rules of evidence. You have time to look up substantive points, but there are certain stock-in-trade points that every trial lawyer must know right now. For example, how far can an opposing expert go? Down in California it is the law, and I assume it is the same in Idaho, that an expert cannot testify that any alleged cause espoused by one side or the other did cause the result for which damages are sought. He can only say that it could have done so. Well, there is a tremendous difference between throwing the weight of an expert to the jury with a statement that that is what did it, or that is what didn't do it, and letting that evidence in there with a statement that it could or could not have. You must know the rule right then and there. There is no time to look it up. When may you insist upon seeing a witnesse's memorandum against you? Can you anticipate the cross examination of your own witness, which you can in California? The California Court says that you don't have to set and wait for the assault of a known coming examination. You can let your witness make his explanations first. There are many such illustrations, so my advice to the young lawyer is to observe and have in a book, for instant use, the authorities on those matters which frequently arise in the trial of cases.

(Whereupon a five-minute recess was taken)

MR. STANBURY: Ladies and gentlemen: I shouldn't leave the subject of the lawyer's part without digressing and making this observation. My advice to every young lawyer is never to consider any case important enough to him to run the risk of getting himself into personal trouble. In one of the first cases I ever tried, in a ringy shack over in Inglewood a horrible looking but important witness said that he could do my client a lot of good if we paid him $150.00.

I got out of the place and formulated a rule right then that became a rule of thumb that never, under any circumstances whatsoever, even if I were hungry, is any case going to be worth enough to me to cause me to do something that might get me in trouble or make me restless so that I will wake up in the middle of the night and think of it.

In the last case I tried, (it was finished Tuesday) I was defending a railroad. It was a case of colossal magnitude, a federal employee case. The plaintiff, the worker, had lost both his legs, one three inches below the hip and the other eight inches below the hip. It was a horrible case. The other lawyer had written me a letter saying that he must insist upon going to trial on time for this and that reason. I wrote back and said "likewise we must insist on an immediate transfer for trial, and I ask you to meet me in the presiding judge's court the day before the trial to see if we can't get an immediate transfer. I am going to Idaho and it gives me only seven days to try the case." We got underway on time, both of us anxious to finish. At five o'clock in the afternoon of the third day the phone rang. A woman's voice said, "Hello, Mr. Stanbury, I am on that all-woman jury."

"Who is this?"

"Mrs. so and so," she said.

"Well, Mrs. so and so, I can't talk to you. I am very sorry. Please hang up." Which she did.

The question was whether it should be reported to the trial judge? If it was, there would no doubt be a mistrial and a painful delay. We wouldn't finish on time. I would have to interrupt the trial to come up here. I couldn't stop in San Francisco on the way home. It threatened a great inconvenience and annoyance. I could not come up here with a free mind. Well, the rule of thumb answers the question. Of course it must be reported. One might know even if he had no sense of ethics about it, for a realistic attitude will tell you that you don't want to be in the hands of a woman like that. So one week ago this morning I was in chambers telling the court about it. To my great surprise, no mistrial was declared. I said, "With all respect to you sir, I am not contemptuous in any way, but when you ask me to tell you which juror it was, I have resolved that I would rather go to jail for contempt than give you that woman's name." As it developed the other lawyer waived the juror's misconduct and we went ahead and finished the trial on time.

It is nice to have a rule of thumb that tells you what to do without argument. You are not going to get into trouble.

I want to rush along. We have a lot of material to cover, and I am going to cut short my observations of the selection of juries. I have commented on the part the lawyer's own attitude and conduct plays in creating the atmosphere that influences the way the jury will feel. I think that so far everything I have said this morning has been with reference to jury trials. Judge trials are different, although it pays to bear in mind that a Judge is a human and will himself be influenced more by one presentation than by another.

Just remember that I can take this glass, and I can hold it up and call it half full, if I want to, or I can also call it half empty. And if I call it half full, it suggests plenty. If I call it half empty, it suggests lack. Well, a law suit is the same way. It is the very same thing. I can certainly magnify upon this matter. It would be a subject of another talk altogether. The very same evidence can be viewed so as to damage your client or to help him, depending upon the way it is handled. The same thing will affect the judge as well as a jury.

In picking your jury, the common evil and the common senseless proceeding is for the lawyer to ask such questions as, "Do you know any reason why you can't be a fair juror in this case." You seldom get anything but a negative answer. But when you pick that jury, there is an opportunity for the lawyer to start his case off in high gear without arguing it, without doing anything irregular at all. I will give you a hypothetical case. It was a hard case for a plaintiff to win.

A plaintiff was trying to pass a man on a curving road. He couldn't get by. He finally got a chance, but the defendant sped up. A car was coming from the other direction. The plaintiff honked his horn twice for him to get over. There was room to get over. The defendant didn't get over, and the plaintiff had a head-on collision on the wrong side of the road with another car. How do you start creating atmosphere for your client? Do you ask the jurors if they have any prejudice because your client is on the wrong side of the road? They have. Are there any reasons why you have any prejudice in this case? Both these questions are worthless. Consider this approach: "You drive a car, do you, Mr. Jones? Do you resent anybody passing you?" Of course Jones says that he does not. "Do you speed up when someone tries to pass you, Mr. Jones?" "Would you refuse to pull over or do you refuse to pull over if a man is passing you and gets in trouble?" You can see for yourselves, without any further elaboration, that that kind of examination gets the case started off properly from the outset, and if you do get somebody who by chance gives you an adverse answer, he is talking on the main line of the case, and he is giving you some information that you can use. Whereas to merely ask for his own judgment as to whether or not he might be prejudiced, is next door to a worthless question.

Assume that the jury is picked, and we are in the actual trial of a case. A general principle which I would advance for the young lawyer is to go hunting with a rifle instead of with a shotgun. A case has to have cohesion. In a bad defendant's case, you can do what they call Indian fighting. Any time you see a head, fire, and generally tear down the case. But the plaintiff shouldn't be doing that.

I was getting on a bus at U.C.L.A. one day and heard two students in front of me talking. One of them summed it up. He said, "You know, hang it all, if you have ten points and they can't answer nine of them and you have one bad one, that is the one they jump all over, and your nine points are no good." That is the attitude I take in trying a lawsuit. I try to be in a shell all the time. I try not to have one single point that I don't need to have that they can come in and blast, because I know that is what is done on the defense. They find the weak point, and that is where they pour everything through like the Germans coming through at Sedan, and when they finish destroying the weak point they may have discredited the case. They may then have obscured the good points.

For example, if a defendant has knocked your client down in a crossover by not having stopped, or he has not stopped at a boulevard stop, why on earth, if the facts don't show that he was speeding, should one muddy up the water by claiming that the defendant was speeding and then give the other attorney a rich field day showing that is not true. He stopped in eighteen feet. How could he be speeding? If they are wrong about that, they may be wrong about everything. I believe a case should not only be given cohesion, but the lawyer should have a theory and know where he is going.

In making an opening statement, I believe one should make a concise, pointed statement, something like this. "Ladies and gentlemen, we expect to show in this case that the accident happened upon a winding, narrow road. The defendant

was driving very slowly. My client was anxious to pass, but every time he had come to a place where the road was straight enough to let him pass, the defendant speeded up. Finally he came to a place where there was a straight way of half a mile, he honked his horn, pulled over to pass, and the defendant speeded up. A car came around the curve in front of my client. My client honked his horn again, and the defendant refused to pull over, although the shoulder was eight feet wide. And we believe the evidence will show the collision which occurred between my client and this oncoming car, although on my client's wrong side of the road, was proximately caused by the defendant's refusal to permit himself to be passed in a lawful manner." In other words, I believe that a lawyer should get his case down to as narrow a spearhead as possible and stay on it. And if he can't prove that the defendant was drunk, having only had a couple of beers, and if he can see that he can't put over the liquor element, why ever try the case? Why make a bad point for the other side to have a field day rebutting?

I also believe that in planning his case, and this is one man's opinion, understand, as I have said all along, I believe in soft-pedaling the good, the very good points. I will give you an illustration.

In a case in which the plaintiff had a case of liability as a matter of law, if he was telling the truth, based upon a federal defect in a ladder on a box car. There was absolute liability if the defect was there, if he did in fact try to use the ladder. Well, the man had been convicted of four felonies. He had been convicted of outo theft twice, forgery and burglary. In trying that case, I never mentioned it on voir dire. I never mentioned it in my opening statement. I never mentioned it during the trial of the plaintiff's case. I never mentioned it during the defense until the very end. I then called him as an adverse witness under our Section 2055 of the Code of Civil Procedure, and then proceeded very quietly, without any excitement whatsoever, to drop these high-powered shells upon the plaintiff. It was done so quietly that the jurors almost had to cuff their ears to hear it.

"Mr. so and so, were you not, on August 1, 1923, in the City of Carson City, Nevada, convicted of a felony, namely the crime of forgery?"

"Yes, sir."

"Did you serve time for that?"

"Yes."

"Where?"

"Nevada State Penitentiary."

"Were you not, on August 8, 1926, in Modesto, California, convicted of the crime of burglary?" And so on down the line. Well, the man lost his lawsuit.

The American people are peculiar. They often believe in supporting the underdog and the worst rascal, when caught, may have a tremendous tide of public opinion in his favor. I don't say it is universal, but there is frequently sympathy for the poor wretch who is cornered, and a man obviously making a big thing of those convictions might help the jury to get used to them by the time it came to present the evidence, and it wouldn't have the fresh impact it would have if saved until the end. And one might actually have some jurors thinking that this fellow had been trying to go straight and was being abused.

I tried a case in which a man received a little tap on the head, a case of absolute liability, and he developed a slow hemorrhage and was in the hospital

for a brain operation five days later. Honest medical testimony would show that it was an old condition coming on for weeks, not days. The first time I tried that case I showed that this man was a drunken, gutter derelict. He had been picked up unconscious time after time. So I thought I was showing that this man lead such a tempestuous life that heaven only could know what bump on the head caused his trouble. And I showed it all, and my client was found liable for $5,000.00. I talked to the jurors afterward. They said that I had just scandalized the man, that I didn't show that he had any other bump on the head within three weeks of this occurrence. That the facts I showed had nothing to do with the case. The judge granted a new trial on the grounds that the evidence would not support the verdict. That is one of the four cases I talked about. My adversary wasn't there when the jury came in. That is another bit of advice I might give to young lawyers. stay with your jury. My adversary wasn't there when they returned their verdict. He didn't hear the jurors tell me that. I resolved that I would not try that case that way the next time. I would try it as a straight medical matter. My adversary came in for the second trial, however, thinking I was going to do the same thing again. He brought all the old evidence out. The atmosphere was altogether different with him bringing it out and the defendant received the verdict.

If you have a drunk man on the other side, my advice is not to become excited and over-emphatic in your opening statement. My advice is to soft-pedal it. Hold it back. It is a bonus point. Make your opening statement, "We intend to show this man was negligent. He was cutting in and out, driving fast." Then, at the very end, if the other fellow hasn't been smart enough to anticipate it himself, bring it in as a bonus point. It will certainly put over the case if, on top of everything else, the man was intoxicated.

It is often possible to find something in the worst evidence about your client to advance in his favor. In a very recent case, in which I represented the plaintiff, there were two witnesses I hoped would be in China by the time of trial. But their testimony could be looked upon in two different ways. It wasn't hopeless. My client's little two-and-one-half-year-old girl had run up to the back of a truck and grabbed hold of the bumper when the driver started back. I would rather have the presumption of due care than that evidence. The witnesses were there. They were subpoenaed by the other side. What were we going to do? If you see a piece of glass in a jeweler's window, you will assume it is a diamond. If you see a witness put on by a given side, you assume, unless it is clearly the other way, that that witness is favoring the side that calls him. So in a case in which one may view testimony in two different ways, it can be a glass half full, as well as a glass half empty. It is helpful to have it appear, as well as you can, that testimony is helpful to you. So we decided to call these witnesses ourselves, and we did so with good success, because the District Court of Appeals just last week affirmed an award which ties the award in amount as the largest given for the death of a child in California.

I believe that in presenting his case, the lawyer should consider the order of proof carefully. If you have a case weak on injury and strong on liability, common sense would say to start with liability. If it is weak on liability, strong on damages, common sense would indicate you would start with the medical evidence. Start with your injury evidence. The sympathy of your jury is then with your client already when the other evidence comes in, and the opposite might be true otherwise.

You have other little incidental problems like this: Your client and a witness of yours that you need do not agree on something. There is a contradiction. Who are you going to let do the contradicting? Are you going to put your client on

and let him be contradicted, or will you put your witness on and let your client contradict him? It seems to me the atmosphere is greatly improved if you let your client do the contradicting. He is the principal actor in the drama. He is then apparently not caught in some lie but is so truthful that he is telling the truth despite the evidence given before. You may ask, "You were present when so and so testified?" He will say yes. And understand that some judges might sustain an objection to that, but I can't stop here and indulge in legal niceties as to whether questions are objectionable or not in every instance. "How did you see it? Is that the way you saw it?"

Your client says, "No sir, I didn't see it that way. The defendant wasn't coming fifty miles an hour the way I saw it. He was coming fifteen miles an hour, and I thought he was going to stop for me."

Now the use of chambers in presenting the case in chief is highly to be recommended to the young advocate. There are certain matters that ought to be tried in chambers first. For example, you are defending a man who was drunk, and you are stipulating liability. In California, when that happens, the plaintiff cannot show that there was intoxication. That, of course, is very important to the jury, but if you don't do anything about it, the first thing you know the other lawyer is making his opening statement and saying that he intends to show that your client was drunk. That is very prejudicial. A lawyer should go into chambers and submit this to the judge and say, "Your Honor, I am sure you are familiar with this decision in which the Supreme Court of Idaho has held that under these circumstances this evidence cannot be introduced, and if it is introduced here, I am going to move for a mistrial." Then you head it off.

I am thinking of a case in which my client had been convicted of manslaughter from the very accident being tried. You can show a felony conviction, but here is a paradox. He was an honest man when he had the accident, but after he was convicted of a felony, he became a possible liar. And you can show it in civil litigation about the same accident. It is a paradox. I went into chambers and said, "Judge, I want to call your attention to the fact that we have an odd situation here, and I maintain they can't show my man is guilty of a felony." I said "I am just raising this at this time because I am asking counsel not to go into that until your Honor has had a chance to rule on its admissibility." The ruling was reserved. We went out and tried the case, and my adversary called my client under 2055, the statute permitting one to cross examine the opposing party before he is called against him, and brought out my client's full testimony, but not anything about the felony. We then went in chambers. I said, "I have another point now. This statute states that a witness called against one may be shown to have been convicted of a felony. I have not called my client, nor do I intend to call him. He has been called by counsel." And we had such a unique question, that my adversary was afraid to go into it at all, afraid it was prejudicial error, and we went through the lawsuit without the evidence. Where would I have been if I had not gone into chambers?

Now, there are some eastern cases that say that if a lawyer makes a motion before the jury to take the jury out to see the premises, that is prejudicial error. It is remarkable. We have no case like it in California. Maybe your client has made repairs in the premises, and his opponent, of course, is not allowed to show it. A motion to view the premises ought to be blocked in chambers, in my judgment.

On the other hand, there are times when the jury ought to hear the other man object. For instance, in California, you may maintain steps for twenty years,

and only one man ever falls. You could prove that 150,000 people used them. One person fell. In California you can show, if you are plaintiff, that one man fell, but the defendant cannot show 150,000 did not fall. That is a very strange rule of law. Jurors always want to know what the history of that step is. If you don't let them know, they are apt to think there is a reason for suppressing it. A smart plaintiff's lawyer would go into the chambers and use the same method I just suggested. Otherwise I think it is perfectly ethical and proper for the defendant's lawyer to say, "How many years have they been there? Has anyone ever fallen before that you know of?" And then let the objection be made. And odly enough, it isn't made nine out of ten times. Adversaries are often not aware of the rule.

I also believe in the use of chambers to protect the other man. There are some situations in which the defendant may show that the plaintiff has some source of income dependent upon his being incapacitated. And that situation, in a case where he may or may not have been laid up as a result of his injury and where his motive for staying away from work or going to the doctor was that income, can be exposed by showing that the man's income was dependent upon his being hurt. I can recall one case of a man going to the doctor one hundred six times for a minor injury. I don't believe a defense lawyer should try to show the private source of income without a preview in chambers. And I do believe that the proper presentation of the case would not be to run the risk of a mistrial or to do something that would lose the judge's confidence in you. It is very important, in my judgment, to have the respect of the trial judges before whom you appear frequently by letting them know that you do not commit misconduct and do not make useless objections, that if you are making an objection, you believe in it.

My advice to the young man is to try to block prejudicial evidence which shouldn't be received, by prehearing in chambers. And you should treat with equal fairness counsel on the other side, when you are offering evidence which, wrongfully received, would be prejudicial.

I am talking now about direct presentation of the case in chief. My advice to a young lawyer is to ask no questions that are suggested by a client. There must be some exceptions. In twenty five years I can't think of more than two occasions when I didn't get into trouble asking some question suggested by my client. There is some evil influence in it. One seems to get in trouble every time. And I would never ask a witness I put on the stand one question unless I had asked it beforehand. I don't need to say to a young lawyer, interview your own witnesses. Dean Sheldon Elliott, now at New York University but up to last year dean of the University of Southern California Law School, once told me a good joke about his ethics class. He said, "I put the question, "should a lawyer interview his witness before putting him on the stand?" You know that in a legal ethics class the students are very ethical. Far over half the class said "no, you should not." (laughter) I wouldn't ask a witness anything that I didn't ask him before. I would rather take him off the stand, if I forgot to ask the question prior to that time, and put him back on.

I was defending a man who ran over Ward Bond, the movie actor, and he was injured. If any of you saw him limping on the screen for five years and playing special roles in that class, I can tell you that my client did that. (laughter) My client was not a good witness and when he was on the stand, with full knowledge of what I was doing, I asked him a question I had not asked him beforehand. I violated my own precept. But this question was so simple I thought I could make

one exception. All I asked was what model of car he was driving. He looked uncertain. I said, "A coupe or sedan or 2-door?"

He said, "A sedan - - no, a coupe."

Well, some jurors, after giving Ward Bond a $50,000.00 verdict, commented upon the fact that if this defendant didn't know what kind of a car he was driving, how could they believe the distances and other estimates given by him.

What is a lawyer going to do when one of his witnesses, right in front of his eyes, is shown to be an absolute liar. I can tell you what I have done. When prohibition went out, I defended a doctor, and seven witnesses said he was drunk. And the jury found for him, incidentally, because he was on his own side of the road and our defense was that a drunk man on his own side of the road is less dangerous than a sober man on the wrong side of the road. (laughter) Nevertheless, my client had been in a bar. He said he had been drinking 3.2 beer. That has some alcohol in it and would give him his alcoholic breath. That was his story. And there was some reason to believe it. His wife was a very fine woman, and she had knowingly let her seven year old son go on this trip after the drinking, which was rather convincing evidence that the defendant, who had no teeth and talked as if he was drunk when he was sober, was in fact sober, and there were other mitigating circumstances. In any event, I put on this bartender to testify, as he had told me in the hall, that he had given him some 3.2 beer. It was within the first week after the repeal of prohibition, and the bartender had some left over.

He got on the stand and said he gave him near-beer.

"Near-beer? You mean 3.2 beer?"

"No, near-beer."

I dropped the man like a hot potato. In the argument I apologized to the jury. I said, "That shows you what happens and that may be going on on the other side. I don't know. This man is for doctor so and so. So between the time I talked to him in the hall, and the time he got on the witness stand, all the alcohol went out of that beer. I am sorry."

I repudiated that man. I believe it is better to give the case an atmosphere of fairness and frankness than to try to carry the dead weight of an exposed perjuror.

That brings me to a few observations on cross examination. I hope I won't trespass upon Mr. Rosenthal. I can't talk about how to make a pie without making any reference at all to the filling, and I know that if I do say something about it, he still has plenty to work on. Down home they call him a plaintiff's lawyer and me a defendant's lawyer. I resent it, because I try lots of plaintiff's cases. Every time a lawyer calls me a defense lawyer, I rather resent it. Not that I am ashamed of it, but it sounds as if they say, "Here is a good half lawyer." There is too much specialization when they divide us like that.

I can't resist telling you the story of the man who went to a dentist in Los Angeles, so they say, and the dentist dropped a tooth down in back of the man's mouth. He tried to get it out. He said, "I am sorry. It is too far down. I will have to get a throat doctor."

He went rushing across the street to the California hospital, and the throat doctor put him in front of the fluoroscope, and said, "Too late for me. You will have to have a stomach man work on that."

He was rushed over to Cedars of Lebanon Hospital, and the stomach doctor

put him in front of the fluoroscope and he said, "Too late, you need a rectal man here."

So they rushed him by taxi downtown to a proctologist's office. The doctor proceeded to inspect him, and he said, "Good heavens, you will have to get a dentist. That is a tooth. I can't work on teeth." (laughter)

I don't want to say that they can't call Mr. Rosenthal a plaintiff's trial lawyer, but I have heard him both ways, and I call him a trial lawyer, and I like people to call me that also. In fact I represented a plaintiff against Mr. Rosenthal once. I imagine he has forgotten it. I was very young. We were in municipal court, and his client received a defense verdict.

On cross examination we hear, all the time, that cross examination without a plan is fatal. I believe that a cross examiner should stay behind a shield as much as he possibly can. I believe that he shouldn't cross examine except in cases where he may have some rein on the witness to bring him under control. I am going to make a very paradoxical statement here that sounds like heresay, and many of you won't agree with me, but it is quite true.

Judge Oliver Wendell Holmes once said, "You can find the truth in the strangest places, even in affidavits." (laughter) Francis Wellman, in one of his books 'Gentlemen of the Jury' or 'Day in Court' comments upon the known propensity of witnesses to become camp followers for the ones who put them on the stand. He said, "I don't know why it is our best people, when put in the witness box, seem to become advocates for the person who calls them." The last place you should expect to find the truth is where people have the greatest motive to lie. And, therefore, I say the last place you should expect to hear a man to tell the truth is in court.

Now, that is an extreme statement to make. I am not talking about the rare witness who claims he was present, when he wasn't there at all, a wholly fabricated story, but I am talking about the man who describes a domestic scene or act or some other occurrance by trimming off all of the bad things and making the drunk sober and the sober drunk and things of that kind. The young lawyer, or any lawyer, who asks a witness on cross-examination a question with the naive belief that he is going to get the truth and that the witness is a frank man, is sadly misguided, and he is going to get into a lot of trouble. That witness is likely to be no more impartial than the batter who is called up there by the manager of the other team to try to hit your ball over the fence. Therefore I believe a good cross examiner is like a good pitcher. He tries never to give the other side a good ball to hit at. He tries to pitch them hard and thin and to the corners.

For example, the worst kind of a cripple ball that a cross examiner can throw at the witness is the question "why?" As a matter of law, the California Court, at least, has held that "why" opens the door to everything. Dreams, heresay, imagination, everything. If a man is crazy, and that is why he thinks something or he has heard heresay, the door is open.

Some of you may have read the book by Judge Steuer of New York about his illustrious father. In it there is one remarkable aberation on the part of that great lawyer. In one case the witness was suing the New York Transit Lines for an allegedly false arrest that occurred seventeen years earlier. And at the time of the preliminary hearing on that arrest, the plaintiff did not take the stand to deny the charges against him. And the testimony of the plaintiff on cross-examination brought that out very clearly. And then, all of a sudden, out of a

clear sky, comes the baffling question from such an expert advocate. "Why did you not?" Well, everybody here in the room knows why he didn't—his lawyer wouldn't put him on the stand at the preliminary hearing, is why. So, sure enough, I looked up from the book feeling that Steuer must have been lucky or this episode wouldn't be in the book. But there comes the expected answer: "Because my lawyer told me that was not the place to testify." And with great skill Mr. Steuer, and in two or three pages, recovered part, but only part, of the ground he lost. I believe a lawyer will never ask "why" or "what was your reason" of this enemy in the witness box, but that he will say, "was it because you so and so—" I didn't mean it that way (laughter) "Was it because of so an so."

Did you ever hear of a more delicate situation than this that came up in the only murder trial I ever tried? A witness, who was in jail with my client, took the stand and he gave the following testimony: "I was talking to the defendant up there in the cell house, and I asked him how they got him. The man was supposed to be dead. He is dead. How did they ever get you? I wonder if the man lived long enough to write the initials of the killer in the dust on his windshield."

And the witness said my client grabbed his wrist and said, "No pulse. No pulse."

It sounds as though that must have happened, (or a simple jail bird wouldn't invent it.) I have said "don't cross examine without a purpose." But you can't let anything like that go without cross examination. It is devastating. It happened that the Lord delivered a built-in answer to that one, because the witness also quoted, as I knew he would, the state's star witness as stating that he had disposed of the gun. Well, if that happened, the circumstances of the case were such that even though my client had said, "No pulse. No pulse." If the state's witness had the gun, there was no chance of any collusion or cooperation between the two. And if the state's witness had the gun, and the state's witness was a perjuror in denying it, then my client wasn't guilty of murder. I cross-examined him only on the other horn of the dilemma, and left him with a reasonable doubt established as a matter of law. So after the jury had been out for some time and as that that witnesses' testimony be read, we were relieved instead of apprehensive.

But what if there hadn't been something like that? Well, rule number one, of course, would be never let the man say "No pulse, no pulse," again. The worst cross examination in the world is, "You are sure of that" or "Will you tell us again what the defendant said." It is remarkable how often we hear it. One should find a collateral matter to attack him on.

"How long have you been in jail? Twenty-four hours?"

"Yes."

"Did you ever see this defendant before?"

"No."

"How long have you been talking to him? Five minutes?"

"Yes."

"You mean to say that five minutes after this man first met you, he made this statement to you that you just related? Is that your testimony?" Or, "What were you in jail for." These are collateral matters. "Is that the first time you were in jail? Have you, on any previous incarcerations, given the authorities information concerning conversations alleged to have been made to you by other prisoners?"

In your argument, it certainly is necessary, since the ring of truth is so great in

such a statement as "No pulse, No pulse," that one couldn't make it up unless he was a John Galsworthy, to suggest to the jury that he may well have heard that statement made by someone else, somewhere else, or have read it, and grafted it onto your client in order to have something with which to ingratiate himself with or make some deal with the prosecution. I wouldn't go any further than that.

A lawyer goes into court with a plan, but he must be ready to swing one way or the other on plain inspiration. I want to read you this cross examination. It was of one of the most corrupt medical witnesses, now dead, that I have ever heard. There is no mistake about it, the man was notorious. He testified for a full hour, and the cross examiner for the defense had worked out an examination on the merits. The lawyer for the defense originally did not know what the witness' Achilles heel was, but it was that he had no sense of humor as shown by his last answer on direct examination. The plaintiff was a middle aged housewife, and the medical witness mentioned, at the very end of his direct examination that the plaintiff had some cerebral disturbance. The last question on direct was, "How would that cerebral disturbance affect her?

Answer: "She couldn't pass the test for a pilot's license. She would be dizzy."

When that foolish answer was given, the lawyer for the defense had an inspiration and scuttled all the plans previously made for cross examination, and this is the entire cross examination:

"Now, doctor, you say she can't fly. I assume that infirmity would also prevent her from walking a tight rope?" The case was tried in Long Beach, where there is always a good audience. There was loud laughter from the audience in the room.

The doctor had no sense of humor, and he just said, "Yes."

Then the lawyer said, "That is, if the rope was too high off the ground."

The witness said, "Yes, and it will bother her descending stairs."

"If there is no hand rail?"

"Yes."

The lawyer said, "So she can't fly. She can't walk a tight rope, if the rope is too high above the ground. And she will have difficulty walking downstairs, if there is no hand rail?"

"Yes."

The lawyer said, "That is all."

That is a cross examination conducted on the spur of the moment contrary to a preconceived plan. The next morning, which was a Saturday, the plaintiff's lawyer called up to discuss settlement and said, "Do not rely upon the testimony of Dr. So and So. I am coming down Monday morning with a brand new medical man." So that was a devastating cross examination on the spur of the moment.

Now, I have just five minutes left. I want to say that in my judgment, the most important part of the case, if a man knows how to do it, is the argument. Some lawyers say they don't believe in argument. They feel the jurors' minds are made up. Well, don't believe that for a moment. I don't believe it. The average person sitting through a trial as a juror knows he must soon make a decision. He may not be used to making decisions like this. He is looking for a solid crutch to rely on, and here at the very end of the case is the golden opportunity for the

lawyer to address those minds that are looking for help. I don't mean the occasional opinionated juror who has had his mind made up all along, but many of them are looking for a basis to satisfy their consciences. And I believe the opportunity to show them the way to a right verdict in the argument of the case is a golden one.

Sam Dunford came to me one day, and he was reading a book on trial technique. He said, "Is this right? This fellow says, in the argument to a jury, we should save our best point for the last."

My idea is that the best point should be repeated last. I believe it should be stated first and last with filler points in between. I believe a lawyer should try to open his argument with some definite spearhead that drives home the whole case. So many times we hear lawyers getting up and saying, "Now, ladies and gentlemen, the first witness, Mr. Brown said so and so and, then we called Mr. Smith and Mr. Smith said so and so." That is a most ineffective way to argue a lawsuit. No one can be interested in it. But if a man can find some opening wedge that puts his opponent's weakest foot forward, and his own strongest one forward, he can, as if turning on a switch, illuminate the whole case.

Suppose you are arguing a personal injury action in which there is reason to criticize the conduct of both people, and you are in a contributory negligence jurisdiction. Suppose the defendant's lawyer opens up with his statement, "The plaintiff claims the defendant is solely and alone, 100 per cent to blame for the accident. And the plaintiff, he says, is not to blame at all." Does not that, at the very outset, turn on a switch that illuminates that case and lets the jury know exactly what the issues are?

Suppose the plaintiff has a case, as he ought to have if he starts it, in which the defendant has been negligent. Suppose the plaintiff's attorney opened up by saying, "Now the defendant in this case contends that his conduct in which he did so and so was not negligent." Does it not put his opponent's weakest foot forward and the plaintiff's strongest foot forward?

And in criminal cases it is remarkable how often criminal lawyers do not fully exploit the reasonable doubt rule. Suppose you get up at the very opening of your argument and say, "The prosecution claims that the guilt of my client has been proved beyond any reasonable doubt. In other words, that if you are sensible people, you can't have any doubt about it. I want to remind you that we are entitled to your verdict of not guilty, even if you think the defendant is guilty, unless his guilt is proved to you beyond a reasonable doubt." And then the lawyer can tell the jury about the Scotch type of verdict and very likely win the verdict for his client from a jury which believes the defendant may be guilty.

I don't want to leave without mentioning the important matter of whether a lawyer should cry during his argument. (laughter) I want to read a quotation from the Supreme Court of Tennessee, Ferguson versus Moore, 98 Tenn. 342, and I might remind you that Tennessee is in a territory where oratory is much prized. The Supreme Court of Tennessee says, "Tears have always been considered legitimate arguments before a jury. Indeed, if counsel has them at his command, it may be seriously questioned whether it is not his duty to shed them with whenever the occasion arises." (laughter)

Ladies and gentlemen. It has been a great pleasure to speak to you. I have emasculated my notes and cut out whole sections as I went along. I have enjoyed

talking to you very much indeed. If I sounded overly scientific, let me close with this word of warning: Don't forget the power, in the winning of these law suits, of black cats and similar things; they are very important (applause)

PRESIDENT BROWN: Thank you Mr. Stanbury. I don't think that I need to mention how well your speech was received in view of that round of applause. We greatly appreciate you coming here from California to give us this fine talk and we hope that you and Mrs. Stanbury enjoy your visit to Sun Valley.

I will now present Mr. Louis Racine, who will introduce the next speaker.

MR. LOUIS RACINE: I thought perhaps we would have a short break, but apparently we should get on, because it is getting close to noon. Without taking too much time, you probably have read the Bulletin, you are probably aware that Mr. Samuel Rosenthal, another gentleman from California, is with us at this convention. And he, too, is a trial attorney of many years experience in the courts of California. Mr. Rosenthal is probably known to many of you here, and many of you met him yesterday when he came to the convention before he was to give his presentation. His subject is on cross-examination. Mr. Samuel A. Rosenthal. (applause)

THE ART OF CROSS-EXAMINATION

Address by SAMUEL A. ROSENTHAL, Los Angeles

MR. SAMUEL A. ROSENTHAL: Mr. Chairman, Ladies and Gentlemen: That is something that has always worried me. Whenever I tried a lawsuit with my friend Ray, we each tried to outdo each other in crying. I can cry easily, and he is no slouch. (laughter) I remember one case in which we almost drowned the jurors, the judge and ourselves in tears. But there is a time when you have to shed a little tear, too.

Ray, I am very glad I came here today. I have been hearing you during the course of a trial, and now I know why you pretended to be so much different than you really are. I always wondered why you wore that same gray suit, baggy at the knees, five days a week. (laughter) I knew you could afford something better. As a matter of fact, Ray, if you could have cultivated a butch haircut, you would have done that. (laughter)

He forgot to tell you about a case in which we both happened to be on the same side. The other lad, representing the Southern Pacific, a mighty fine lawyer, did wear a butch, and he was very young looking and rather pretty. There were three of us against him. There were three oldsters, myself, Ray, and another great big lawyer. We were lined up against that poor kid. The jury seemed to think that even the Southern Pacific was entitled to a break. (laughter)

Well, we have had very many enjoyable trials together, and I want you to know that Ray Stanbury is perhaps one of the best trial lawyers in our jurisdiction. Haven't you come out to Idaho to try a lawsuit yet? If not, expect one.

My subject is "Tthe Art of Cross-Examination." You know, you have to have a lot of cheek, to come to a group of lawyers and try to tell them what you should do and what you shouldn't do in connection with cross-examination, because there isn't a lawyer who has tried a few cases who doesn't feel that he is it. And so, the best that I can do, is to give you a few do's and don't's that I think are perhaps worth while considering, because I know that somewhere in this room there are any number of you who, by reason of your number of long years of experience, have learned some of those things the hard way. And perchance

I say something here, believe me it is probably not original, because it has been learned by others many years before advent into this world, and many of you also have had occasion to learn, through experience, the things the authors write about. And many of you will learn, as you go along, the things that time and experience teach.

So whatever is said here must not be taken to mean that you have got to follow some of these suggestions. You may not think they are good. And of course, I expect you will forget about these suggestions.

It takes you so many years to learn something about trial procedure, cross-examination, and after you have reached the age of about 50 or a little over, then if the defendant companies believe that you are pretty good trial lawyers, they will do as Ray suggested, they will send these young men up against you. So what is the use of knowing all about cross-examination? When they put these men up against you, you have to be careful. You can't even open your mouth, as Ray suggested. (laughter) You don't know how to deal with the situation. You certainly can't cry in the presence of the young man. (laughter) So we are stuck. Be as nice as you can, but don't be too nice, because you will just be helping him a little too much. Take it easy. Don't embarrass him at all.

I have had one situation in which my cross-examination was more or less of a fishing expedition on my part, because I had nothing to lose but my chains. I had a very weak case, and if I didn't make it on cross-examination, I would have nothing. And don't think you are so smart when you fish for something and some good comes from it. It is purely accidental. But when you are so desperate you can't help yourself, you go fishing. This fellow took time out and asked for a recess, and he went out in the hall and the poor chap started to cry. "Well," I said, "Don't do that. Anybody could have gotten into that hole that you did. Just take it easy. Dry your tears and take a few more minutes and go back as though nothing happened."

He said, "But I am all shaken up. I should not have made the mistake I did."

I said, "We all make mistakes, even we attorneys who have been in practice for many more years than you have. We have all asked silly questions or have asked a question that opens the door up wide. Don't criticize yourself. We do it even after fifty or fifty-three years of existence or more. We are never so perfect that we don't make a mistake in cross-examination.

Well, he got himself together, and at the same time I suggested he might bring the claims man down during the noon hour, because maybe we could settle it. (laughter) We did. And he has always been kindly disposed towards me, because I did help him, and he was gracious that I didn't just absolutely make it too difficult for him.

Before I really touch upon my subject, I would like to say a word or two to the judges—those of you who have been honored with the distinction of being on the bench. Remember that possibly at one time you studied law too, and you practiced law. (laughter) I have always been at ease with a judge who was at ease with me. Forgive us for our little trespasses unless you think we are just smart alecs, and then you can take us in chambers and give us a good trouncing. Don't do it in front of the jury. While we must try to be respected, remember that we, too, are growing up. Give us a helping hand while we are young. And

as we grow older, be considerate too. Because we like to be at ease and feel that if we want to cross-examine a certain way, if we like to stand on our feet, please don't insist upon us sitting down. Sometimes you can be more effective when you are trying to think while standing rather than while sitting down. These may be little idiocyncrasies, but they do exist. I don't want you, Mr. Judge, to let me get by in going up to a witness and shaking my finger at him. I don't like to do that anyway. But if I do move a little closer to the witness stand, don't bawl me out. Don't say I have got to sit back there near the railing. There are times when we have to move around a little bit. Be courteous. We have some judges, who, every time you go before them, you are tense from the moment you start. You are tense until you are through.

Remember that there are other judges that are just as brilliant, believe me, but they are human. They are just as smart, but they treat us with courtesy that we, as officers of the court, are also entitled to. A lawyer who respects the courts, the law and those administering it, will never fail to tender his respects to the judge. All we ask is that we, too, might be made to feel at ease. And if perchance we indicate that we are not prepared or that we are stalling or that we think we are putting one over, we are not disillusioned. We know when we are weak and we know when we are strong. Listen and then render the decision.

We had a judge back in Los Angeles—he is now dead—who was a brilliant lawyer, but he had a wise-cracking habit. You never knew when he would turn on you or your adversary. If you had an accident involving the two streetcar lines like the Pacific Electric, which had red cars, and the L. A. Transit, which had yellow cars, he would say, "Well, we have a case here today involving the red reaper and the yellow peril. (laughter) If my client was a passenger and was injured, I wouldn't care, but by the same token, if the other fellow asked a question, and I stupidly objected or probably had to object because it may have been important, he would say, "What is the trouble, Mr. Rosenthal, don't you want the jury to know the truth." (laughter)

So to the judges here today, please take what I have said in the light of desire to build up the necessary two-way street that goes from the lawyer to his Honor, and should go from his Honor to the lawyer who is industrious and who does not come in in a shilly shally fashion. Give him at least the environment to let him take it easy. "You have got something, I will listen to you." And do not put on that very strict, holier than thou, next to God-like attitude which does not put me at ease no matter how carefully I have prepared or how good a lawyer I might be. If you gentlemen will do that for us, we shall never forget it and ever be gracious and thankful. You see, I can be pretty brave out here. I am not in California. (laughter)

Probably all of us here have studied the subject of cross-examination at school or at college. Some of us have even dipped into a few books upon that subject by very famous lawyers, teachers, as well as those who, by reason of many years of trial work, have been able to give us some of the "do's" and some of the "don't" in connection with the art of cross-examination.

In many instances, authors have given us facsimilies of brilliant cross-examination by taking excerpts of transcripts which best illustrate good or bad cross-examination in actual practice. Extra-curricula reading has never hurt anybody. You can learn from what others have done before you, and by listening to experienced lawyers in the courtroom.

However, in the final analysis, what you yourself do on cross-examination in the trial of your individual cases, may mean the difference between success or failure in your practice. "Experience is still the best teacher."

Professor Wigmore, that great legal mind stated:

"The final establishment of the right of cross-examination gave to our law of evidence the distinction of possessing the most efficacious expedient ever invented for the extraction of truth."

There is an age-old, but never outworn weapon by which an honest man may be defended against the assaults of an expert whose opinion has been bought and paid for in order to swear through an unjust case. I refer, of course, to cross-examination. This fascinating, difficult and immeasurably important part of the trial lawyer's work has well been referred to as an "art." It is an edged tool, but like all weapons that are sharp it may cause injury to the wielder rather than to the object of the blow. Some lawyers use it like a bludgeon, some handle it as a broadsword, others as though thrusting with a shining rapier.

In his work on the "Art of Cross-examination," Francis L. Wellman has contributed fascinating illustrations of its use as well as its abuse. *Yet while this subject may be studied in the books, it never can be learned there. Natural aptitude, plus large experience, is necessary.* To modernize the metaphor employed a few lines back, cross-examination is a weapon more likely to explode in the unskilled hands of the assailant than to destroy the enemy.

Mr. Wellman stated in his book:

"The public realizes that a good trial lawyer is the outcome, one might say, of generations of witnesses, when clients fully appreciate the dangers they run into in trusting their litigation to the so-called 'office lawyers' with little or no experience in court, they will insist upon their cases being intrusted to those who make a specialty of court practice, advised and assisted if you will, by their own private attorneys."

Cross-examination, it has been said, is the rarest, the most useful, and the most difficult to be acquired of all of the accomplishments of the advocate—it has always been deemed the surest test of truth and a better security than the oath.

The issue of a cause rarely depends upon a speech and is but seldom even affected by it. But there is never a cause contested, the result of which is not mainly dependent upon the skill with which the advocate conducts his cross-examination. This is not to detract, however from the importance of a forceful argument.

There is no shortcut, no royal road to proficiency in the art of advocacy. It is experience, and one might almost say experience alone, that brings success. I am not speaking of that small minority of men in all walks of life, who have been touched by the magic wand of genius, but of men of average endowments and even special aptitude for the calling of advocacy; with them it is a race of experience.

It used to be said of a famous English barrister, "He weilded a huge two-handed sword to extract a fly from a spider's web." (That of course should be avoided). As yet no substitute has ever been found for cross-examination as a means of separating truth from falsehood, and of reducing exaggerated statements to their true dimensions.

Francis X. Bush, of the Chicago Bar, and the Dean Emeritus of the DePaul University Law School, in his book, Law and Tactics in Jury Trials, published by Bobbs-Merrill Company, Inc. (which incidentally I recommend to all of you who have not as yet read the book, to do so and keep it in your library because of its vast resources, information and citations to support the various phases of the law with which you may actually come into contact in the trial of your lawsuits), has a brilliant chapter on cross-examination, and I will have occasion to refer to various passages therefrom. Successful Jury Trials, whose author is Appleman, is another good book to read. This book was also published by Bobbs-Merrill Company, Inc. For humor, dealing with this subject, "Laughter Is Legal," is a good publication, by Francis Leo Golden, published by Frederick Fell, Inc.

Cross-examination, as has already been suggested, is a powerful weapon. It may be as sharp as a saber or blunt as a shillelagh, but in their usage it may have a crushing effect upon improper testimony. It is the task of the advocate to discover the truth of the issue. His method is by having his ear attuned for deviations from the truth or inconsistencies in recital of facts from the witness stand; then to use some degree of forensic skill in bringing these to the jury's attention.

PRIMARY PURPOSE OF CROSS-EXAMINATION: The primary purpose of cross-examination is to extract the truth, but upon occasion there is an attempt to crush it because there are times when cross-examination is used for the specific purpose of confusing the witness who apparently is endeavoring to tell the truth where such testimony may be damaging to your client's cause. But not even the abuses, and the mishandlings, which are so often found associated with cross-examination, have availed to nullify its value. It may be that in more than one sense it sometimes takes the place in our system, which torture occupied in the medieval system of the civilians. Nevertheless, it is beyond any doubt the greatest legal engine every invented for the discovery of truth.

In Jones' Commentaries on the Law of Evidence, it is stated as follows:

ENGLISH RULE: "The first question arising with regard to the permissible scope of cross-examination generally is as to whether the subject matter must be confined to that brought out on examination in chief or whether it may exceed that scope. The rule, as originally introduced into this country from England is still in effect in several jurisdictions. According to this rule, which we hereinafter refer to as the 'English Rule,' a witness once called becomes a witness for all purposes and may be fully cross-examined upon all matters material to the issue."

AMERICAN RULE: The American Rule, however, is generally restricted to examination in chief.

ATTRIBUTES OF SUCCESSFUL CROSS-EXAMINER: What must be some of the attributes of a capable or successful cross-examiner?

Books and articles innumerable have been written on the subject of the equipment possessed by famous advocates which rendered them great cross-examiners. These suggest that the successful cross-examiner must combine within himself a profound understanding of psychology, an alertness to discover the strengths and weaknesses of witnesses, a comprehensive knowledge of law, science, literature and current affairs, a temper which will withstand any strain that may be put upon it, an accurate memory, a genius for apt expression and an ability to make instantly the vital decisions upon which the success or failure of the inquiry may depend. Added to this, he should possess a personality and manner which so operate that while he demolishes testimony or destroys witnesses, he never

offends either the court or the jury. Fortunately for the less-favored members of the profession, this beau ideal is rarely encountered in actual practice. Any lawyer with the usually required educational background and a fair share of natural gifts, and a desire and aptitude for trial work, who will devote himself to the special study of trial practice and advocacy, and prepare his cases carefully and thoroughly, can become an effective cross-examiner. His comparative excellence, only apparent after long experience, will depend upon the measure of his understanding, knowledge and industry, and the natural or acquired aptitudes which he brings to his task.

SINCERITY: Specifically, it may be said that the effective cross-examiner, to be persuasive, must be sincere; he must keep his temper under control at all times; he must have or develop a memory which will enable him to avoid mistakes in assuming or repeating what the witness or others have testified to; he must render courtesy to whom it is due; and he must be fair, even to those whom it is his privilege to assail. This does not mean you have to be a jelly-fish or apologetic.

COURAGE: The cross-examiner must have the courage to go through with the examination which his considered judgment has determined upon. Specifically, this involves the willingness to meet the embarrassment encountered in smaller communities in the cross-examination of persons who are personally known to the examiner. In a rare case, where an advocate espouses an unpopular cause, it means risking whatever sacrifice that espousal may entail. The lawyer must determine for himself how to conduct the trial in such a manner as best to fit his own temperament and capacity. Most trial lawyers can do a better job by being themselves and not trying to be someone else. This applies to all of life, doesn't it?

PURPOSE OF CROSS-EXAMINATION: The purpose of cross-examination is primarily as follows:

1. To explain, supplement or qualify the testimony given on direct, or compel admission of facts inconsistent with or contradictory of it.

2. In those jurisdictions where it is permitted, to elicit new matter favorable to the cross-examiner's case.

3. To discredit or weaken the effect of the story told by the witness.

4. To discredit or destroy the witness by showing him unworthy of credence.

Cross-examination, if undertaken, should have at least one of these objects in view. If it is apparent that none of them can be accomplished, cross-examination is worse than useless. Nothing does an advocate's case more harm with a jury than a long, aimless, and fruitless cross-eamination.

EVERY WITNESS A SPECIAL PROBLEM: Every witness presents a special and particular problem. Every eperienced advocate realizes that a successful cross-examination depends upon his proper appraisal of the type, capability and disposition of the witness who faces him. The thought was expressed by the great Roman advocate Quinitillian, writing more than 2,000 years ago.

"Knowledge of the views held by, a peculiarity or weakness in a witness, will often aid in his cross-eamination.

ILLUSTRATION: In a sensational divorce case tried in one of the courts of Illinois a number of years ago, the complainant husband alleged and called several witnesses to substantiate the charge that the defendant had been guilty of an illicit intercourse with a prominent merchant, resident of Louisville, Kentucky, but a frequent sojourner in Chicago. Defendant's lawyer called the alleged cores-

pondent as a witness. He was a typical Southerner in appearance and manner. His denial of any improper relationship with the complainant's wife was vehement to the point of belligerency. When he was tendered for cross-examination, the questioner quietly developed the facts that the witness had been born and educated and had always lived in the south and prided himself upon being a "Southern gentleman." With this foundation laid, the examiner, with great apparent earnestness, then asked this question:

> "Mr. Watts, as a Southern gentleman, versed in all the traditional obligations such as a gentleman owes to womanhood, if you had become improperly involved with another man's wife and were called to the witness stand and asked as to the nature of your association with her, you would deny vehemently, would you not, that there had ever been any improper relations between you?"

The witness replied, without hesitation, "I certainly would, sir; I would consider that my sacred duty."

HOW TO PROCEED – WHERE TO BEGIN – WHERE TO END: (Final Question) Often when a witness is through and is then turned over to you for cross-examination, you must make a quick decision as to how to proceed, where to begin, and where to end.

The determination of the order in which to take up various subjects on cross-examination must depend largely upon the circumstances of each particular case. Some of the considerations which may influence this determination follow. As has been noticed, a cross-examination which follows literally the order in which the subject matter of the direct was presented is least calculated to produce a satisfactory result. The witness through pre-trial preparation and his direct examination has learned this sequence and is usually ready with his answer before the cross-examiner's question is finished.

Neither is it ordinarily good tactics to commence a cross-examination with the subject matter last testified to by the witness on direct. This is fresh in his mind, and he is not likely to contradict it if immediately cross-examined upon it. An exception may be indicated where the cross-examiner has in his hands convincing impeachment on the subject matter last dealt with on the direct. In such case, by immediately putting the impeaching matter to the witness in a series of crisp, rapid questions, he may so disconcert him as to throw him completely off balance during the remainder of the cross-examination. The experienced advocate, lacking such material, usually picks out a subject matter from about the middle of the direct examination, and, without regard to the direct sequence, "skips around from one subject to another, not giving the witness a chance to relate his answers in the order in which he gave them on direct. This method is most likely to produce contradictions.

You may find upon occasion that you are not making much of a dent in the testimony of the witness on cross-examination and you may be impelled to otherwise cause the witness to lose favor in the eyes of the jury. Under the head of showing an improbability in the testimony of a witness, many lawyers will in the cross-examination of a witness, ask him to whom he has talked about the case, and if he answers that he has talked to no one, argue the improbability of his having been called as a witness unless he had previously told his story to the party or lawyer calling him. Granted that such an answer by a witness discloses an obvious improbability, it is submitted that such a question, in the form in which it is usually asked, is a trick question. The witness who has not been previously

warned to expect such a question will ordinarily give a negative answer because of the implication he senses in the question that the examiner is trying to insinuate that he has been told what to say. It is again submitted that it is a legitimate part of trial preparation to warn one's witness that such a question may be put and to explain its implications.

Of course, if you know opposing counsel and his reputation for not overlooking the slightest detail, then you might as well not put that type of question for it may react very unfavorably to you. For if the witness has been properly prepared, should say yes, he has talked it over, it is more harmful than if the question had not been asked and if you are foolish enough to ask the witness "And what did your lawyer tell you to say," he may come back with the prepared statement, "Why, my atorney told me to tell the whole truth." Then he has really hit you between the eyes.

With children, too, be careful. "Get the kids on quickly and get 'em off quicker."

A boy who was a witness in court was asked by a lawyer: "Did anyone tell you what to say in court?"

"'Yes, sire.'"

"I thought so. Who was it?"

"'My father, sire.'"

"And what did he tell you?"

"'He said the lawyer would try to get me all tangled up, but if I stuck to the truth, I would be all right.'"

When your own plaintiff is being cross-examined he must not hesitate to give all the facts quickly, without unnecessary hesitation. By all means never, but never fail to advise him to expect such a question.

WIDE LATITUDE: There are avenues presented for the cross-examination of parties which are not present with other witnesses. Depending upon the rule of applicability in a particular jurisdiction, a party may, like any other witness, be cross-examined upon all matters *germane* to the direct examination (American rule), or generally on *all* issues pertinent to the case, whether developed in direct examination or not (English rule). It is, however, held generally that, subject to such limitations as the trial court's discretion may impose, a party may be cross-examined in a personal injury case where it is claimed that the injuries are feigned or exaggerated, a wide latitude in cross-examination is properly allowed. So, too, where it is claimed the plaintiff's condition is due, wholly or in part to previous injuries or illness.

Hence it is always necessary to advise your plaintiff to reveal his entire history as to illnesses prior to the accident, or injuries, if any.

CONVICTION OF CRIME: You may have the evidence to show that a witness has been convicted of a felony or infamous crime. If so, you may be fortunate, but do not go upon a fishing expedition.

In the absence of permissive statutes, or case, it is generally held that a witness may not be asked if he has been indicted, or accused, or arrested, or tried, for a crime, when he is not shown to have been convicted of it.

Where such cross-examination is permitted, the decision when, during the course of the examination, to put to a witness the question whether he has not

previously been convicted of a specified crime will depend largely upon the factors present in each particular case. In some instances it may be clearly indicated to make that impeachment *the sole item of cross-examination.* If so, the inquiry should be undertaken directly, and without preliminary questions of any kind. It is considered that some advantage is to be derived from other cross-examination, as, for example, to show that the witness is mistaken in material points, has exaggerated, or is motivated by personal interest, prejudice or hostility, it is generally considered good tactics to inquire first as to those matters, and cap the cross-examination with a question directed to the witness' previous conviction of a crime deemed in law to affect his general credibility.

CONTRADICTORY STATEMENT EXTENDS NO FURTHER THAN CREDIBILITY OF WITNESS: Where a witness has made a contradictory statement at sometime prior to his testimony in court, it may be said the effect of proof of the contradictory statement, however and whenever made, extends no further than the question of credibility and (except in the case of a party) is not evidence of the truth of the matter embraced in the contradictory statement. The contradictory matter may destroy the witness, but it does not establish the prior statement as the evidence.

RELATIONSHIP OF WITNESS: It is always competent cross-examination to show the relationship of a witness to the party calling him. By "relationship" is here meant relationship by consanguinity, affinity, or a collateral relationship which does not strictly fall within the definition of affinity; also legal relationship, such as guardian and ward, trustor and trustee, principal and agent, partnership, master and servant, landlord and tenant and debtor and creditor.

EXISTENCE OF RELATIONSHIP: Ordinarily, such cross-examination should be confined to developing the existence of the relationship. It is seldom profitable to pursue the examination beyond this point with questions such as, "Doesn't the fact that you are the defendant's cousin incline you to see the facts his way"; or, "You would like to see your cousin win this lawsuit, wouldn't you?" The answers to such questions are usually equivocal and disappointing. They may have a more serious effect. In one instance a witness was called who was a nephew of the plaintiff. On cross-examination he was asked, "Naturally you would like to see your uncle win this case, wouldn't you?" The witness with apparent sincerity which evidently convinced the jury, replied, "No sir; his case means nothing to me. I want him to win if the jury thinks he's right; if they think he is wrong, I am sure they will say so."

ELEMENT OF SURPRISE: It is good trial practice for the party who calls a witness to bring out on his direct examination the full extent of whatever relationship may exist between the witness and the party calling him. In this way, a cross-examination that does go into it, will find that the element of surprise is absent. If anything is sought to be made of the fact later, the direct examiner can argue that there was no effort on his part to conceal that fact, and that the credibility of the witness is to be judged with that fact in mind.

MANNER AND STYLE OF CROSS-EXAMINATION: Now a few words about the manner and style of cross-examination. Cross-examination must be approached with a recognition of certain general factors, as well as of facts particularly applicable to the witness presented. Witnesses are almost always biased in favor of the party calling them; more often than not they have been called in because they are friends, associates, or favorably disposed toward that party. Generally, they have been (we won't use the word coached) etc., trained, and have listened before

trial to the stories told by other witnesses similarly disposed. Frequently, their antagonism toward the opposing side has been aroused. Consciously or unconsciously, they have caught the spirit of the contest and, as contestants, deem themselves important actors. Such persons take the stand determined to make "good witnesses." They feel that to be good they must be positive in what they say. If you get such a witness on the other side it is absurd to think that such a witness is going to change lightly his direct testimony, or admit that he has made a mistake. In reaching such a state of mind, the witness is not necessarily dishonest. He may be honestly mistaken in his perception and recollection of what he states as facts.

APPRAISING WITNESS: In determining how best to cross-examine a witness, an advocate must appraise the witness. There is the apparently respectable, honest witness, who is mistaken about the facts as to which he has testified. There is the essentially honest witness, who, because of his partisanship, has gone further than the facts warrant. There is the belligerent witness, who, because of relationship, interest, prejudice, or other antagonism, is determined to assist to the limit of his capacity the party who calls him. There is the "smart alec" witness, given to "wise-cracks," who believes he is a match for any lawyer. There is the timid, hesitant witness, where the lawyer is called upon to make a quick determination of whether the hesitation is due to uncertainty as to the facts, or to a natural disposition. There is the ignorant witness, whose perceptive faculties are none too good, who has been over-persuaded into giving favorable direct testimony as to facts of which he has no actual knowledge or recollection. There is the evasive or reluctant witness whose attitude suggests the concealment of facts which would weaken the direct testimony he has given. There is the artful witness, who has cleverly woven a harmful lie into a fabric or other testimony admittedly true. Finally, there is the vicious, reckless witness, whom it is considered, has wilfully sworn falsely.

CONDUCT OF ATTORNEY IN CROSS-EXAMINATION – MANNER OF CROSS-EXAMINATION: If, in a given case, the advocate decides to cross-examine, he should appreciate that everything he says and every move he makes enters into the process of persuading the jury that the witness is to be discredited or his testimony discounted. Every feature of his conduct has its importance. First, he should take a position from which the cross-examination can be most effectively conducted. This should be a point from where he can keep the witness under his eye, and at the same time observe the reactions of the jury. A cross-examination which the advocate thinks is good may be boring rather than persuading the jury. His cross-examination is directed to it at least as much as to the witness. He should speak distinctly, and put short questions couched in simple and readily understandable English. The necessity of putting plain and simple questions to jurors upon their voir dire and to witnesses in their direct examination must be stressed. The same observations apply with greater force to witnesses under cross-examination. If the question is so involved that the witness fails to understand it, it is more than likely that some juror finds himself in the same situation. Such a question gives the witness time to hedge by saying he does not understand. His evasion slows up the examination and destroys its continuity and effectiveness. Your question should be as simple as possible.

"Just what did your medical report show, Doctor?" asked the defendant's counsel.

"I examined the tissue under the microscope and detected squamos epithelium with normal margins. The central portion was markedly thickened and kerationizaation had increased. These papillary-like projections in some areas showed distinct

calcification. The underlying fibrous conective-tissue stroma revealed no pathology."

"In simple, every day language, Doctor, what did the plaintiff have?"

The doctor looked sheepishly at the judge, and answered, "A wart."

Your Experts' answers should be simple.

RAPID QUESTIONS: Politely, but firmly, the cross-examiner should insist that the witness answer his questions in sufficiently loud voice and distinctly, so that the jury may hear and understand each response. The examination should, at all times, be conducted with dignity and reserve; slang should never be resorted to, and sarcasm employed sparingly. The examiner should not appear over-smart. If he does so appear, and succeeds in eliciting a favorable answer on cross-examination, it is apt to be attributed by the jury not so much to the unreliability of the witness as to the sharpness of the lawyer.

A witness was being cross-examined and the lawyer was asking the same question again and again. Everyone grew impatient, the witness particularly so.

"You say that after the auto passed, you saw the victim lying there in the street with his scalp bleeding?"

"Yes, I did."

"After the auto passed?"

"Yes."

"But did the car hit him?"

"Yes."

"Are you sure?"

"No. What I said was a lie. The driver leaned out and bit him as the car went by."

Lawyer Smith for the defendant, has a technique of bullying and smearing hostile witnesses. He employed all his savagery on a surprise witness produced by plaintiff. This witness told a straight, eyewitness story. He had been at the scene, described the accident, and gave his opinion on how badly the horse had been injured.

On cross-examination, Smith snarled, "What do you know about horse injuries? You're not a veterinarian, are you?"

"No."

Again Smith sneared. "That means that you only know a horse from a jackass when you see one. Is that it?"

"Yes, sir, I think so," he said. "For instance, I'd never take you for a horse."

Cross-interrogation should ordinarily be put in even, rapid sequence; and closely directed to one subject at a time. The purpose of putting questions rapidly is threefold; the attention of the jury is better maintained; the witness has less time to consider the effect of his answers; and rapid questioning is calculated to produce rapid answers. A witness answering rapidly is more likely to contradict himself than one who answers after having been given plenty of time to deliberate.

WATCH HABIT OF REPEATING STATEMENT OF WITNESS: A hesitant, rambling cross-examination can not be effective. Some lawyers, usually the inexperienced ones, are given to repeating all, or the last part of every answer made by a witness. The habit minimizes the chance of success in an examination. This

automatic repetition emphasizes the witness' answers, slows up the examination, and gives the witness an added opportunity, between an answer and the next question, to weigh the effect of his last answer and prepare for the next question.

WITNESS ENTITLED TO COURTEOUS TREATMENT: At all times it must be kept in mind that the witness is entitled to courteous treatment. A jury is ordinarily quick to sense and resent a discourtesy. There is no occasion in cross-examination to deviate from the general rule which prescribes politeness in all relationships of the advocate to the trial—politeness to the court, the jurors, court attaches, witnesses, and opposing counsel. The most direct, searching, and damning cross-examination, even of one who is hostile and deemed to be dishonest, can be conducted with an observance of proper courtesy. The shrewd advocate will resist the temptation to put a question to an adverse witness concerning some disgraceful episode in his life, unless the question is definitely proper as affecting his credibility. Unless such questions have that effect it is held in most jurisdictions that they are improper.

MUST BE FAIR TO WITNESS: A cross-examination to be effective must be fair to the witness. To base a question upon an unfair construction of a previous answer is usually readily detected by a jury, and, if the opposing advocate is alert, can be made the basis of damaging argument. If the cross-examiner refers to previous answers of the witness, he must be sure of his own memory. Unless his own memory is better than that of the witness, he had better not cross-examine.

DANGEROUS TO WISECRACK: It is dangerous to "wise-crack" with a witness. If the witness is a match for the lawyer at such a game, the result may be disastrous.

SELF-CONTROL OF ATTORNEY: However cautious an advocate may be in the cross-examination of an adverse witness, he is bound to make the mistake at times of asking a question which elicits a damaging answer. Such a situation demands perfect self-control. The advocate should not, by manner or subsequent question, give the slightest indication of surprise or discomfiture. The experience of Rufus Choate, in the defense of a charge of murder, is often cited as a classic example of such conduct. An adverse witness was asked on cross-examination by Mr. Choate what the defendant had said to him on a particular occasion, and the witness answered that the defendant had said "there was a lawyer in Boston named Choate who could get him out of it even if a dozen witnesses swore they had seen him commit the crime." It is said the expression on Mr. Choate's face changed not the slightest, and that, after the inevitable laughter had subsided, the great advocate proceeded, unruffled, with his cross-examination.

ATTORNEY NEVER LOSE TEMPER: In this connection, it is pertinent to observe that the trained advocate never loses his temper, whatever the provocation may be. Simulated anger, like pretended surprise, may sometimes be resorted to with telling effect; but this is far different than an actual loss of temper. Loss of temper means loss of mental control; and unless he has complete mental control of himself at all times, the advocate is risking a wrecking of his cause.

KEEP CONTROL OF WITNESS: It is essential in cross-examination that the examiner keep control of the witness. Ordinarily a witness should not be asked any question to which the answer can not be reasonably apprehended. Questions should, if possible, be so framed as to include a direct suggestion and limit the answer to an affirmance or negation of it. Some advocates believe in letting a loquacious witness talk, the idea being that, given enough rope, he will hang himself. It is submitted that such a witness, having been called by the other side, is

more apt, if given his head, to blurt out something harmful rather than helpful. Particularly it is true if the witness is definitely partisan or hostile. When the witness has responsively answered a question on cross-examination, it is good tactics to prevent him from following it with an explanation. This can usually be done by stating courteously, but firmly, "You have answered the question," or, if the witness asks permission to explain, "You can explain that on redirect examination, if Mr. Smith, your lawyer, wants you to." If the witness is persistent in his efforts to volunteer and argue, a question such as, "Have you some special interest in this case which prompts you to want to argue it with me," will ordinarily check him. It is particularly impossible to conduct an effective cross-examination if the advocate's planned sequence is continually interrupted by the explanatory or argumentative interpolations of the witness.

HOWEVER IN EXCEPTIONAL CASES: The foregoing is subject to qualification where the direct examination has been so completely damaging to one's case that it is considered there must be a pretense to cross-examination, even at the risk of emphasizing or enlarging the direct testimony. The theory here is that the cross-examination cannot make it any worse, and something favorable may possibly develop from it. There is always the possibility that a persistent cross-examination may tire out a witness, and get him to display temper or become sullen. This must be balanced against the hazard that the jury may also be tired out by such a cross-examination. If the witness can be made to lose his temper, a point is scored, because that almost inevitably emphasizes the witness' interest or hostility. If he becomes sullen, or pretends a failing memory, with the frequent repetition, "I don't remember," or "I don't know," or otherwise evades questions, the effect of his direct examination is weakened. If the examination reaches the point where the witness makes no response, or refuses to answer proper questions, the situation has turned to the definite advantage of the cross-examiner. In the latter case, the advocate must choose one of the two techniques: call upon the court to compel the witness to answer, or put some such question as "You can't answer that question, can you," or, "You don't want to answer that question, do you," or, "Well, if it embarrasses you to answer that question, I won't press it." The witness suffers with the jury whichever tactic is employed.

STYLE OF CROSS-EXAMINATION: The style of an advocate's cross-examination will necessarily depend to a greater or lesser extent upon the natural disposition of the examiner. The trained advocate, however, will cultivate and employ the style which he thinks is best calculated to produce effective results. Speaking generally, there are two prevailing styles: the savage, slashing, "hammer and tongs" method of "going after a witness to make him tell the truth," and the smiling, soft-spoken, ingratiating method, directed to lulling the witness into a sense of security and gaining his confidence. Neither style can be adopted to the exclusion of the other for every situation that may be presented. There are many situations where a vigorous, rapid-fire examination is likely to produce the best results, just as there are many situations where a quiet, easy, friendly examination will elicit more that is favorable to the examiner. The experienced advocate, like the seasoned baseball pitcher, relies upon his ability to change the pace to suit the varying conditions in the game. It is submitted that in most cases the gentler approach is better calculated to elicit the concessions which the examiner desires. The savage, vehement style of cross-examination ordinarily makes the hostile witness more hostile. In some cases, such an examination angers the witness to the point of impelling him to make vicious answers. While this may weaken the effect of his direct testimony by emphasizing his partisanship and hostility, the content of the answer may be such as to lead the jury to believe that the witness is beating the examiner at his own game. Only the complete success of such an examination will

keep the advocate in the jury's good graces. The repeated failure of such examination is incalculably prejudicial. The witness is the "under dog" and the jury's sympathies are ordinarily with him. Mr. Osborne suggests, "violence of cross-examination is often the measure of the importance of the testimony to which it is directed." If the witness is not particularly hostile, a slashing, finger-shaking attack is apt to terrify the witness and "dry him up." It is next to hopeless to expect concessions from a witness in such a state of mind. The "soft and smiling" type of cross-examination, on the other hand, is calculated to put the witness at his ease. If he knows the reputation of the examiner, he may well be wary, but persistence in such an examination, skilfully conducted, will in most cases ultimately gain his confidence and even friendliness. Such an examination cannot offend the jury and concessions obtained by an examination of this kind will ordinarily be appraised at their full value. Where under such an examination a witness is caught in inconsistencies, the slashing, bull-dog type of examination may add to the witness' confusion, but the soft-spoken type will usually get the witness to talk more volubly, and his effort to reconcile the inconsistencies usually emphasizes them. When an inconsistency has been made clearly apparent, the same choice of style is presented. The inconsistency may be served up to the witness offensively with such a question as, "When you said (so and so) you were lying, weren't you" or, with assumed sympathy for the witness' dilemma, with such a question as, "Now, Mr.——, I don't want to confuse you. You said on your direct examination (so and so); now you have told me (so and so). Both of these statements cannot be true. Which is correct," and follow the witness' answer with, "And I take it you wish to withdraw your previous statement that (so and so)?" An affirmative answer to the last question constitutes a complete victory. If the witness refuses to withdraw either statement, he is in a sad plight. He has laid himself open to the charge of having wittingly or unwittingly, told an untruth and of refusing to correct his testimony when given the chance.

METHODS IN CONFRONTING WITNESS WITH PRIOR STATEMENT OR SIGNED PAPER: Where a witness has been confronted on cross-examination with a letter signed by him, which is definitely inconsistent with his direct testimony, a question is presented as to how to deal with the paper most effectively. Some advocates counsel having the witness identify the letter, later offer it in evidence, and then or in later argument read it with full dramatic effect to the jury. Others contend that the witness should be confronted with it, the inconsistencies pointed out, and the witness embarrassed to the utmost. It is submitted the latter is the best tactic. The witness, if possible, should be discredited while he is on the stand. The surprise is at least as effective and valuable then as later. The latter offering, reading and arguing of the paper gives it a double emphasis. Here's an example of a witness confronted with a prior statement, or letter:

Q. "Did you think we might not know of that letter, and that you could get by without the jury ever hearing about it?

A. "Yes, but I wasn't under oath when I wrote that letter.

Q. "Oh, I see. When you are not under oath, you are not particular whether you tell the truth or not, is that it?

A. "Well, I don't have to be, do I?

Q. "So that is your conception of honorable conduct, is it, to tell the truth or not, as it serves your purpose, so long as you are not under oath?

A. "You can put it that way, if you like.

Q. "That's the way you have put it, Mr. Witness; and that is all I care to ask you."

Perhaps a written statement has been obtained by the opposition which contradicts the testimony furnished by your witness upon the direct examination. About all that is left to do is to find out which facts the witness thinks represents the truth. In such a situation there is no place for a defeatist. It is then that courage is needed and a greater effort is used to find and use other sources of information, which would not otherwise have been used. (Trial counsel must not give up. In adversity, the fight is really on. Out of bad spots and in hard cases, great lawyers are found.)

METHOD WITH STUPID WITNESS: Now the cross-examination of the stupid witness:

The stupid witness of poor perception is usually easily confused. A temptation is present to harass him to the breaking point. Such a course has its dangers. If the witness is apparently honest, he is likely to have the sympathy of the jury. A mild, tolerant, and ingratiating examination is more apt to impress the jury than a loud, vigorous, and demonstrative one. The advocate, by his cross-examination of a witness of this type, should endeavor to leave with the jury the feeling of sympathy for him but a conviction that he is far below the average of intelligence, that his perceptions are inaccurate, his judgment unrealiable, and that the other side has taken advantage of his weaknesses.

METHOD WITH HESITANT WITNESS: How shall we deal with the hesitant witness? As has been suggested, where a witness appears timid and hesitates in making response to questions, the cross-examiner is called upon to make his determination from all the indications whether the manner of the witness is due to an uncertainty as to the matters about which he is being interrogated, or to a natural embarrassment because of the strange environment in which he finds himself. In any event, the cross-examination at the start should be conducted on the latter assumption. A few relatively unimportant questions, put in a casual and friendly manner, will usually furnish the basis for such a determination. If the cross-examiner decided that the witness is trying to tell the truth, and that his hesitation is due to a feeling of uncertainty as to the facts, the examination should be gently directed to developing that fact by such suggestions as, "You are not quite certain of that, are you, Mr.——?" or "Might it not have been one hundred feet rather than fifty feet?" or "You didn't actually measure any of these distances, and you might easily be mistaken in your estimate of them." If, on the other hand, the examiner concludes that the hesitation of the witness is a peculiar personal trait, such an examination as has just been suggested is not likely to produce a favorable result. Where such a witness qualifies his answers with statements such as "I think" or "the way it looked to me," leave him alone. It frequently happens that, if pressed to admit uncertainty, he will strengthen his former answer with some such statement as, "Well, I am giving you the best of my recollection," or "I don't want to say anything positively unless I am absolutely sure of it." Such answers enhance the credit of the witness with the jury.

METHOD WITH EVASIVE WITNESS: How shall we best deal with the evasive witness? A type of witness commonly encountered in the trial of contested cases is the one who attempts to evade specific questions asked on cross-examination. Such a witness is not necessarily dishonest. More often than not, the disposition to evade springs from his direct partisanship, or a reluctance on the part of the witness to qualify his direct testimony for fear of weakening it. A witness, however, may be exceeding the limits of his exact knowledge of a fact, and resorting to evasion to avoid stating details which may get him into difficulty.

The handling of such a witness requires an alertness to perceive the evasion.

This is not always obvious. When it becomes apparent that the witness is trying to evade a question, the cross-examiner's effort should be concentrated upon keeping the witness to the original question asked. With a clever witness this requires persistence. The advocate's determination and patience must outlast that of the witness. The best results are obtained by deliberate, carefully framed, incisive, and simple questions. The examiner's temper must at all times be kept under complete control. An example of evasion and how to cope with it:

"How long have you been in the music hall business?" asked the lawyer. The witness answers glibly, Theatres and music halls, twenty-one years." Then with deadly emphasis, immediately followed with, "Mr. Cox, how long have you been in the music hall business?" The witness, realizing that with this lawyer any further attempt at evasion was useless, answered, "Seven months."

An effective device in the examination of an evasive witness, if the answer is clearly unresponsive, is to follow it up with a motion to strike and then to ask the court stenographer to read the question to the witness. This is ordinarily more effective than for the advocate to repeat the question. The reporter is generally regarded by the jury as a neutral officer of the court. The literal reading of the question in a dispassionate tone of voice impresses the jury. The impression is heightened if the witness persists in his attempt to evade, and the reporter is called upon to repeat the original question several times. Another effective device, when the attempted evasion has been made clearly apparent, and the support of the court is reasonably certain in the event of objection, is to ask the witness, "Mr.—— don't you want to answer that question?" or, "Why don't you answer that question?" or, "Now, Mr.——, you can answer that question if you want to. Why are you trying to evade it?"

METHOD WITH WITNESS STALLING FOR TIME: Sometimes evasion takes the form of repeated attempts on the part of the witness to "stall for time" in which to think up satisfactory answers. In such cases, the witness affects to have trouble hearing or understanding the questions and asks to have them repeated. The experienced trial lawyer permits this play of the witness to go far enough for the jury and court to perceive it, and then follows with such questions as these: "Now, Mr.——, the question is simple. It has been read to you twice. Answer it," or "You know well enough now what the question is. What is your answer?" If a witness habitually hesitates, or takes an unduly long time before answering, it is well, both for the benefit of the jury and for possible later argument in the event of appeal, to get the fact of such a delay into the record. This can be done by pulling out one's watch, timing the witness, and following with, "Mr.——, it took you exactly fifteen seconds to answer that question. What was there about it that caused you to wait so long" or, with the same preface, "If you remembered the fact, why didn't you state it at once?" or "Were you calculating the effect of that answer before you made it?"

If it can be established by cross-examination that a witness is evasive, a long stride has been made toward completely discrediting him. When the examination is completed, a trial note should be made of the circumstances, and the matter vividly recalled to the jury when the evidence is later discussed in argument.

Now we shall treat with the flippant, or "smart-alec" witness:

METHOD WITH FLIPPANT WITNESS: Occasionally there is encountered a witness whose vanity and self assurance deludes him into the belief that a court room, as well as every other place, is a stage designed for the exhibition of his imagined wit. Such a witness seldom does the party who calls him any good. The ordinary jury dislikes a smart-alec witness as much as it dislikes a smart-alec

lawyer. The shrewd cross-examiner will aim in the cross-examination of such a witness to convey to the jury the impression that he is light-headed and irresponsible. This can sometimes be done by permitting the witness to over-extend his efforts and then pulling him up sharply when it is apparent that the jury is becoming disgusted with his attitude.

ILLUSTRATION: In an action for damages for serious personal injuries, after such a witness had repreatedly ogled the jury and tried to provoke its laughter by "wise-cracks," the cross-examiner, choosing the right moment, interjected with a sharp question: "Mr. Witness, do you see anything particularly funny about this case?" The witness was surprised into quickly replying, "Why, no sir." "Well," continued the examiner, "the plaintiff here has lost his right arm, and none of us on his side of the case can see anything funny about that. Now, will you please pay attention to me, and give me serious answers to my questions." The witness was thrown completely off balance, and the expression on the jurors' faces showed their complete approval of the reprimand, or occasionally a witness comes forth with a comment which is roaringly funny. This is very seldom, but when he does, laugh with him. It is a certainty that the jury will. Enjoy yourself and then get back to business. Don't stop to trade wisecracks. The smart aleck is seldom really funny. He usually has a great admiration for his own humor or for the devastating remarks which he believes that he is making. Occasionally the trial judge will sit down on such a witness, but certainly don't ask for the help of the trial judge. Simply ignore those replies and persist in getting in a direct answer. Such a witness will invariably over-reach himself. And if he persists in trying to be funny, some such comment as the following will reduce him to shreds. "Mr. Smith, Marjorie Jones has a broken back. This case is not funny to her. Now please give me serious answers."

METHOD WITH WITNESSES WITH PREPARED STORY: Now for the witness who has been coached to recite a prepared story.

There are times when the manner of the recital of a detailed story on direct examination indicates definitely that the testimony has been fabricated and memorized. In this situation, one of the most effective methods employed by the skillful cross-examiner is to ask the witness to repeat the story. If the examiner's "hunch" is correct, the witness will repeat his testimony almost exactly as he gave it on direct. If this is followed up by asking a question which will compel the witness to start in the middle of his story, he will likely either become hopelessly confused, or, after some hesitation, pick up the memorized narrative at the indicated spot and repeat it substantially as he has twice stated it before. Such a consequence must almost inevitably discredit the witness with the jury.

IF POSSIBLE, KNOW YOUR JUDGE: Some judges may not, however, permit you the leeway of asking for a repetition of the story. Hence, you must know the judge's disposition. If you don't, you may decide to try and see how far you may get.

METHOD WITH DISHONEST WITNESS: The dishonest witness presents a problem. If a cross-examiner has no impeaching material in hand with which to impeach a witness whose dishonesty is apparent from his attitude or facts developed in the direct examination, and his testimony is at variance with the clear weight of testimony in the case, it is sometimes good tactics not to cross-examine the witness at all. To dismiss such a witness with a statement, such as, "I am not going to cross-examine this witness," or, "I have nothing to ask you, sir," and later argue to the jury the futility of cross-examining such an obvious liar, may prove more effective than an attempt to cross-examine.

On the other hand, if the witness' testimony is palpably false, some advocates think an advantage is gained by pushing the witness to further extremes, either to show the absurdity of his testimony or develop improbabilities which can be made the basis of effective impeachment. If the witness has made previous contradictory statements, he should be thoroughly cross-examined to show his shift of position and, if possible, the reasons therefor. If the cross-examiner has the material in hand, he can sometimes disconcert such a witness by unexpectedly putting a bold question. As Bacon says in his Essay on Gunning: "A sudden, hold and unexpected question doth many times surprise a man and lay him low."

As to the matter of cross-examination of a dishonest witness, some advocates consider that the best results are obtained by a determined, vigorous and rapid examination; others, that an easier, slower approach, with an inflection of voice suggesting the examiner's incredulity, is more apt to persuade the jury of the witness' unworthiness. Ridicule and sarcasm are dangerous weapons to use, but, if ever employed, are indicated in the examination of a witness of the type now under consideration. Even here, their use may be overdone. As in all cross-examinations, caution is sounded to "let well enough alone" and drop the witness when it is considered that his viciousness has been sufficiently revealed.

CROSS-EXAMINATION OF WOMEN: There is an old rule of cross-examination: "Never cross-examine a woman." This is one of the most foolish rules ever preached by academic text writers; yet it has some merit in indicating that there are certain elements of danger in the cross-examination of women. Women are, as a general rule, clever in repartee; they are resourceful in their capacity for ingenuous explanation; they are evasive; and they have a tendency wholly to ignore the point in issue or the question asked, in order to make a reply which they feel will be damaging to the cross-examiner. In addition, there is generally the feeling that chivalry requires the exercise of the utmost courtesy toward the female of the species, however much she may exaggerate, prevaricate, or color her testimony. Any display of a lack of such chivalry will judge the cross-examiner a brute and find against his client.

These fears are no longer a matter of the concern that they might have been some decades ago. While no juror would welcome the spectacle of a lawyer browbeating a frail, gentle appearing, old lady, or young child, we must recognize the fact that chivalry, although not dead, is at least somewhat dormant. The granting of equal rights has seemed to reduce the need which has been felt in past decades for protecting the frailer, and more long-lived, sex. Men are apt to judge a woman witness on the basis of her testimony and not her sex. In addition, the advent of women jurors in the jury box often means that these jurors are more critical members of their own sex than they are of masculine witnesses.

The Positive Witness Who Could Do No Wrong

Suppose, again, a defendant has rather bragged about how good his brakes were—could stop in twenty feet, going at his speed of twenty-five miles an hour. Perhaps he struck a pedestrian. The attorney would go into his eyesight—splendid, of course; his opportunities for visibility, which were probably excellent. He might follow this up, then, with the fact that the driver saw the pedestrian start to cross the far crosswalk as he entered the intersection, approximately thirty feet (the width of the street) plus eight feet (width of the parking) away. But, he protests she didn't pay attention, didn't even look up! The examination might then proceed:

"You saw that she was paying no attention to you?"

"That's right."

"And that she was walking directly in front of your car?"

"Yes, sir."

"And you were going only twenty-five miles an hour?"

"Or less."

"And you could stop your car in twenty feet traveling at that speed?"

"Just about."

"Was your foot paralyzed?"

"No, sir."

"Then, Mr. Brown, will you tell the jury why you didn't stop your car instead of knocking Marie Jones down?"

This is one of the few types of instances where you may risk permitting the defendant a general answer. Yet, how many men, even lawyers, could give an answer which the jury would accept, even after deliberation, much less when under pressure on the witness stand. He may say, "Well, I tried to swerve," which is followed by: "But you didn't stop," or he might say, "Well, I had the right-of-way," which upon final argument, will be characterized by great bitterness. This callous creature, who values his precious right-of-way more than the life of a fellow human being, etc.

EXPERT MEDICAL WITNESS: I will not touch upon cross-examination of medical or other scientific witnesses, for that would require a lecture all by itself, as it is extremely technical and would require much time to treat with the subject accurately. However, I would say, in passing, impress upon your own expert in your case, to use simple language. If medical terms must be used for the record, to do so sparingly, and then interpret them in lay language.

The hypothetical question comes into play often in cross-examination of expert witnesses, and must be carefully prepared. Professor Wigmore states as follows:

"The hypothetical question is one of the few truly scientific features of the rules of evidence. Indeed I fail to see how a scientific issue could properly be decided without questions of this kind. I agree that the use of these questions is frequently abused in practice . . . so are scalpels and judge's gavels, but that is not a sufficient excuse for their total abolition, although it may be an argument for confining them to those who know how to use them."

A lawyer who was visiting his psychiatrist said, "I had Dr. Enright, the eminent authority on forensic medicine, against me in the case. All the court would allow me was a hypothetical question."

"Yes, go on," said the psychiatrist, soothingly.

"Our office worked on the question for weeks. We checked all possible answers against the most authorative medical opinion. It took me one full hour to ask the question."

"And then when I had finished . . ."

"Yes?"

"The witness asked me . . ."

"Yes?"

"If I would mind repeating the question."

LET WELL ENOUGH ALONE. We have often been advised to let well enough alone. Try to do so. I am reminded of another story.

A stenographer who worked in a lawyer's office and a witness to a will, testified she thought the testator when signing the will was sane. She was youthful, etc.

Question: "Have you ever in your life seen anyone who it was claimed was insane?"

The witness paused, began to giggle and replied: "I guess I have. I have been employed in an insane asylum for the last two years as an attendant."

While cross-examining, let well enough alone! Don't let your associate lead you into asking a question you think is very risky and might backfire. Here I recall the case where a famous lawyer was imposed upon in a murder case by an associate attorney for the prisoner, to ask a certain question to which he was most opposed and against his own better judgment—the answer to which convicted the client—at the next recess said, "Go home, cut your throat, and when you meet your client in hell, beg his pardon."

HOW TO BEGIN AND HOW TO END CROSS-EXAMINATION: We often ask ourselves the question: "How shall I begin, and how shall I end, the cross-examination?"

Experienced advocates stress the importance of commencing a cross-examination with a question designed to capture the attention of the jury, and if possible, disconcert the witness.

The determination of when to end a cross-examination is even more important than to determine upon its appropriate commencement. In this there is little chance for controversy. If possible, end on a high note; in other words, drop the witness after a telling point has been scored. Cross-examination, like argument, to be effective, requires a climax. Just as the effect of a good argument is destroyed by an anti-climax, so the legitimate advantages of a brilliant cross-examination which has scored many hits are thrown away by a final descent to interrogation on petty or immaterial details.

It is a mistake when a highly favorable answer has been secured on cross-examination to labor it in an attempt to make it stronger. The risk is too great that the witness will retract or modify it. In any event, before the final, killing question is asked, the witness must be made to commit himself irretrievably to some position from which he cannot retreat. The last question should never be asked, or the forgotten document produced, until the witness has crawled out to the very end of the limb, and the attorney must use a sharp axe which will sever the limb cleanly.

TEARS! And while speaking of avoiding an anti-climax, when you argue to the jury pointing out the inconsistencies of the defense witnesses and you are waxing eloquent—and have brought the jury to tears—remember this also, that as in cross-examination, you must know when to stop—"That any moisture, including tears, dries when too much hot air blows upon it."

CONCLUSION: I trust that the few suggestions I have thrown out, which in turn have been handed down to me by others, will be of some value to you in the future, if your trials and tribulations have been few in number. To the experienced lawyer these utterances may be of little value. You have, or will hear, from very many learned and eminent men, who will treat with subjects which are also extremely important in connection with the presentation or trial of a lawsuit.

All the subject matter we shall be or have been privileged to hear during this convention will be important. One cannot state that one subject will be more important than another or that one phase of the presentation of a lawsuit should

be given greater attention than another, because they must all be correlated, since they go to make up the whole. You cannot afford to overlook any important factor in a lawsuit.

This brings me to a story taken from the Talmud. The Talmud, as some of you may know, is a work wherein is deposited the bulk of the literary labors of numerous Jewish scholars over a period of time between 200 B.C. and 500 A.D. The Talmud contains a great fund of experience and wisdom accumulated throughout the course of the ages.

In the Talmud there is a fable concerning anatomy, which may be appropriate here. The brain, the eye, the stomach, the heart, among other organs of the body, were discussing their various functions and their importance, each believing that its function was most necessary to man, as if without that particular organ a man could not exist or function properly. The eye said to the brain, "Listen here, brain, I am more important than you are because I can see things, and even though you are brilliant and capable, you could record nothing that I would not permit you to, by taking the various images that appear before me. Said the brain to the eye: "Listen here, eye, you are only a window, through which one may see certain images, but without my interpretation, they would be meaningless to man." Spoke up the stomach: "Listen here, I am more important than both of you. Suppose I would stop digesting the food, where would you be?"

Spoke up the heart, "I think I am more important than all of you. If I were to stop pumping the blood and circulating the same, you would all perish." But these organs did not reckon with God, for at that moment God, who was listening in, spoke up and said: "You all be quiet, you have got to work together in harmony. The malfunctioning of any one of you would indeed be harmful to man. Hence you must work together like a team."

So it is with the art of cross-examination as well as the other important factors in the trial of a lawsuit. We dare not say, however, that this phase of the case is more important than the other. It must cooperate with the other factors in trying a lawsuit, to the end that your client and yourself may win and be successful.

PRESIDENT BROWN: Thank you very much, Mr. Rosenthal, for a very instructive and interesting presentation of the art of cross-examination. We have all appreciated it very much.

At this time the meeting will be adjourned.

(NOTE: Mr. Erle Stanley Gardner was then introduced by Mr. Robertson. Address not published. See page 115, ante.)

PRESIDENT BROWN: The meeting will please come to order. At this time I will present Mr. T. M. Robertson, who will present our next speaker. Mr. Robertson.

MR. T. M. ROBERTSON: Ladies and Gentlemen: We, who have studied the law of Idaho, I think, are deeply appreciative of the extent to which Idaho jurisprudence is founded on California jurisprudence. We now have the fifth of the quintet of Californians who have come up to our meeting this year, without pay and for the love of the law, to give us the benefit of their professional learning and their professional experience. The Californian we have to present at this time is not entirely a stranger to Idaho. He tells me he spent quite a period of time during his boyhood years in southern Idaho around Bear Lake and Twin Falls and Magic Valley. Mr. Russell is a law partner of Mr. Jamison, who spoke to us yesterday afternoon. The subject of his talk today is one that I know will vitally

interest every member of the bar, and it is on the subject of Estate Planning. Mr. T. Newton Russell, from Fresno, California. (applause)

MR. T. NEWTON RUSSELL: Thank you for that nice introduction, Mr. Robertson. Ladies and gentlemen of the Idaho Bar and Bench: I want to thank you very much for your invitation to come here and the honor of appearing before you, after having been here for over a day, I am more happy for the opportunity of meeting you people and talking to you than of seeing Sun Valley, and that is a real treat in itself.

You know my position on the program today is rather interesting. I follow Mr. Gardner, a man who writes mysteries, and I come to lecture on tax law, so I come to talk about mysteries. (laughter) Mr. Gardner has a solution in his books. I have read a lot of them, and he always solves them. I am not sure I can.

Coming up here from out-of-state sort of has an implication of expertness in it. As the man said, there may be some truth in it. This is the way he said it. He met a friend on the street who said, "Bill, gee it's good to see you. I hear you made a killing in oil, $50,000.00."

"Uh huh," he said, "there is some truth in it. Of course, it wasn't oil, it was coal. And it wasn't $50,000.00, it was $5,000.00. And I didn't make it, I lost it." (laughter)

Now my subject, as presented by the president, is estate planning. In the pamphlet my subject is given as Estate and Income Taxes. Either way, when I come to you here, I would like to give you what I would like to get when I go to a law lecture—not so much a splendid survey of the entire subject but some parts of it which I can absorb and use and maybe digest without reading a lot of material I am not going to have time to study anyway. That is what I hope to do today.

I want to caution you that I don't know your local law. It is somewhat related to our California law. I have been talking to some members of the bar and bench about it, and I am going to try to bring out some of the income tax and estate tax and gift tax problems. It will be up to you to find out what your local law is, and that is going to be difficult, because you don't have cases on some of the points that are important; then you apply the tax rules.

I want you to feel free to ask questions. I would like to feel free to defer answering them, or to answer them if I want to. In some cases I may not know the answers. In other cases I may think it will take us rather far afield from our subject. With that introduction, let's go into some of our problems.

At the risk of disappointing some whom I have talked to, I want to start off with what I think is the most fundamental matter that any lawyer, whether he specializes or not, should have some knowledge of in trying to work out any phase of an estate planning program. That is the matter of cost basis.

Now, cost basis, or technically adjusted cost basis, is a phase out of the Internal Revenue Code. It means book value. If you have a piece of business property, you have a cost. If you improve it, you capitalize your improvements, and you take your appreciation. Up to a given date, you will have a given book value on that property. It is important to you in two ways. If you sell the property, your gain, taxable gain, or loss, is measured by the difference between your adjusted cost basis and the sales price. If you don't sell it, you will, if you have any income, want depreciation, and your depreciation will be based on your cost, as to the portion that is depreciable. If you have a piece of land on which a building is placed, the building will be depreciable, but the land will not, of course.

You are all probably acquainted with the nature of cost basis and book value

of property with respect to its acquisition by purchase. How about the case of death? Well, for my guinea pig, I have Mr. Daniel Dunder. First of all, let's take the case of Mr. Dunder's separate property of which he is the sole owner. He has a cost basis on that property, or book value, of $10,000.00. He has depreciated it down to that point, and he acquired it early. We have had inflation, and it has built up to a market value today of $50,000.00. If he were to sell that property, he would have a profit, or equivalent of capital gain, of $40,000.00.

As to capital gain I might mention this: There was some comment about it yesterday. Land itself is not a capital asset as defined in the Code. It is, however, treated under certain circumstances, for gain purposes, as if it were, so that the maximum tax you would pay on the profit would be 26 per cent. That used to be 25 per cent, and it is much easier when talking to calculate the tax on a one-fourth basis, so I will do it that way. On $40,000.00 it would be $10,000.00.

Mr. Dunder doesn't sell the property, but he dies. His estate consists of that asset, and others, presumably, and it becomes necessary, in his estate, to raise money by selling that asset. It is sold for its market value which is $50,000.00. Is there or is there not a taxable gain of approximately $10,000.00 to pay? I am talking about what is substantially an income tax now. There is going to be a federal estate tax, if he has over $60,000.00 in property of some kind. But is there this capital gain tax? The answer is no.

Under the Internal Revenue Code, Section 113 (a) (5), if the property was acquired by bequest, devise or inheritance, by the decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition. It is worth $50,000.00. It gets a cost basis of $50,000.00, and when he sells at $50,000.00, there is no gain or loss. That is one of the fundamental rules. That is something you should always have in your mind.

We have, over the last ten or twelve years, had appreciation in value. That is the other side of saying we have had inflation, and people who had original costs which have been written down, or have been improving the property with hard labor, have now got, very frequently, a substantially higher fair market value in their property than they have cost or book value. And property which does pass through the estate by bequest, devise or inheritance gets this high value as its new cost.

Compare this with joint tenancy. And I understand you don't have joint tenancy between spouses very often. Mr. Dunder may have some joint tenancy with his brother. They are both bachelors, for example. If they have the same situation, a $10,000.00 cost and a fair market value of $50,000.00, and Dunder dies, the property, by right of survivorship, is in the hands of the surviving brother. The brother sells it. Does he have a capital gain tax to pay? (Again we will have an estate tax, if it is over the exemption, but we are talking about this capital gains tax.) The answer is yes.

Well, the question is, why didn't we get a new cost basis as we did before? The answer is simple, although not realistic. Section 113 (a) (5) doesn't cover the right of survivorship under joint tenancy. It covers bequest deviseor inheritance, and from that simple matter of how you hold title, the brother or surviving tenant will have to pay $10,000.00 in taxes, which he would not otherwise have had to pay.

Now we come to a third situation which is common to you people in this state and my state, and that is the community property situation between a husband and

wife. And here is one spot in the tax law where we have a bargain basement deal. Here are two for the price of one. This is the way it works:

Dunder dies, and he had a piece of property that had a cost basis of $10,000.00. It is now worth $50,000.00, when he dies; he owns one-half, and she owns one-half, under your property rules. And we are going to have an estate tax on his half. But does his death have any effect on the other half, the wife's half?

Well, it seems to me and to you that his estate is going by bequest, devise or inheritance, under our respective laws, and so we should get, and we do get, a new cost on Dunder's half that goes to his wife, or whomever else gets it. But how about the other half? That is where the price is good with respect to what you are getting, you are getting, for one-half being death-taxed, a new cost, not only on the decedent's one-half but also on the surviving spouse's half of the community property. It is written right into the law, Section 113 (a) (5), and put in there by the Revenue Act of 1948. There are historical reasons for it which we don't need to go into at this time.

That has tremendous significance. Compare, for example, the situation where you had a joint tenancy between husband and wife, if you could have it. Dunder dies, and she gets his property in her hands with a cost basis of $10,000.00, but she had to pay estate tax on it. If it has a $50,000.00 value and she sells, she has this large capital gains tax of $10,000.00. Whereas, if the property is held as community property, not only does Dunder's half get a new cost, but her own, the surviving wife's or husband's, gets a new cost. It doesn't matter, either spouse. They save $10,000.00. That is a real savings.

Now, I am not sure of your local law, and I appreciate the difficulty for you, without case law to work from. But it could be a valuable right to you if you could go back and forth with the way you hold property between spouses. We can do it in California. We have probably gone too far; we can change the character of the wife's and husband's property over the breakfast table. We don't advise it, but they sometimes do it.

I have this illustration here, which occurs to me, I don't know what your law is, but you might consider it. Suppose the husband and wife each have $5,000.00 cash as their separate property. They each inherit it. Suppose that the husband buys, with his $5,000.00, a piece of land. And the wife buys, with her $5,000.00, a different piece of land. It is his separate property and her separate property. I appreciate the earnings will be community property under your law, but I am looking at the land. If he dies, we will have a new cost basis on his land under I.R.C. 113 (a) (5). We won't have on hers. If she dies, we will have a new cost basis on her land, but not on his. In either case the property of the deceased spouse will be subject to estate tax. So we will have the same estate tax, but we won't have any benefit income tax-wise.

Suppose they had transmuted these two pieces of property to community property—this piece over here is community property and this piece is community property. There would be no increase in estate tax. They each have a half interest. But when Dunder dies, we will not only have the same amount of property subject to estate tax (one-half), but we will have a new cost basis on the whole, and if she wants to sell, she will have that new cost benefit.

And it is not only in selling. There is a lot of benefit from the depreciation that you might secure on allocated amounts of value to improvements. I will get into that later. So there is one situation where free movement between the spouses

as to their property could result in very large tax minimizations. I try to keep myself from using the phrase "tax savings." It is pretty hard to know if you really save somebody some taxes until afterwards.

Now, here is another situation you might consider. Suppose that the husband and wife have some community property, and they have a fairly high book value. For example, I had an estate for a doctor I was planning a few months back in which this situation really was present. They had about 160 acres of some fine land. They planned to plant some cotton, put some in fruit trees, and some grapes. He built a large and beautiful home, with a part for his office. Now, start to play with this cost basis thing.

I am not sure whether we are going to have that much more inflation that we would be better to assume that when he dies it is going to have a higher market value than its cost. It could go up. If it does, we are going to have an awful lot of inflation. He is in deep, costwise already. He says so. On the other hand, it could go down, but it might not. I don't know which way to go. Am I going to shoot for the community property, so I get a new cost basis on her half and his, if either dies, or would I rather save the cost basis they now have? Well, you might say go to joint tenancy if you are afraid values are going down; that will be good, because it will be estate taxed at a lower value, but you retain this old high basis. Joint tenancy has many disadvantages, so I don't like joint tenancies, although we can do it in our state. I decided to use joint tenancy; so I had to hedge. I had them transmute their property to tenants in common in equal shares. They each have an undivided one-half interest. I don't know whether you can do it. If you can, consider the possibility, because here was my thinking on why tenancy in common was what they needed:

If the property increases in value, then I have hedged in that I will get a new cost on the half of the decedent who dies, whether it is husband or wife. If the property decreases in value, I will get a new cost, which will be down on the decedent's one half, but I will have kept my old cost on the survivor's half. Whereas, if it were community property, I would get a new and lower cost on the whole. So I have hedged. That is just one illustration of the possibility of being able to maneuver in the field.

I might mention, in passing, that that tenancy in common I created will not be basis for a marital deduction. It won't be the basis for marital deduction because the property was derived from the community, and Internal Revenue Code Section 813 on marital deduction treats that separate property, tenants in common property, as tainted for the purpose of marital deduction where it derived from community in 1942 or after April 3, 1948.

Now, just for your own interest, I picked up a tax case that construes your local law, Black v. Commissioner, 113 Fed. 2nd 355, and the facts are unusual. It was a Federal case but it did take a position with respect to your local law. It was decided in about 1940. It holds that the husband and wife can make the husband's separate property into community property which will be recognized for income tax purposes.

Now I have been talking, in almost every case, about when we want to sell. We have got a high market value at death, low cost, and we get a new cost equal to the market value, and we don't have any capital gain or loss. You may say that they don't want to sell. They have lived there all their lives. Their daddies have lived there. What would you have in the case of almost any type of asset you can think of? Take a ranch. On a ranch, you have maybe a barn or barns, fence,

underground pipe, well, pump, tenant houses, all of those items are properly subject to depreciation. Suppose you have two miles of fence. You have had it there for quite a while. It is going to be subject to depreciation, but he had depreciated it down to zero. He had written it off over three or ten years, or whatever the life of a fence is. But we have this inflation, this appreciation in value, and when we say this ranch is worth $50,000.00, that is not all attributable to the land, it is attributable to the land and improvements. And even if you are not going to sell, you will want this new depreciation and I mean new, because if you have written the fence off, and it is still there, it is worth something—maybe $1,000.00. All right, let's get it appraised at $1,000.00. It is not an additional amount to the total value. It is part of it. Appraise it and set it up on your depreciation schedule and start deducting the depreciation from income tax. That is valuable to the wife or heirs. You could have conceivably $1,000.00 worth of fence, several thousand dollars in wells, four or five thousand dollars on barns and so forth.

So when you, as attorneys, set up your inventory, maybe you are not going to have any estate tax return, because your estate is not big enough. But these points I am trying to bring out apply to big estates or little ones. The rule applies whether you have to pay an estate tax or not. So in your inventory or in your appraisal, or however you set it up, get it broken down—so many acres of land, so many miles of fence, a barn, what kind, grade A dairy, size of pipes, wells and describe them, so you can identify them. List them so that the accountant can pick them up and put them on the schedule and can take depreciation on the applicable life rules on that type of property. It puts income tax dollars in your clients' pockets.

Mr. Jamison covered this point yesterday. I would like to go into it a little bit more, because I think that there might have been some questions about it, and it is very, very valuable. Suppose that Daniel Dunder had a ranch, and in addition to having all this depreciable property on it that I have talked about, he had, at the time of his death, a growing crop. Now that crop could be in any stage of development. If it is just ground preparation, you are not going to pay much attention to it probably. It could be half made, three quarters made, or one quarter made, or it could be just ready to harvest. Properly appraised that crop is an asset of the estate, and properly there is an estate tax due to Uncle Sam on it, if you are over the exemptions so you are going to pay a death tax on it. If it is property, then under 113 (a) (5) isn't it property that passes by bequest, devise or inheritance which gets a new cost basis? Well, we say it is. The authorities aren't clear, either statutory or case. There is trouble with it because of Section 126 of the Internal Revenue Code, which was put in the law in 1942, to prevent super-accrual at death as to cash basis taxpayers and to spread out the tax burden on income items to persons who get the income. So if this is income of the decedent, which is received by an estate or distributee, then we don't get a cost basis probably. Well, we felt, (and a number have) that it is not a 126 item. It is property and part of the estate, part of the land, that should get a cost basis.

So if you have a client who dies, and they rush in to you to get the estate started, you should rush out and get an appraiser and get him in the field and find out what the crop is worth. Don't wait a week or two months, while you are getting the inventory worked out. Get him out in the field right now so that later, if there is any question about it, you have got a man who can say he was there three days after the date of death and he appraised the crops and knows what they were worth and that they were worth this much.

Let me give you an illustration of the importance of that. Suppose that crop would have been worth to Daniel Dunder, if he had not died, $27,000.00. Suppose that his cost on that crop, the ordinary farming cost, would be $17,000.00. He would have had $10,000.00 in ordinary income on which he would pay ordinary income tax. Now, suppose at the time he died the crop was substantially all made so that its market value, at that date, was $25,000.00. The estate sells it for $27,000.00, and the $2,000.00 difference in there is actually additional value on the gross, but you also have a couple of thousand dollars worth of expense for harvesting, hauling and selling it. The estate sold for $27,000.00. If that property gets a new cost basis in the estate of $25,000.00 (and if it is community property, it would be on the whole) and if that crop is sold for $27,000.00, you have only got $2,000.00 of income in the estate on that crop as against $10,000.00 that Daniel Dunder had, if he had lived. In fact, the estate's net income would be zero because it had $2,000.00 of harvesting and selling expense.

Furthermore, up to the date of his death, he had put out $15,000.00 in expenses on that crop. He had paid them. He was on the cash basis. If he had lived, he would have listed all of those $15,000.00 on his return and taken a deduction for them against the gross proceeds. Well, the law says that when he dies, his accounting period ends. You file a return from the first day of his accounting period to the date of his death. Incidentally, that will probably be a joint return with his wife. There is a lot of advantage in doing that ordinarily the first year. It is the only year he could do it. What will that mean? It will mean that in that period, let's say from January to August, he had $15,000.00 of expenses. Maybe he didn't have any other income during that period. Frequently farmers do not. That will create a loss, an operating loss, if the theory works, in his final decedent's return up to the date of his death.

Now, the law provides that operating losses, subject to certain computations, can be carried back one year, forward five. Well, if we have got enough of a loss, we might carry it back to the prior year and wipe out his prior income from the prior year and get a refund. And we have done it. Unfortunately, if we don't absorb the loss in the carry-back for one year, we can't go forward five, in this case, because you cannot carry forward from the decedent to his estate. They are two separate persons. You can't carry an operating loss from a partnership to a corporation or something like that. They are separate. There is a possibility that on the surviving spouse you could carry forward half of that. Now, as I say, the value of this is just tremendous. Look at the income tax consequences for that estate, zero income as against $10,000.00 income. And those are very conservative figures. It could be, and I have seen it, that the value of the crop would be $100,000.00 or more.

Well, let's review. The rule that I think is fundamental to all of you, as it is to me, is what is cost basis, book value. That is your original cost plus your improvements less depreciation. How does it change? What does death do to it? At death, you get a new cost, if the property goes by bequest, devise or inheritance. In joint tenancy it doesn't, it goes by survivorship. There is no reason that I know of for it, but the right of survivorship doesn't give you a new cost. That is one reason, among many others, why you are going to stay away from joint tenancy. If it is community property, you are going to get a new cost basis, not only on the decedent's half, but on the half of the surviving spouse.

The value of that cost basis thing is that cost basis measures the amount you are going to pay in way of capital gains tax, if you sell, and measures the amount of depreciation deduction you are going to have, if you don't sell, if you keep it as business property.

Now, I have a tough problem for you. We have some tools to work with. Let's start some estate planning. I don't know the answer to this one. This is a mystery. You have got this story now that a farmer should get a new cost basis on the growing crop at his death. By golly, we are going to run appraisers out there to get the value right away. But the client that dies is a member of a farming partnership. There are three members in the partnership, and he dies right smack when the crop is waist-high and ready. So you rush your appraisers out there, and they get the value all right. You want to say, "I have a new crop cost basis for my client on his third." But do you? What did we have?

Well, in California, under the Uniform Partnership Act, as I understand it, he has an interest in the partnership. That is personal property. That is one point. He doesn't own the crop; the partnership does. So when he died, he had a partnership interest. Do you get a new cost on that partnership interest? Yes, you do. But that new cost on your partnership interest won't put any money in anybody's pocket unless you sell the partnership interest, and the wife or heirs want to go right on. It is a family affair. They wish to continue operating the place. They don't expect to sell that partnership interest. It is not a depreciable item.

I have fought this out with an agent. He said, "You can sell."

I said, "They will never sell. They will pay the death tax and never get any benefit out of it."

Well, it seems to me what you are going to have to do—and I don't know the answer—is to convert that cost basis that the treasury department will recognize that you did get on the partnership interest, convert that cost basis to the cost on the individual assets of the partnership as to the decedent's portion of them. Now, that gets you into a tough area. Let's look at it briefly.

When you dissolve a partnership, what is your situation? The partnership has acquired a lot of property. It has a cost on each one of those items, unless it is depreciated down to zero. But that is cost. Zero is a number. The partnership has a cost, but the problem is the partner doesn't have a cost on those particular items. He had a cost basis on his partnership interest. That is what the law is, as near as we can make out; when you dissolve a partnership, and you get an undivided one-third interest in these assets, your cost basis on your share of these assets is your cost basis on your partnership interest allocated among the assets in the ratio of their fair market value to each other.

Now, we have got the possibility of doing something. We have got a new cost here on the partnershop interest of $50,000.00. Most of the value behind that is in growing crop. Incidentally, when you dissolve a partnership, nobody knows what happens to the partnership's cost basis. It apparently blows away. We want to convert that $50,000.00 cost basis we have got in that estate on this partnership interest to its proportion among these assets, particularly this crop.

Well, we have got a growing theory or entity in partnerships which Mr. Jamison spoke about yesterday. The Uniform partnership Act goes back to common law, and to some extent we have an entity theory, so when we get a new cost on the partnership interest we have got to get rid of that entity. Death dissolves the partnership. But the tax cases have a weasel word, terminate. As near as we can make out, you have got not only to dissolve that partnership, but you have got to terminate it. Get it completely out of existence, and then the estate has, in its hands, its proportionate share of these assets with a cost basis which, in toto, is the amount of the fair market value of the partner's partnership interest at date of his death.

Now, I don't know exactly how you make that conversion, but I will tell you what I have tried, and if you read the Uniform Partnership Act, it worries you somewhat. Move in on the darn thing fast. If you wrote the partnership agreement, you might have helped yourself if you put in the right provisions. If you wrote the will, you might have helped yourself. But the partnership is dissolved. Now terminate it, eliminate it. Get the assets out of the partnership. Give the creditors all the assurance they want. Pay them, if possible. If not, have assumptions of liability by the partners. But get out an individed one-third, in our case here, interest in all those assets to our estate. If you want to go on from there, as you probably will, and operate that property, you may want to form a new partnership. But you have local law problems. Can the estate be a partner? We believe it can. If you have written the will, put in that you want the estate to be in the partnership at the discretion of the fiduciary and that it is to the best interest of the heirs.

We got the assets out of the partnership. We worked fast week-ends and nights to do it. Now the estate owns an undivided interest in that beautiful barley or wheat crop. Next this thing gets bigger or tougher, because some way or other, it would be advisable for you to keep that crop out of that new partnership. If you put the estate's one-third interest into that partnership, the other two partners didn't get a new cost. They are back at the old basis; if you keep the same profit sharing ratio, and you put in a higher cost figure on this crop as to the estate's one-third interest, then unless your estate gets its entire benefit of that entire new cost basis, you are changing the profit sharing ratio by giving some of that benefit to the surviving partners.

You can see it is a tough area, but there is something to chew on there, and as a matter of fact, we are working on it all the time. We had a case that went to conference, and incidentally the idea was new to us then and pretty new generally, and I didn't know how far we would go. The agent wouldn't give me anything. The conferree wouldn't give me anything. He wanted to send it to Washington. I had gotten a court order that this partnership was not only terminated but all assets distributed out. I'm not sure how much weight that carried but we won the case and the taxpayer didn't have to pay a $24,000.00 deficiency; he was very happy.

Now there is just one more item I want to cover on cost basis at death. It is a rather dangerous device, if handled carefully, but a very good one if it will work under your local law or under the law of any foreign jurisdiction. People don't want to make a will. They just really hate the thought of making a will. And furthermore, they don't like the idea of having a probate of the estate and paying attorney's fees and costs. Moreover, if they are elderly, they feel they desire now while alive to put their property in a position of some form of administration. Well, the revocable inter vivos trust is a wounderful device for that purpose. It is a tough one. You have to watch it like a hawk. You have got to comb and recomb your draftsmanship and read the best form books you can find. Read the case law. But it has a lot of advantages. Let's look at cost basis in that situation.

Section 113 (a) (5), our old friend, says that if a grantor-trustor sets up a revocable trust in which he has all the income, equivalent of absolute ownership, then they will treat, for cost basis purposes, the property which he transferred to this trustee as getting a new cost basis. They say it will be treated as if it were a will made on the date of his death.

So first of all, you don't have to worry that you are going to crystalize cost

basis by transferring into this trust, if you can revoke it. Make it completely revokable, all rights reserved to the trustor, and if you mean it is revokable, say so. Spell it out. If it is revocable there is no taxable gift when he transfers. For income tax purposes, it is not even an income tax entity; the income is still all taxable to and reported by the grantor-trustor-owner of the property. And incidentally, if I have time to get there, I will talk about testamentary trusts later; bear in mind that I will then be talking about an entirely different animal. There the fellow who set it up is gone. Here we are talking about a revocable trust, and the trustor is still very much alive. This device has a number of advantages which I have to cover rather rapidly. I have used it where there has been an ancillary problem. The client has ten acres in Ohio. I don't know whether Ohio has the kind of law that we can use this for. But it might be that you save probate administration. You put it in some form of revocable trust while the client is alive. You would get a new cost basis at the date of the client's death and avoid anullary probate administrations.

We have used this in our practice. In fact I used it about a year ago in a very large estate, about $1,500,000.00. These people were elderly, and they acquired this property over a period of many many years. They were 85 and 86, very astute and very sharp. But they could not bring themselves to make a will. They knew they should and they worried about it for about ten years. Back in about 1943 we had worked on their estate and broke it down to separate property, which was a desirable thing to do at that time, and that made it possible to look for a marital deduction at the time of their death. They had no children. They had a nephew, who was already operating the property for them. He counseled with them, and he made most of the small decisions, but he had to come back to them for signature and that sort of thing. So there was prepared a revocable inter vivos trust that they were willing to sign. Strangely enough they didn't look at it as a will. It took care of the property right now and passed it along. Well, it has been quite sitisfactory. Not too long after the program was worked out, the husband did die. Of course that then fixed his trust. It was no longer revocable. It provided for income for the wife for life and remainder over to certain named nephews and nieces. It also provided for certain property to go outright to the wife. We didn't advise that tax-wise, because it was such a large estate, and their needs were small. She simply didn't need it, and it would pyramid the tax on the second death, but they felt they had no immediate children, and anything these neices and nephews got, was lucky for them, and it was, so why not absolutely give completely one hundred percent protection to each of the spouses.

Now, be careful of this inter vivos revocable trust. In some jurisdictions it is regarded as a will. In some cases it fails. Don't let it be a passive trust.. It can't be just dry. That will come under your local law, and you will have to look it up.

Now, the material we have been covering, has considered cost basis as affected by death. It is very important that we next consider what happens, if anything, when property is given away, not at death, but during life. Let's take our friend Daniel Dunder.

Dunder's ranch is worth $50,000.00, and he has a cost basis of $10,000.00, and quite a bit of that is in improvements, which we would like to depreciate. But he has his depreciation schedule way down after all these years. He gives this ranch to his son as separate property. He gives it to his son and makes a complete outright gift of it. His son is struggling along, and he does make a pretty good income a year or two when he has a lot of rainfall, and he finds, to his dismay, that he has lots of income. He has his ordinary expenses on the crop, but no

depreciation. Why? Because the rule is that his cost basis, the son's, is the same as that of the father, the donor.

Now, that is the rule after December, 1920. That is the rule with the exception of this situation: The son might want to sell that property; suppose the basis of the father was up high and the value happened to come way down low, and that son had a lot of capital gain or other kind of profit somewhere else. Dad might say, "Here, son, I will give you this piece of property. You sell it at a loss and you take the loss against all that gain." The law says, in that case, your basis is not the donor's basis but the fair market value at the date of gift.. You won't run into that situation until our economy goes over the hump and we get into a down-sweep.

Now, notice this, Dunder gave his son this fine piece of property worth $50,000.00, but the next day he died. So the son was in the position of having this property on his hands at a $10,000.00 cost basis, but if Dad waited two days and left it by will, the son would have had a $50,000.00 cost basis. Instead of having two or three thousand dollars on the depreciation schedule, he would have had twenty or thirty thousand dollars. The moral is, be careful about this gift-giving. Look at the amount of depreciables, on the property. Maybe there is some other kind of property you can give, so have this father give that, and it will solve the gift problem in the way you are trying to work it out without sacrificing cost basis.

I want to go into that a little more in this way. Let's look at the entire gift field. For the benefit of those who may not have run into it too much, let us briefly consider what the gift tax law is. It is a tax on the transfer of property during life by gift. The law makers said, "Well, if you die, we will get an estate tax out of your estate. But if you give it away during life, we won't, because you won't own it at death. So to take care of that situation, we will apply a gift tax." The rates are about three-fourths as high as the estate tax rates. In looking at any volume of property, and comparing the two rates, you will find the tax rates in about that proportion.

The exemption on gifts is a lifetime exemption of $30,000.00. Each one of us has one $30,000.00 lifetime exemption under the present law. You can use it up a little bit at a time, or all at once, but once gone it is all gone. Now, I was talking about exemptions, and some of you are wondering what about this three thousand dollars you've heard about. That is the exclusion, that three thousand dollars. They couldn't police every gift made, so they said, "We will forget that first three thousand dollars that any one donor gives to any one donee." If you had a million people, and you had three thousand dollars to give to each one of them, you could do it every year as long as you held out. There would be no gift tax to pay and no return to file, if it isn't over three thousand dollars. The minute you go over three thousand dollars, you enter your lifetime exemption. You nick away a little at a time. Once you have used up a total of $30,000.00, then you have used your lifetime exemption up.

"Ten of those 3's don't make the 30. The exclusion is year after year, but $30,000.00 is the total exemption. So a client can make a gift to his son of $33,000.00 out of his separate property. First of all take off the $3,000.00. That is excluded. The return has a place for it. He has never made a gift before, so he has $30,000.00 lifetime exemption all complete. Take that off. Now you have a zero taxable gift. You have to file a return, if it is over $3,000.00, but no tax. Next year he gives another $33,000.00 to the boy. Take the first three off. Now we have $30,000.00. But he used up all the exemption last year. $30,000.00 is taxable. If we used only $15,000.00 of it last year, we could apply $15,000.00 of it against

this $30,000.00. The third year he gives $33,000.00. Take that $3,000.00 off again. He gives that free and clear. But the extra $30,000.00 is taxable. And watch this, you give him $30,000.00 the first year, $30,000.00 the second year, and the second $30,000.00 was taxable, and now, in the third year, he is giving another $30,000.00 taxed at the top of the second thirty thousand dollars. They shove the old gifts under, and shove the new gifts into the higher bracket, which climb like estate and income taxes. So you can give away a million dollars in one year, or over ten years, and it will cost you the same amount in gift taxes, except for the three thousand dollar annual exclusion.

Now let's look at why gifts are valuable in estate planning. First I told you the rates on gifts were about three quarters as high as the rates on estates. Now your estate tax pyramids. The larger your estate, the higher the brackets you use, and it will climb rapidly. If you take off the top chunk of that pyramid and put it down here as a gift, you have done two things. Maybe you will have to pay a gift tax on it, but you are down here in a lower gift tax bracket, four percent or five percent or six percent or seven percent. And you took it off of the highest bracket the estate would have been in, if you hadn't made a gift. So you got a double quantity of advantage there in trying to minimize the tax.

Now a word of caution. This looks so good, that I want to give a word of caution. You have trouble with your client. You know what the law is. You know what you can save him or minimize to help. And he wants his boys to have it. "I want my sons to have it. Of course, I want to kind of control it. They are kind of young." Well, that is what Uncle Sam doesn't like. He says, for income tax purposes, the income from that property is not taxable to the boys, if Dad can pull it back, if he has strings on it. That is a whole subject in itself, and there is plenty of law on it. But if you want to make a gift that will stand up from all viewpoints, you better be sure that it is a complete gift, and by completed, don't just stop with your ordinary rules of property law. Look and see whether there are some strings running back to Dad. I speak from bitter experience.

In your gift planning, consider beyond just what will be the gift tax. You have got to look at this gift cost basis factor. And you will have to watch the estate tax factor too, because there are considerations there.

You can't give a gift of income. If you have income right there ready to be reported by Dad, and he says, "I will give it to Junior, and he will report it." They will tax Dad. That was held in a case a long time ago where Dad took a ripe coupon off a bond and handed it over to the boy, who cased it in and said the income was his income and he would report it. Uncle Sam said, "No, that is matured fruit. If you want the boy to report that fruit as his income, you give him the tree before the fruit is grown." (laughter)

Now we are still on gifts. There are a lot of advantages in these gifts. And there are some disadvantages. Let's look at one. When they passed the death tax, people said, "Well, we will give our property away to our children as they grow up." They made life time gifts and to catch that the gift tax statutes were passed. Then we have the in-between situation. The taxpayer said, "I am going to beat not only the attorneys on their probate fees, but Uncle Sam on his death tax. I give all my property to my boy." So they passed a new statute. You have heard of it. It considers gifts made in contemplation of death. That is a statutory monster. Gifts made in contemplation of death are taxable in the estate of the donor as though he never made a gift. And that can hurt terribly, because he might have given it away years ago, and the child is stuck with low cost basis Dad had. He

doesn't get a new one. It doesn't pass by bequest devise or inheritance; it passed by transfer during life. But it is in the estate; it is in at the top bracket. It is the last thing you expected in the world to happen, or the taxpayer did, and there is going to be an estate tax to pay.

The law does give you this: Since you paid a gift tax back there, we will give you a credit against your estate tax for the gift tax paid, and sometimes that will be a dollar for dollar credit. There is a formula relating between value at the time of gift and value at the time of death. But you can sometimes get 100% credit.

How about those gifts in contemplation of death? How do you avoid them? There has been a great deal of litigation about whether gifts were or were not in contemplation of death. What was the donor's intent? Well, you know what that means. Everybody has bundles of evidence on why he made a gift. I suppose nobody that knows anything about living under our tax laws today doesn't think about the fact that if he gives property away now, it wouldn't be in his estate to be taxed there when he's dead. But I suppose it is a equally recognizable motivation for parents to give to their children. I have seen a lot of property given away, and I am entirely satisfied that one of the greatest pleasures that parents have is to give to their children, and that they can do that quite apart and above and beyond any tax motives.

Well, the present law and since 1950, says that if the taxpayer dies within three years of having made a gift, the presumption is it was made in contemplation of death, and the burden is upon the taxpayer's estate to prove it wasn't. If the taxpayer dies after three years have passed, the contemplation rule cannot be invoked. He may have made it perfectly clear that he wanted to avoid estate taxes. But if it is within three years, the taxpayer's estate has the burden of proof.

What are some of the motives? Well, the cases and regulations and all of the authorities recognize that there are death motives and there are life-time motives. A pattern of giving will help you build your case. A lot of parents, as they get older and attain a certain amount of affluence, begin to make current gifts to their children to ease the cost of living burden on the children who are struggling to get started. There will be a pattern of giving over a period of years. You can look at the age of the donor. If he is 95, it may reflect on whether he is thinking about dying, and therefore it was a gift in contemplation of death, although there are cases where gifts by persons 85 years old were held not to be in contemplation. Health is a very important factor respecting whether he had lifetime motives or death motives in mind. Before 1940 it was recognized that one good reason for the gift was to save income tax. I suppose it is still a good reason, but there is such an aura of impropriety and immorality surrounding the thought of trying to cut down your income taxes now that I never argue that this man wanted to save income tax. But it might be that is what he had in mind.

I would avoid a coincidence in time of signing wills and making gifts. Don't have them sign the gift deed the same time they sign their wills. The amount of the gift, in relation to the size of the estate, is very important. We have a case now, as a matter of fact, that I don't know how it will work out. A girl of 85 died leaving six children who are in their late 50's and early 60's, and she gave away, in the last three years, $200,000.00 worth of property. She made every mistake in the book. She was her own attorney and she had a fool for her client. When she died, they had a little bit of probate; she had $2,500.00 left. The general attorney associated me on the case, and one of the reasons he did was because he couldn't convince these people they were faced with a possible $20,000.00 or $30,000.00 of

estate tax. I spent half my time pointing out to them that mamma didn't know what she was doing. And they said that mamma did. We have a contemplation of death problem there.

Now, suppose you have a situation where the gift was made in contemplation of death. Sometimes it was, and you can't do anything about it. Suppose the gift was made within the three years, and he said that he was going to save death taxes. He said, "I am thinking of dying, and I want to do it this way instead of writing a will. I don't want to write a will." Well, you might make some savings that way, apart from losing cost basis from donor to donee and that part of the problem. I had a case where they made a gift, and they didn't know it, and when the death of the wife occurred, I discovered the gift had been made as a result of transfers. They dissolved a corporation, and it was her stock, and all the property was given half to him and half to her, and that was some years before. Now, what I understand is the proper way to handle that is to file a gift tax return on those old gifts. That meant that in my estate tax return I had a deduction for an old gift tax. The law allowed me to take it as a credit against the estate tax.

But look at this. If it was a deduction from the estate tax, then in effect, we didn't have to pay whatever their federal estate tax bracket was, say 30% on $5,000 of gift tax money. On $5,000.00 it would be $1500.00 right there in estate tax that was dropped even though we were getting credit for the $5,000.00 we paid now for that old gift.

There could be a loss. It didn't happen there, but it could. If they paid that tax when they should have, then over that period of years in between, before there was a death and credit was made, you lost the use of the money. Maybe it wouldn't cripple somebody, but if they paid a large gift tax and had lost the use of that money for five or ten years, it might be a substantial economic loss.

We got a late start today and I have been asked not to run much beyond 4:45. I have been going about an hour, I have got a lot of material I would like to cover, but you may be getting tired. If you would like to take a break, that would be fine with me. If you would like to go on for 15 or 20 minutes without a break, that will also be fine with me.

I would like to take you just briefly through the income taxation of an estate or trust. You ought to know this. There is a lot about it that I don't know. There is a lot about it that even the text writers don't know. An estate or trust is treated substantially the same. I may say trust, or I may say estate, ordinarily it will apply to either one. Basically they are treated the same as individuals so far as exemptions and credits and that sort of thing goes.

The way the income is taxed depends upon the way the income is handled. That is true in many many respects, but I am thinking about it in from this viewpoint: The income may be all accumulated in the trust or estate, or it may be all distributed out of an estate or trust, or, in between, it might be partially accumulated and partially distributed, presumably in the discretion of the fiduciary.

To the extent that all of the income is distributed out of a trust or estate, this is what you will have: You will have the fiduciary--and remember that the trust I am talking about now is not the revocable type—file a return showing, like an individual, gross income and expenses and net income. If, under the instrument or court decree that he is acting under, all the income was properly distributable (and whether he distributed or not) it will be taxed to the distributee. The fidiciary

will show on his return $5,000.00 of net income, and then there is a place on the return "distribution, $5,000.00. Net income for the trust or estate, zero." That distributee has to pick it up. To that extent the trust or estate is just reporting as an entity. It just gives Uncle Sam a chance to check.

Suppose the instrument provides for an accumulation of income. Then the trust would be a taxable entity reporting this net income and paying the ordinary tax rates on it.

In the in-between area, and this is very valuable advice used properly, you could provide in a testamentary trust with respect to children—one child, for instance—that until John is twenty-one, the income shall be accumulated or distributed to or for his benefit in the discretion of the trustee. And then give some kind of a standard for the trustee to work with. Let's suppose that the trustee, in any given year, actually distributes half, by his election or discretion, and accumulates half. Well, in that year the trust will show an income of $10,000.00—$5,000.00 distributed and $5,000.00 accumulated. There will be $5,000.00 taxable to the trust, and the child will report the $5,000.00 taxable to him.

Suppose that the child was out working, and he made a pretty good bit of income some year. Well, the trustee might reasonably exercise his discretion under the standard you have given him and feel that the child doesn't need the money for support, and if he gives it to the child, it is going to be taxed in the high brackets, so in that year he elects to accumulate all the first income. In that year you have all the income reported by the trust. Maybe the child doesn't work at all during the next year, so the trustee gives him three-quarters or all of the income. The tax bond follows the income.

There is one rule you should know about. It is a tough one and let's not get too far into left field discussing it. It is the so-called 65 day rule. This is a monster. All of the text writers have little foot notes about how unintelligible this rule is. The American Law Institute had a proposed change on their model income tax law to change this monster, and they created a new one. It was not quite as ugly as this one, and I voted for it, but a lot of men said why keep having more monsters.

This is the way the 65 day rule works. Let's put the estate on a calendar year. Let's put the individual distributee on a calendar year. We are ready to close the estate. The estate has been going for two or three years, and we are getting along fine, because we have been taxing one half the community property income to the estate, and the other half to the wife, and we like that split. We haven't been in too much of a hurry to close out the estate. But now we are ready to close by January 15th. At that time we have, among other assets, $5,000.00 worth of income. It was earned within the last twelve months. The 65 day rule says distribution within 65 days after the closing of the accounting year of the estate or trust will be treated as if it had been distributed on the last day of that prior accounting period. So we distributed January 15th, but for the trust or estate income tax return it will be treated as if it had been distributed on December 31st.

And now for the other angle. The wife is treated as though she had received the income on December 31st. So it is to be reported by her in that tax year. Let's say we are talking about January 15, 1954. We distribute. In her 1953 return the wife picks up that income, and in the estate or trust return it will show as a deduction because of distribution.

Suppose we know about this rule, and we don't want to have the income

shoved back into that prior year, because in that year the wife had a much higher income than she is going to have this year. We will go past the 65 days before we distribute the estate. Then the rule is that it will be taxable to her in the year in which she gets it, and it will be a deduction by the trust in this year, 1954.

There is a possibility of a double taxation under the 65 day rule. I have not run into a situation where Section 162 (d) (4) didn't avoid the double tax, but I am not sure anybody understands this rule too well in all of its ramifications. I know most attorneys don't and most revenue agents don't, and everybody admits it.

Incidentally watch this point: There is no provision in the taxation of trusts or estates for the distribution of losses, and that is a very difficult and serious problem. They don't seem to have this problem in the East, I guess, but it is common in our country. We have a farmer who dies, and his estate is in probate two or three years, and in the meantime you have to run the ranch, and you have a loss, and that loss might run for a couple of years. If you have a loss for several years, you have no income to carry it back against, and you can't go back from the estate to the decedent. You might go forward while you are within probate administration, but if you don't have income, you will not get the benefit of it, and it is going to be a last loss income taxwise. That isn't right or fair. You can help yourself by some proper language in your will and trust, but it is awfully tough, and I don't know all the answers on it. We are working on it. We have tried and are still trying. It is not at all fair, and the only solution I know of at the moment is to try to keep your estate going until you get some income, if you have a large loss. In a farming economy it can be like this, and I have seen it happen: We had a loss of $30,000.00 one year, and the next year we would have had just that much income, but we thought we had to distribute it out, because Uncle Sam says you can't be in probate an unreasonable length of time.

I want to mention very briefly the device of the testamentary trust. You should bear in mind that it is the time you tax the property that you have to watch out for. To avoid having the property subject to several successive death taxes, you may try to use the testamentary trust device. You want to give the wife or husband the protection of the income, and more than that, the protection of the principal, but you don't want to have it taxed twice. So you have each spouse leave their property in trust for the benefit of the surviving spouse for life remainder over to the children. Watch your draftsmanship. Work it over. The theory is that after the death tax is paid on the first death there shouldn't be any tax on that first half again that went into the trust for life, because under regular rules the testator didn't leave it to the wife and then she to the children. He left it to the children subject to the wife's life estate. All she had was a life estate; you can't tax that because it expired when she died. The testamentary trust is a very valuable estate planing device and is commonly used.

Now, when you work up a trust it may be that you want to keep the trust open for the children, if they are small, and the spouses die. Here is a useful trust idea. Use the multiple trust device. It is perfectly proper, if it is properly done. Commonly we might write a trust and say to the wife for life, remainder over still in trust for the children until they are twenty-one. Now, suppose we have accumulative or distributive provisions in that trust, after the wife is dead, and while it is still operative for the children. The trustee decides to accumulate. There is $20,000.00 of income and five beneficiaries. The trustee accumulates the income, and he will be getting that income taxed in the $20,000.00 bracket. If he distributed it out to the five beneficiaries, it would be $4,000.00 apiece in their particular brackets. But he doesn't want the children to have the income. It is

within his discretion. He has to pay a sacrifice income tax on $20,000.00 in one large chunk in order to avoid giving it to the children. If that trust were properly prepared, in my opinion, there would be as many trusts as children, and when he accumulates, each trust reports its proportionate part of that income. It would be $4,000.00 taxed in each trust. Each would be a separate tax entity.

Now there is also the device known as the sprinkling trust. I just used this recently for a doctor. He was anxious to have his children secure an education. He was aware of the fact that their ages were different and that their needs for education would occur at different times. He doesn't want them to have any of this particular money if they don't want an education, but the sky is the limit if they do want an education. We used the sprinkling trust type of provisions. There, the discretion is given the trustee to sprinkle the income among the members of this class for any one alone or for them all equally or however the trustee deems best. But spell out the discretion. Spell out the standard you want. Be careful that the trustee is not a beneficiary of the fund.

There is one thing concerning these trusts that I must tell you about. They changed the power of appointment law in the federal estate tax law a couple of years ago, and it is extremely important and extremely valuable. Whether it is constitutional or not in its retroactive application is another question. But up to the time they changed that law when we set up a trust for the wife on the husband's half of the community, we could only give her the income from his half after he was gone because we were afraid that if we gave her any rights to go into that trust's corpus they would say she could have gone in there and taken all the corpus and so we will tax to her all of his half when she dies. They have a provision in the new law that says if you have a reasonable standard for measuring health, maintenance and support and education, we will allow you to provide for an invasion of the corpus of the trust measured by the standard without that alone causing the entire trust corpus to be taxed to the life tenant on the death of the life tenant. That is exeremely important. When you set up one of these testamentary trust plans with the property these people have accumulated during all their lives and on the death of one take away from the survivor the decedent's half and only leave that survivor the income, you can't help but worry about the economy going down hill. There may be some terrible sickness over a period of years or there may be all kinds of other expenses, and you can't get to the corpus. After all, you are planning people's lives and taxes are just one phase of this thing. When you give a lecture on it, you emphasize it beyond its comparative importance, but you need a bigger picture, and should realize that taxes shouldn't be the tail wagging the dog.

I have used up my time. It was grand being here with you. Thank you again for inviting me here. Thank you. (applause)

PRESIDENT BROWN: That was certainly a most infornative talk. I think it has been fine that these partners have come up here and have given us so much information on the subject of taxes. We surely like it.

At this time we will have the report of the Canvassing Committee.

MR. HUGH MaGUIRE: Well, the Canvassing Committee met in session this afternoon to canvass the votes, and Russell Randall is your new commissioner by an overwhelming majority. (applause)

PRESIDENT BROWN: I see Mr. Randall is here, and I would like to have him come forward so that I may present him to you. I present Mr. Russell Randall of Lewiston, your new commissioner for the Northern Division.

COMMISSIONER RANDALL: Mr. President and fellow members of the Bar: I assure you I am proud and happy to be on the commission. When I see the work that has been done by the previous commissioners, I go into this work with fear. But I assure you that whatever I can do for the improvement of the Bar, I will do it and happily. Thank you. (applause)

PRESIDENT BROWN: We will now adjourn until 9:30 tomorrow morning.

Sun Valley, Idaho
Saturday, July 11, 1953, 9:30 a.m.

PRESIDENT BROWN: Gentlemen, the meeting will please come to order. The first business on the program this morning is the report of the Prosecuting Attorneys' Section. Is Mr. Maguire present? I understood he was to make the report.

We will pass that for the time and hear the report on the Judicial Conference from Justice Porter.

JUSTICE JAMES W. PORTER: Mr. Chairman: My report on the meeting of the Judicial Conference will be very brief. The conference occupied all day on Thursday. It was attended by all but four of the District Judges and all of the Justices of the Supreme Court. It was a very interesting and instructive conference. This was largely due to the fact that the speakers to whom topics had been assigned had given real thought and consideration to their subjects and presented them in a very, very satisfactory manner to the conference.

The first matter we took up was the matter of a manual for venire men or prospective jurors. They are using these manuals in some districts in the state. Of course, the Supreme Court has never passed upon the use of these manuals or upon the subject matter which they might properly contain. For that reason a committee was appointed to study the matter and to recommend to the next conference a model manual which might be used all over the state. As to the advisability of using the manual, it seemed to be the opinion of the judges that it would be quite beneficial, providing it didn't contain matter that might be construed as prejudicial to the rights of any of the parties.

The next subject we took up was the advisability of general instructions to the jury at the opening of the trial. The practice has grown up in some districts of the state, or at least it is being used by some of the judges, of giving some of the statutory instructions, some of the regular stock instructions, to the jury at the opening of the trial after the jury is sworn but before any testimony is taken. That matter was before the Supreme Court recently, and it was not disposed of, because it wasn't properly presented to the court by the record. We didn't discuss, in the conference, the legality of it, but only confined ourselves to the advisability of it. We have appointed a committee to study that matter. Some of the judges are very much in favor of it. Others are very much against it. The committee will report at the next conference. It is a very practical matter, and if such a practice is to grow up, it should be understood and taken care of by rule of court.

We had the report of the Coordinator, Justice Taylor, as to the amount of work and comparative amount of work being done in the various judicial districts.

The highlight of our conference was an address by Hon. R. S. Tofflemire, publisher of the Twin Falls Times-News, on the subject of public relations of

courts. He didn't pull any punches, and his remarks were of such a nature as to cause rather soul searching thought by the judges who were present. He disturbed our thoughts and gave us something to take home with us and to think about so far as our public relations are concerned. Of course, a judge is somewhat like an umpire. He expects the worse, but that shouldn't deter him from doing his duty, nor should it be used by him as a reason for neglecting his public relations.

The judge should bear in mind that the attorneys and litigants are entitled to the same courtesies as the judge is. And according to Mr. Tofflemire, some of the judges—most of us perhaps—forget what we owe the attorneys and litigants and to the public in general. It was a very interesting and worthwhile address.

Another technical matter that was on the program was the question of whether the memorandum decisions of the District Judges should be made a part of the record on appeal when requested by the praecipe. This question of memorandum decisions is before us all the time. Whether we should sanction them and give them some formal recognition is a question upon which the judges seem quite divided. Of course the law does not require a written decision by the District Judges other than the findings of fact and conclusions of law and decree or judgment. It had been suggested to the Supreme Court that we make the memorandum decision a part of the record when called for by the praecipe. But we felt we would like to have the reaction of the District Judges before we made any change in the present situation. Just what the Supreme Court will do after they have heard the divergent views of the District Judges I would hesitate to predict.

We had one other subject on the conference calendar which we were not able to discuss due to lack of time and the absence of some of the speakers. That was the question of pre-trial and the experiences of the judges with it.

I want to say to you members of the Bar that in getting up the program for the Judicial Conference we have been striving to get questions for discussion which were practical and which were of interest to the judges and attorneys, not something theoretical, but something that they deal with from a practical standpoint from day to day.

I believe that is all the report we have, Mr. Chairman. (applause)

PRESIDENT BROWN: The Bar is very appreciative of the fact that these Judicial Conferences are doing much good. Is there any comment with respect to the report?

MR. S. T. LOWE: I don't think that the District Judges have anything to say about whether or not a memorandum opinion that they have rendered should be included in the transcript. I think that should be confined to the attorneys, and the District Judges shouldn't be interested in it. There is no question in my mind that it should not be decided by the District Judges but should be decided by the attorneys. As far as I am concerned, I am absolutely opposed to any memorandum decision being included in the transcript either by rule or otherwise.

PRESIDENT BROWN: Do you have any response you would like to make to that, Judge Porter?

JUSTICE JAMES W. PORTER: Well, I can only say that it was suggsted to the Supreme Court that such a rule be adopted. Rather than take any action, we presented it to the District Judges to get their reaction. And our thought was that before we adopt any rule, the matter should be presented here at the regular Bar Convention for approval or disapproval before we make any material changes in the practice.

PRESIDENT BROWN: Is there any other question or comment? We will consider the report approved.

Is there anyone at this time prepared to make a report for the Prosecuting Attorneys' Section? Is Mr. Jess Hawley present to make a report of the Legislative Committee.

We will hear from Mr. Fred M. Taylor. He will report for the Committee on Court Reorganization. Mr. Fred Taylor.

MR. FRED M. TAYLOR: Mr. President and fellow members of the Bar: This report, too, will be very brief. It has been rather difficult to get the committee together, although most of the members have gotten together, at some time or other, on the things that will be contained in this short report. This report covers only the question of what should be done, if anything, in regard to improving our probate and justice courts. It does not go into any other courts in the state.

REPORT AND RECOMMENDATIONS OF COMMITTEE ON RE-ORGANIZATION OF PROBATE AND JUSTICE COURTS

The problem of what to do about improving our lower court system in the State of Idaho has been before this Bar Association for the last five years. Your present Committee was appointed by the Commissioners of the Bar for the purpose of making recommendations to you in regard to these courts.

It is well known by most of the Bar that in the 1949 and 1951 Sessions of the Legislature attempts were made to pass legislation to amend the Constitution so that Probate and Justice Courts would no longer be constitutional courts. On both occasions there proposals were defeated for the reason that the lay members of the Legislature were most apprehensive in regard to what was going to happen insofar as these courts were concerned if they were no longer constitutional courts. Obviously the lawyers in the Legislature presenting the proposals could not assure the Legislature of what could or might be done with respect to these courts, but could only conjecture as to what could or might be done and at the same time tried to assure the members of the Legislature that any changes would have to be made by and through the Legislature. This assurance did not seem to be sufficient, because in both instances the proposals did not get the required two-thirds vote in order to present the same to the people for consideration.

Your Committee recognizes that there may be various and sundry ideas as to what should be done with respect to these courts and consequently we can only submit to you for consideration a general idea of what we think should be done towards working out a more adequate and efficient lower court system for the State of Idaho. In considering this matter, we must keep in mind the variance in needs of the respective counties of our State. The following are the few suggestions which your Committee believes should be considered at this time:

First, the various sections of the Constitution should be amended so as to eliminate the Probate and Justice Courts as constitutional courts. These Sections are:

Sections 2, 21 and 22 of Article 5 and

Section 6 of Article 18.

In presenting such proposed amendments, it should be stressed that these courts

will remain as statutory courts and that it is not the intent and purpose of the amendments to (entirely) eliminate these courts.

If and when the Constitution is amended, as suggested, then an orderly and well planned re-organization of the lower courts can be had by amending the various statutes pertaining to them. No doubt when such proposed amendments are presented, the question again will arise "What does the Bar intend to do with these courts?," and we must have at least a general plan to submit when such questions are asked.

Your Committee suggests that the Probate Courts remain as they now are, but that the jurisdiction of such courts in civil matters be increased to $1,000.00. This suggestion is made simply because of the inflationary times in which we are living. We also suggest with respect to these courts that in such counties as Ada, Canyon, and perhaps others, where the work load is becoming too much for one Judge, provision be made for a second judge. In such counties as would have two judges, the probating of estates, juvenile and insanity matters could be handled by one and the civil and criminal matters by the other, or, the work could be divided between the judges as might be satisfactory to them, or, the work could be divided as directed by the Senior Judge.

Your Committee feels that qualifications should be fixed for these judges and although we believe that it would be most desirable to require that a judge be a lawyer, this we realize is presently impracticable in a great many counties of the State. However, we do think that some qualifications by way of education should be required. This again would be a matter of legislation to be considered in the re-organization process.

So far as the Justice Courts are concerned, Your Committee suggests that the Justices of the Peace be changed to appointive instead of elective officers. It is our suggestion that Justices of the Peace be appointed by the Board of County Commissioners and that each county should have at least one Justice of the Peace and such additional Justices as might be needed, all to be determined by the Board of County Commissioners; that each Justice Court have county wide jurisdiction; that the civil jurisdiction be increased to $600.00; and that each Justice be paid a fixed salary instead of being on the fee basis. Also, Your Committee believes that the Justices of the Peace should have qualifications fixed by statute, such qualifications to be comparable to those as may be fixed for Probate Judges.

It has been suggested that Justice Courts be eliminated entirely, but again we are faced with the problem of the diverse needs of our various counties in the State. We still have places which are rather remote so far as the county seat is concerned and in those places there must be a court to handle the problems of the community.

Your Committee recognizes that the above and foregoing suggestions are quite general, but due to the nature of the problem, the suggestions must of necessity be general. If this Bar Association can agree on some general plan and will go along whole-heartedly with such a plan, it will be possible for us to commence working out the details. There is very little, if anything, we as a Bar Association can do until we get the Constitutional Amendments passed in the Legislature and approved by the people. If and when this is done, this Bar Association can then start what may be a long and arduous process of improving our system of lower courts. We must keep in mind that such improvements as we may desire cannot and should not be accomplished hastily. Most of all, we cannot even get started unless this Bar Association has the desire to do something and is generally in accord with

whatever is proposed by way of legislation. If these suggestions which Your Committee is now making do not meet with your approval, we should here and now agree, if possible, upon a plan, because year after year we have delayed concerted and concentrated action insofar as this problem is concerned. If the Bar generally is satisfied with the lower court system which we now have, then there is no purpose in our attempting to do anything further about it. However, if we desire a more efficient and satisfactory lower court system, then we should take some definite action at this meeting in order to commence an orderly process of improving our lower courts.

PRESIDENT BROWN: Are there any puestions from the floor? You appreciate that this is a standing committee, the Committee of Court Reorganization, and they are ready and willing to act and consider any proposal that comes from this organization. I think that was a very spendid report, Mr. Taylor.

MR. CHARLES SCOGGIN: Mr. Taylor, there was one thing that came up in the prosecuting attorneys' discussion that might be of interest along this line.

As you know, considerable changes have been made in the juvenile code. That affected the probate court. There is some question as to whether the legislature has too much authority or sufficient authority—the court being a constitutional court —to make the necessary changes the people and their legislators felt should be made. That is just another reason why I think your suggestion of making a legislative court out of it would facilitate the movement of justice generally and the control of it.

MR. FRED M. TAYLOR: I think that is definitely right, Charley. I suppose some of the members here do, but I don't know why the probate and justice courts were necessarily made constitutional courts when we adopted the constitution. They are lower courts, and I think they should be statutory courts. They should be elastic. They should be, from time to time, improved as times and living conditions change. Our mode of travel, our mode of communications and everything else is changing. And our problems have changed to a great extent.

I have served on the Legislative Committee of the Bar during my eight years in the State Senate, and I have done everything I could for the Bar, but I want to stress this: The Bar Association can pass legislation, if it will get behind it. Too many times, however, we found ourselves confronted with a split organization.

Because of convenience, the Legislative Committee is usually composed of members of the Bar residing in Boise, and I can say that from my own experience, they have conscientiously worked at the problems given them, and they have given a great deal of time in trying to bring about a great many of these improvements.

I understand, although I didn't hear it, that your President made a very forceful talk along that line, because we had a very unsatisfactory experience in the last legislature of trying to carry out recommendations of this Bar Association.

Now, if we can get together on some of these problems—and we are by nature individualistic—but if a majority of us can agree, I think the Bar Association should go along on that kind of basis, and I believe we can get the legislation through if the lawyers in their respective communities will but go out and put forth a little effort. Because I believe that most legislators pay some attention to the lawyers in their communities, especially if it is a law question or a court question.

I recall to mind 1949, because that was my last term, and we had four lawyers

in the Senate. We were standing up there trying to battle through these amendments, and a lay member or two kept popping questions. "Well, what are you going to do?" We had no plan. I was taking the lead on it, and all I could tell them is what I thought might be done.

That is why I say we have tried to present to you a general plan, because the details will necessarily have to be worked out and be presented first by this Association and then sold to the legislature. And we should, above all, eliminate any concern of the Probate Judges, because apparently they have more influence in their counties, or at least take more interest in it, than we do as lawyers. Thank you. (applause)

PRESIDENT BROWN: Thank you very much, Mr. Taylor. Is there any further comment with respect to the report of the Committee on Court Reorganization? If not, I will consider the report approved.

Mr. Maguire, are you now prepared to give the report of the Prosecuting Attorneys' Section?

MR. WALTER ANDERSON: Mr. President, I would like to go back to the report just made. I had some observations I might make in respect to that. I notice that the committee recommended that the justices of the peace be appointed by the county commissioners, and as I understood the report, they thought that that would get better qualified justices of the peace. Well, I think that might or might not be true. I am not prepared to take a strong position one way or the other, but my impression is that when you place the selection of the justices of the peace in the hands of the county commissioners, instead of getting better qualified justices of the peace, you will get better politicians. I think that is true of the offices that the county commissioners appoint generally.

We are inclined, a good many times, to pass over the question of justices of the peace as not being of much importance. I believe that is one of the most important offices that we have in the state for the simple reason that the average fellow becomes acquainted with the court system through the justices of the peace, and I do not believe that too much care can be exercised in selecting a justice of the peace, and I do not believe that it would improve the situation to confer that power upon the board of county commissioners. I believe they would make a mistake if they ever do that.

In Pocatello we are fortunate to have a very spendid police judge, but generally I don't think the appointment of a police judge has worked out as well as if the people selected them. As I say, we are fortunate in having Judge Bistline, who is a spendid police judge, but we could have somebody that is not so good. Take the appointment of the police force. I happen to know that that works as a wheel within a wheel. There is a faction against a faction, and I am opposed to the appointment of too many officers of any class.

PRESIDENT BROWN: Do you have a response you would like to make to that, Mr. Taylor?

MR. FRED TAYLOR: I don't like to belabor the question. As I said at the outset, there are a great many ideas that we might have. It was merely a suggestion that they be appointed. I think the situation now is that you can have a justice of the peace in each precinct. I don't know what you have in Bannock County, but in Ada County we have over fifty precincts. We thought that the Board of county commissioners could determine where justices of the peace were necessary and perhaps select them. The justices of the peace do not necessarily

have to be appointed by the commissioners or appointed at all. That is something we are going to have to work out after we get them out of the constitution. That is one of the things that will have to be argued out.

I am not saying that is the answer. The same is true with the qualification problem. I think we will have an awful hassle over that. But the intent and purpose we had in mind was that while they are very important courts, and in a great many places we have very fine justices of the peace and probate judges, we know that in many localities it is a big red apple to pass around to somebody to keep them off relief or something like that. I know that from personal experience.

We are fortunate to have one of the best justices of the peace, a lawyer, who was appointed by the board of county commissioners, and he has since been re-elected.

MR. FRANK MARTIN: As recommended by the Bar Association.

MR. FRED TAYLOR: Yes. And I think, in a good many instances, the board of county commissioners would take the recommendations of the lawyers in their county.

MR. CARL BURKE: I understand this would require a constitutional amendment.

MR. FRED TAYLOR: You would have to amend the constitution to do anything about changing the justices of the peace, because the constitution provides for the justices of the peace. But someone is going to have to carry the ball, and we are the ones that have to do it.

MR. CARL BURKE: The Legislative Committee is authorized to proceed along the lines suggested in your report? Is that it? If not, I would like to so move. I would like to have it appear in the record that it is the consensus of the Bar that the Legislative Committee proceed along the lines recommended.

PRESIDENT BROWN: Mr. Burke, I take it you are putting that suggestion in the form of a motion.

MR. CARL BURKE: It probably isn't necessary.

PRESIDENT BROWN: Are you proposing that they proceed again to endeavor to pass the act necessary to take the steps for a constitutional amendment?

MR. CARL BURKE: I suppose the report already provides for that. Perhaps it isn't necessary.

MR. E. B. SMITH: Mr. President, this Bar Association has approved the kind of recommendations that Mr. Taylor has put forth at its 1949 meeting and at its 1951 meeting. The constitutional proposals have been placed before the legislature at both of those sessions. As I understand the report made by Mr. Taylor, if we are able to pinpoint that report, it is this—and if I am wrong, you correct me, Senator Taylor—it isn't a question of what the Bar Association will or will not do. They have authorized this matter twice, and it is still authorized to proceed with reference to the proposed constitutional amendment or proposed resolution. It is a question of public relations. It is a question of educating the people, a question of educating the members of the legislature through the attorneys throughout the state.

I have served for years on these legislative committees and particularly on

the committees of 1949 and 1951 when we had these constitutional resolutions before the legislature. We know from experience that this project cannot be accomplished in the present form. We have to have a plan. We have to have some definite plan to propose. The members of the legislature say, "Well, what are you going to do? What is your plan for the future, if you do away with these constitutional courts and make them legislative courts?"

To pinpoint this, it means this: That so far as your Legislative Committees are concerned, they are helpless in the face of the various arguments which are proposed. We have to have education throughout the State of Idaho. We have to have the lawyers educate the members of the legislature. They have to go down there prepared in order to support the plan, and until and unless that is done, we feel, so far as the Legislative Committe is concerned, that we are somewhat helpless.

Am I right there, Mr. Taylor, when I say this is a public relations problem?

MR. FRED TAYLOR: I think that is right.

MR. E. B. SMITH: Because the action has already been authorized twice and is presently authorized. If you want to proceed again, your Resolutions Committee should again adopt the same resolution that we proceed with the constitutional amendment or constitutional resolution.

MR. DAVID DOANE: Mr. President, I might point out that in 1951, pursuant to the Bar Association resolutions, the two amendments to the constitution to eliminate the constitutional status of probate courts and justices of the peace courts actually passed one side of the legislature, the House of Representatives, but it didn't get through the Senate. It just barely passed the House. It takes two-thirds of each body in order to accomplish a constitutional change.

I believe that it has already been mentioned that it is more of an educational problem than anything else, but I would like to state it in another way and say it is a matter of getting votes in the House and in the Senate of the state legislature, and the only way you are going to do that is by personal contact in each community. And I feel that this Bar Association has gone on record often enough as to its stand on the academic question of what to do, but they have not crystalized a definite plan of action on how to get it across.

It can be accomplished, but it is going to take a lot of work, and it is difficult to convince an awful lot of law members of the legislature that you are not trying to eliminate these courts entirely when you are trying to change their status. That seems to be their fear.

PRESIDENT BROWN: Thank you, Mr. Doane. Now, if I correctly understood Mr. Taylor's report, it was the feeling of the committee that the reason the proposed constitutional amendment had not been passed was the fact that we had not prepared or were not prepared with answers as to what we would do or what would be done once the amendment was passed. It seems to me, in view of Mr. Taylor's report and the recommendations of the committee, that under our procedure, which is set out in Rule 185, probably a resolution should be introduced at this convention directing the committee to prepare a plan on the reorganization of the courts, if the constitutional amendments are adopted, and under our rule, it requires that that be submitted directly to the members through their local bar associations for balloting.

If the committee is directed to prepare the reorganization plan, which, of

course, would be contingent upon the passage of the constitutional amendment, we would at least have the matter crystalized, as Mr. Doane has suggested we should, so that we would have answers for the legislators who will ask, "Well, if we pass the constitutional amendment, what is coming?"

Is that in accordance with your thinking, or am I mistaken?

MR. FRED TAYLOR: I think you are quite right, and that would be a very wholesome and fine thing, Mr. President. The only thing that bothers me about that is that we are liable to be forever in getting these constitutional amendments I was thinking of the committee in the legislature. If we could dispell this fear that they have that these courts were going to be entirely eliminated and assure them that any plan we might agree on would be again submitted to the legislature for their approval—you know how long it takes to get a constitutional amendment—and I am afraid, if we try to prepare a detailed amendment to all these statutes and get them all together and crystalize them that we will be forever and a day getting this thing submitted to the legislature for constitutional amendments.

We may have to do it. And I think Dave is quite right, that it would be very wholesome to have it. I forgot that it got through the House last time, but the thing that defeated the bill in the Senate in '49 was the fact that the probate judges were afraid they were going to be eliminated, and perhaps some of the justices of the peace, and the probate judges got to work, and they contacted their legislators while the lawyers sat back and didn't do anything in their respective counties that I know if. They may have, but I never heard about it.

I will agree that there may eventually be some differences as to what we might do by way of electing or appointing these men. But we should present it to the legislature in this light, that the justices of the peace may be appointed or elected, whatever way the legislators determine, but they are not going to be eliminated. We should explain that we will attempt to get the salaries up and that some qualifications will be required. Again they fear that we are going to require they be lawyers. But a great many counties can't have lawyers at this time.

I think that if we, as a Bar, could assure them the things that are going to be done and are not going to be done, eventually they might come around to our side. But it will be a gradual process.

MR. T. M. ROBERTSON: Would it help, from a point of legislative strategy, rather than outright repeal of the present constitutional provisions and a substitution of a system of lower courts established by the legislature, if the amendments could be couched in terms that there shall be probate and justice courts which shall have a certain jurisdiction and the judges of which shall have qualifications as prescribed by the legislature?

MR. FRED TAYLOR: I think that might be a wholesome thing. I haven't studied the constitution with a view of amending it, but I think that could be done.

MR. T. M. ROBERTSON: That might convince the legislators and probate judges that there are going to be those courts.

MR. FRED TAYLOR: We probably could change the type of amendment so that it would be more acceptable.

MR. CHARLES SCOGGIN: In that committee, some of us thought, in order to get the constitution properly amended, it might even be necessary to say that they would be left exactly the same as they were in order to keep out of the political influence of the other side. Your probate judges, in many instances, are

better politicians and more active than we are. The thought was expressed in our committee that the legislative enactment be made exactly the same as it is at the present time, so far as qualifications are concerned, in order to get the constitution amended.

WILLIAM EBERLE: The Illinois Bar Association presented to their legislature a very comprehensive constitutional amendment along the line Mr. Robertson has mentioned at this last term. It was sponsored bipartisan. They presented an entire judicial reform bill of all their lower courts, and they were debating that when I was back there. It was supported by the Bar Association and by most of the newspapers.

PRESIDENT BROWN: Is there anything further from the floor?

MR. DAVID DOANE: Do you want to discuss this thing a bit more, or do you want to go into something else?

PRESIDENT BROWN: Well, I realize, as Mr. Smith has pointed out, that the committee has the authority to proceed to endeavor to get the resolution for the constitutional amendment. However, it occurred to me, particularly in light of the discussion that has taken place, that it might be well to have a resolution directing the committee to submit to perhaps the 1954 meeting, a proposed resolution which might eliminate the problem that Mr. Taylor said confronted this matter before. It might be in the form of a constitutional amendment to the effect that the probate courts would not be eliminated but would be provided for by the legislature.

To that end I would entertain such a motion, or it could probably be made at the time of submitting resolutions from the floor at the conclusion of the Resolutions Committee report.

MR. FRANK MARTIN: Mr. Brown, I think that if such a resolution is made, there should be added to it that the matters be prepared in time so that they may be submitted to the various Bar Associations of our state prior to our 1954 meeting, because it should come up here with everybody's knowledge of it, and with the thought that the local Bar Association do what they want to do on it. I know, from experience with the legislature covering a good many years, that time after time after time we have been faced in the lgislature with some member of the legislature getting up on his hind legs and yelling, "What are you fellows talking about? I have talked to so and so up in my county, and he says, 'Why the Bar don't want any such thing. That is just a little handful that got together down at the meeting and suggests these fool things.'" We have had to meet that so many times it gets to be a darn sad and old story. If we can't have this thing before our local Bar Associations and threshed out so that we get at least 50% support on it from our Bar members, if not more, we are never going to get anyplace.

PRESIDENT BROWN: It would be my thinking, Mr. Martin, that it is the sense of Rule 185 that when legislation is to be proposed in that manner, that it properly should be circulated to all the members of the Bar for consideration.

MR. FRANK MARTIN: That should be prior to our meeting next year.

PRESIDENT BROWN: Yes. And I think, if the committee is directed to proceed, that the resolution, of course, would direct the preparation of the proposed legislation or the proposed constitutional amendment, of which it would be the purpose of the Bar to sponsor, and that they in turn should then be submitted

to the membership through the local Bar Associations so that we would get a comprehensive and a proper vote at the 1954 meeting.

MR. DAVID DOANE: Mr. President, in order to get this thing really going, and to be sure it is not overlooked, I move you appoint a committee of two or three men, or whatever you think is necessary, to prepare the proper resolution in accordance with your remarks and submit it to the resolutions committee.

PRESIDENT BROWN: Do you mean a committee to act on this matter this morning? I think our standing Committee on Court Reorganization would properly prepare the proposed constitutional amendment.

MR. DAVID DOANE: I am talking about the resolution to be adopted at this convention.

PRESIDENT BROWN: Well, that is what I wasn't clear on, Mr. Doane. Was there a second to that motion.

FROM THE FLOOR: I second the motion.

PRESIDENT BROWN: Is there any discussion at this time?

MR. RALPH BRESHEARS: Mr. President, it seems to me that not only should that direction be that the constitutional amendment be prepared but that the Court Reorganization Committee be directed to submit to the Bar this plan that the legislature wants, the answers to the questions that the legislature wants, as to what is going to happen after the constitutional amendments are adopted. We will be 25 years getting this job done if we don't answer these questions that the members of the legislature want. It seems to me that if we don't do the whole job, we will never get it done.

PRESIDENT BROWN: That had been discussed some, Mr. Breshears. It was the opinion of the chairman of the committee that we should perhaps go a step at a time. Now, do you wish to propose that as an amendment to the motion by Mr. Doane?

MR. RALPH BRESHEARS: I will offer a substitute motion, that this committee that is to be appointed by the Chair at this time prepare a resolution directing the standing committee to prepare constitutional amendments and a court reorganization plan to be submitted to the members of the Bar and discussed at the next annual meeting for adoption and submission to the legislature at its next session.

PRESIDENT BROWN: I don't believe the substitute motion is in order without the withdrawal—

MR. DAVID DOANE: I will be glad to withdraw my motion in favor of Mr. Breshears' motion, and I will second his motion.

PRESIDENT BROWN: Gentlemen, it has now been moved and seconded that the Committee on Court Reorganization be directed not only to prepare the constitutional amendments but to likewise prepare the proposed legislation for the reorganization of the lower courts—

MR. WALTER ANDERSON: I don't think that is right, Mr. President.

PRESIDENT BROWN: Will you correct me?

MR. RALPH BRESHEARS: Prepare a plan for court reorganization.

PRESIDENT BROWN: Prepare a plan for court reorganization and submit,

for the consideration of the membership of the Bar, at its 1954 convention, its proposals. The motion was seconded by Mr. Doane. Is there any further discussion?

(Whereupon the motion was carried unanimously.)

PRESIDENT BROWN: In view of that, I don't believe it becomes necessary to have a resolution from the floor later on or a committee appointed to present such a resolution.

At this time we will have the report of the Prosecuting Attorneys' Section.

MR. HUGH MAGUIRE: This will perhaps be one of the shortest reports on record. The prosecutors have been meeting during the periods that the Bar has not been holding its meeting, and I think that is the first time this has been done, and it has proven to be very successful, because the prosecutors wanted to have an opportunity to attend the very fine programs that we have had here. They have asked me to express their appreciation for the very excellent programs that have been presented at this particular time.

The prosecutors are going to have a meeting probably during the first part of February, 1954, at which time they have decided to ask some speaker to talk to them about some of the problems of the prosecution of criminal actions. And I have been asked to invite any of you gentlemen who would care to attend that meeting. We would like to have you. And I will notify Paul when that will be. And if any of you would be interested in coming and hearing someone from out-of-state discuss the problems of criminal investigation at that particular time, we would be happy to have you be there. (applause)

PRESIDENT BROWN: Is there any question concerning the report?

MR. EVERETT TAYLOR: Where is the meeting going to be?

MR. HUGH MAGUIRE: I believe it will be in Boise.

PRESIDENT BROWN: Mr. Hawley is not here to give the report on behalf of the Legislative Committee. Mr. Smith, could you give us a short report on the action of the Legislative Committee this year? You served on that committee with Mr. Hawley, did you not.

MR. E. B. SMITH: I couldn't give the details, no. I could state this: All of the proposed legislation which came to the committee, with the exception of the proposed legislation having to do with the revised plan for the election of the members of the judiciary, was passed. But I can not at this time, with such short notice, give you a detail report of the various bills that were enacted. Perhaps Mr. Doane could give the details.

MR. DAVID DOANE: I might be able to give a little bit. I would like to say, Mr. President, that this legislative committee that assisted during the legislative sessions did a very magnificent job, and they were very generous in giving their time to the lawyer members of the legislature. I know that at any time we had a problem that had any legal significance or judicial significance at all, and even some that were not really in that category, it was presented to this committee, and they really went to bat and worked hard to help us out.

Of course, the big project this last time was the increase in the judges' salaries, and everyone went to bat on that, including members of the Bar all over the state. But this legislative committee organized a force that was very capable and very successful in this last session. Most of you are aware, I am sure, that the

judges' salaries were increased $1,000.00 for the Supreme Court Justices and the District Judges alike. That was the main accomplishment.

As Mr. Smith pointed out, the only thing we weren't able to do was to accomplish the resolutions of the last Bar Association meeting with regard to the election of the judiciary. I don't quite understand why that was misunderstood in the legislature, but they were just a little bit leary of it, and they felt it was an attempt on the part of the lawyers to take away the rights of the people to vote for their judges. That seemed to be the general trend of thinking.

I would say that they accomplished very well the most important features of the legislative program of the Idaho State Bar Association.

PRESIDENT BROWN: Thank you, Mr. Doane. I might add some comment at this time. I had not anticipated that Mr. Hawley would not be here. As Mr. Doane has stated, the legislative committee gave a good deal of time and effort this year not only to the legislation which the Bar was interested in, but I think they served a great purpose in our public relations with the legislature due to the fact that they did give freely of their time in considering for the legislature certain matters that were pending and gave their opinions, in some instances, as to whether the legislation was good legislation or whether it was unconsitutional or not. I think it had a marked effect with a number of the legislators that the Bar was interested in being of real assistance.

There is only one additional comment I would like to make, and I would like some of you to have in mind, when you return to your local associations, in connection with the judges' salary bill, that we had wonderful cooperation from the members of the Bar throughout the state. There was only one place where there was any failure at all. The Bar Commission determined to have the local Bar Associations, prior to the legislative sessions, indicate to the Secretary of the Bar members within the local associations who would have some good contacts with the men who had been elected legislators, and we suggested that prior to the legislative sessions these individuals from the local Bars who were named interview the legislators and explain to them exactly what legislation we were sponsoring and what it involved. The response from most of the local Bar Associations was excellent. We sent out a letter to each local Bar President. And most of them, in a very short time, reported to Mr. Ennis the names of the men whom they thought could do this best in that particular locality. And Mr. Ennis immediately contacted these individual lawyers and explained what we would like them to do—to go and explain the legislation in detail and why the Bar was sponsoring it. We had one or two Bar Associations from which we had no response whatever.

So I would like to ask that you take home to your local Bar Associations the information that if that sort of thing occurs which it should, before the next legislative meeting, that the local Bar be called together, if necessary, and that they determine and give to the Secretary the names of the individuals who can lay before these men the legislation we are interested in and why we are behind it before the legislators reach Boise.

MR. FRED TAYLOR: Mr. President, along that line I have an idea that may or may not be worth something. Why wouldn't it be well to appoint individuals from the various counties to the Legislative Committee, and those people in those various counties will then be responsible to apprize the members of the Bar, as well as their delegation to the legislature, of any proposed legislation? In other words, it is your educational process again. They would of necessity have to delegate some authority to the members in Boise to carry through on it, but if they were on the committee, they would feel a little more responsibility, I think.

MR. E. B. SMITH: This is a very important feature that I think is worth mentioning. It occurred in Boise during the last legislature. In many instances the State Bar Legislative Committee acted as a liaison committee for the legislators. By request, in many instances by different members of the legislature, different bills and different questions were brought to our Legislative Committee for analysis and a request made of our committee to determine various aspects of legality and operating procedure in case of enactment of the proposed legislation, questions as to constitutionality and in general questions of advice.

That is a very important feature in public relations.. And, as I say, it was done at the instance and bequest of the legislature's members. You could see immediately that it created very good public relations.

Now, in order to carry that out a little further, this thought occurs to me. If the various local Bar Associations in the state, before the legislature goes into session, would invite the elected members of the legislature to a meeting of the local Bar Association and indicate to them the work that was done in aiding and assisting the members of the legislature in 1953, and offer the services that are available to the members of the legislature through our Legislative Committee, it would go a long way in creating good public relations.

I point out, Mr. President, what occurred in the last legislature, because to by knowledge I believe it is the first time that that sort of service was ever requested. It wasn't offered in the first instance, and if we can carry it forward and keep it going, it will aid and assist in our public relations.

PRESIDENT BROWN: Thank you. I am sure the Commission has a very great awareness of how much it benefited the Bar in this last session, and it just happened that immediately following the legislative session we attended the Interstate Bar Council, and in the State of Oregon they have instituted a very comprehensive program along that line. I do not think, to that extent, we could finance such a program from our Bar funds, but on a modified basis I think perhaps we could, and I am sure the Commission has something of that kind in mind prior to this next session of the legislature in the way of increasing the activity of the Legislative Committee. They will perhaps need some assistance from the Bar funds in order to make it workable.

MR. EARL MORGAN: Following up Mr. Smith's suggestion, I would like to say that I think it was two sessions ago our Bar had the newly elected legislators of the surrounding counties attend one of our meetings. I believe the subject was the Supreme Court and District Court judges' salaries, and we explained the proposals as we saw them. They were well received and thoroughly understood. I think the value of such a meeting is invaluable, because you give these legislators the thought before they leave their counties to go to Boise that there is such a thing as a Bar committee to work with. And I think it is a wonderful idea.

PRESIDENT BROWN: Thank you. I think, to that end, the Commission will have in mind this problem and no doubt suggest to each Bar Association, prior to the next legislative session, that such be done.

We must push along, gentlemen. The next matter is a report by Mr. Merrill on the American Bar Foundation Fund. Mr. Merrill of Pocatello.

MR. A. L. MERRILL: Mr. President and gentlement of the Bar: I see there is a small crowd here, and I wonder if I am not fishing in the wrong hole this morning.

That which I have to say to you, to me, is very important. Probably I won't

be able, in the time there is left, to explain the importance of it to you. But I want you to know how vital it seems to us who have been devoting our time to the National Organization that we have this objective carried through.

The American Bar Association consists of approximately a little more than 48,000 members. The program is tremendously extensive. It is recognized that it takes three things to make a great nation—land, law and literature. I like to call it the three L's. Land is the economic source of that which gives us material resources. That third L, literature, that right to think, that right to speak, that right to invent, that right to work. And the pivotal L, law, makes the other two possible. And the strength of that is what is necessary in the preservation of this great land.

We have land here in Idaho, and I love Idaho. It is a land of flaming mountains and flashing streams, far flung forests and great sweeps of plains. A land of majestic dunes and glorious sun sets. And I want to see us progress here just as we progress everywhere. And we, as lawyers, have a responsibility of preserving that second L, and it is subject to attack and has been seriously attacked, as every one of you know.

We have, in the American Bar Association, a very tremendous program. It has come to a place where it is necessary that there be a unified system, a place where the work can be accomplished. There are a number of affiliated organizations with the American Bar Association. We must have headquarters for the Association which will enable the Association to serve its members and the profession as efficiently as they should be served, a focal point where the products of its efforts and all the units of the organization may be preserved, correlated and made available for reference and study. There must be a center where the results of research in those fields to which the profession is dedicated may be found and where a clearing house of research activities will permit all persons to discover the current status of any research project in the field of law, a plant where the history and the acts relating to any subject in the legal field can be assembled for public use.

These affiliated organizations are very active. Some of them are the American Judicature Society, the American Law Institute, the American Patent Law Association, the American Association of Law Schools, the Association of Life Insurance Counsel, Conferences of Judges and Chief Justices, Federal Bar Association, Federal Communications Bar Association, Judge Advocates Association, the National Association of Attorney Generals, National Association of Women Lawyers, National Conference of Bar Examiners, National Conference of Uniform Laws, National Conference of Judicial Councils et cetera.

And in the Association itself, as you know, there are a large number of sections that have their points of operations at various places.

The objective is to build a center where all of them can be correlated, where there will be this research center that can produce and will produce a tremendous advantage to lawyers generally. I have pamphlets explaining that. I would like to give them to you, if you wish them. I won't take the time to cite them.

But what I want to suggest to you today, gentlemen, is the objective of the Association and how it is now to be accomplished. There was a lawyer in New York City of great views for the future. His name was Cromwell. Upon his death it was discovered that his will provided $400,000.00 for this objective. There have been others that have contributed. Plans have been evolved for the development of such a center. And there has been enough given that it leaves $1,500,000.00 for

the lawyers of America to contribute to accomplish this great objective which will give us a foundation headquarters of a value in excess of $2,500,000.00.

The University of Chicago gave us a block of land. I have been on the land. It is a marvelous site, and it is without restrictions of any kind or character. That has been deeded to us. We organized what was called the American Bar Foundation, a corporation, for the purpose of accepting that title to the land upon which this building will be constructed. Then we took that through the Internal Revenue Department, and we have a ruling that every dollar contributed to this fund may be deducted from income taxes. Then we began to determine how we are going to collect this money. It was decided that it would be suggested to the lawyers of the various states that there be a certain amount from each state contributed. And it was felt that no state would fall down. That, I am confident, is true. An apportionment was made conditioned upon the number of lawyers in the respective states, the income of those lawyers, and there is a lot of information on that point, and various other factors. A very careful analysis was made and the amount to be furnished by the respective states was then determined. The request made to the lawyers of the State of Idaho was $5,173.00 of which there has already been paid $193.00, leaving a balance of $4,980.00.

Now, it is earnestly requested that we, as lawyers, contribute that amount for that great purpose. In order to do that and to contact the people, I have written several lawyers. And they have agreed to support us so graciously that it warms my heart. In the various locations of the state there have been suggested the names of Robert E. Brown, Abe Goff, T. M. Robertson, Adonis Nielson, William Holden, Joseph McFadden and E. B. Smith to whom responsibility has been given to contact the members of their respective localities. We don't call them chairmen. We suggest them as persuaders with full power, of course, to get others to help them and to do anything in the line of work necessary to accomplish this objective.

We haven't done much in Idaho yet on this. I have a report here of Friday, June 26th, wherein it is recited that the following states have already met the following amounts of their quota: Deleware, 79 per cent; Montana 67 per cent; Indiana, 57 per cent; New York, 48 per cent; Missouri 47 per cent; Ohio, 45 per cent; North Dakota, 42 per cent; District of Columbia, 39 per cent; Tennessee, 38 per cent; Wyoming, 37 per cent; Oklahoma, 34 per cent; Philippine Islands, 34 per cent; Rhode Island, 32 per cent; Hawaii, 32 per cent; Michigan, 31 per cent; Texas, 30 per cent; California, 30 per cent; West Virginia, 28 per cent; Massachusetts, 28 per cent; Illinois, 25 per cent; South Dakota, 22 per cent; Pennsylvania, 22 per cent; Alabama, 18 per cent; Arizona, 18 per cent; Nebraska, 16 per cent; New Hampshire, 15 per cent and Wisconsin, 14 per cent. Other states have not yet reported. Idaho, as you have noticed, is not on that report, but it will be before the annual meeting in Boston the last week in August.

Now, gentlemen, I would like to urge you to give consideration to this wonderful and important project. I wish I had the time to tell you how important it is. It seems tremendously important to me. We all become interested in certain projects. My intense interest results from being a member of the Board of Governors of the American Bar Association, a member of the Board of Directors of the American Judicature Society, a member of the Uniform Laws Commission, and a member of the American Law Institute, which is devoted to the restatement of the law, taking about one-fourth of my time. And were it not for the loyalty of my brother and son, of course, I couldn't do it. But I merely mention that to show you how deeply interested one does become and how I know the value, to every lawyer in Idaho, of this project and how it will help us.

That research center will be of inestimable value to every one of us. Headquarters for an organization is, of course, an essential thing in any business. We all recognize that, and it has been needed for a long time.

It has been suggested how much should be contributed by the respective lawyers. That is a matter for you. Contributions are sought both from members of the American Bar Association and from lawyers generally. There has been a suggestion made of one dollar to one thousand dollars. It can be anywhere within that limit within the State of Idaho. One theory is this. This year is the 75th Anniversary of the American Bar Association. If you will note these figures, it will work out very well. If the lawyers can contribute, on a three year basis, $25.00 per year, all of which is deductible for income tax purposes, we would have ample funds. That is merely a suggestion. There are lawyers that will contribute more. Idaho will go over. We are not going to be left short, and when these persuaders contact you, either by letter or in person, if you have any question or inquiries you would like to make, do so. All of the information is available. Pamphlets are available and have been sent to you so that you will understand and know what it is about.

Here is a beautiful picture of the proposed building. The contract has already been let. I have a copy of it here. The work is going to progress. It will be finished and ready for use within the period of time that these payments are to be made.

Gentlemen, the time is gone, I am sure. I don't want to take up too much of it. I have a decided amount of information here, if you would like to contact me either now or after the meeting. But the contacts will be made personally by our persuaders who will give this matter the attention, I am sure, that it deserves. I thank you very, very much for your time. (applause)

PRESIDENT BROWN: I believe we all appreciate what a fine project the American Bar Association is sponsoring, and what a wonderful thing it will be, once the center is completed.

At this time we will have the report of the Resolutions Committee. Mr. Nielson.

MR. ADONIS NIELSON: Mr. President and members of the Bar: At the meeting of the committee, the following resolutions, except one, were adopted:

RESOLUTION NO. 1

BE IT RESOLVED, That the Idaho State Bar appoint a committee of the Bar to make a study of the subject matter of the proposed Uniform Commercial Code and that such committee be instructed to render its report and recommendation to the 1954 annual meeting of the Idaho State Bar.

Mr. Chairman, I move the adoption of this resolution.

MR. A. L. MERRILL: I second the motion.

PRESIDENT BROWN: It has been moved and seconded that resolution number one of the Resolutions Committee be adopted. Is there any discussion?

MR. A. L. MERRILL: May I make this statement: Probably there is no more important objective that will come before the legislatures of the respective states in the immediate future than this commercial code. There were $350,000.00 contributed by various institutions and foundations for a unification of our commercial code, which consists of ten sections, as you know. Ten years' work has been

devoted to that by the American Law Institute and other organizations. It is a matter now that is becoming of intense importance. Pennsylvania has already adopted it. It has been introduced in the legislatures of the various other states. When the larger states adopt that commercial code and there seems to be no doubt but what they will the smaller states will be in a very awkward position in trying to transact business unless they adopt it.

I don't say that as a threat in any sense of the word but merely to show to you and suggest to you the vital importance of it. There is a tremendous amount of information that is available to anyone that wants to study it as to what that commercial code means and its value and effect upon the commercial transactions of the respective states and how necessary it is that there be unification in it.

If this committee wants me to help them in any way—and I say that because I have served at the American Law Institute in the Uniform Laws Commission—I would be happy to render any assistance that I can.

MR. E. B. SMITH: I want to add this to what Mr. Merrill stated. This organization should have in mind specifically what that resolution states. It states that we would desire to in some measure study this Uniform Commercial Code for the next year and then come before this meeting at the 1954 convention and make recommendations as to what our position would be. Will this organization support the measures in the future or will we not support it? That would be one question for the committee to determine. Will we sponsor it, or will we not?

This is a gigantic work. The book now available, which is in the public library, is over two inches thick. There is a vast amount of comment and citations which support the text of the proposed laws. And I can discern this: If there was any action at all taken by the 1955 legislature, it would probably be in the form of a legislative interim committee to study this subject matter for the 1957 legislature, or to report at that legislature. In other words, we think it is probably a three or four year program in the State of Idaho to really get ready for this thing.

We feel that Idaho should not stick its neck out at this time in view of the fact that there is only one state at this time that has adoped the code. After another legislative term throughout the nation, we will then know the trend of this legislation. So the objective of this resolution is to have a committee of the Bar in some measure study it and to make a report at the next annual meeting.

I feel we can furnish that committee with a great deal of aid, because I have just aided and assisted in a completion of a study of it with reference to a young man who has submitted a thesis to the University of Washington on the subject matter with reference to his banking studies.

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

MR. ADONIS NIELSON: There was also presented to the committee four typewritten resolutions. The committee left that, because of the sweeping changes made by the proposed resolutions and the few men who were generally present on mornings of this kind when the Resolutions Committee reported, we should present this resolution in lieu of the four resolutions mentioned.

RESOLUTION NO. 2

There was presented to the Committee one resolution regarding the disqualification of the Supreme Court Judges, one resolution regarding the dismissal of actions upon reversal by the Supreme Court of the State of Idaho, one resolution regarding the disqualification of District Court Judges, one resolution regarding the reciprocal admission of attorneys to the Idaho Bar without examination and

whereas it was the opinion of the Committee that these resolutions should first be studied by the local bar associations and recommendations made to the Idaho State Bar

NOW, THEREFORE, BE IT RESOLVED, That copies of these four resolutions be mailed by the Secretary of the Idaho State Bar to each local bar association with requests that said resolution be studied by the said local bar and recommendations regarding said resolutions be made to the Secretary of the Idaho State Bar prior to the annual meeting of 1954 and that said resolutions be submitted by the Secretary to the Resolutions Committee at the annual meeting in 1954.

Mr. President, I move the adoption of this resolution.

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

RESOLUTION NO. 3

MR. ADONIS NIELSON:

BE IT RESOLVED, That the Idaho State Bar favor the robing of District Judges while presiding over the Court.

Mr. President, I move the adoption of this resolution.

PRESIDENT BROWN: Is there a second to the motion?

MR. FRANK MEEK: I wish to amend the motion by inserting "and that they wear wigs." (laughter)

MR. S. T. LOWE: I move the resolution be tabled.

PRESIDENT BROWN: I didn't hear a second to the original motion.

MR. RALPH BRESHEARS: I will second this last motion.

PRESIDENT BROWN: The motion before the house at the present time is the motion to table, which has been duly seconded. All in favor of tabling resolution No. III please stand. Nine are in favor of tabling. All of those opposed to the motion to table, please rise. The motion to table is lost.

The question now before the house is on resolution No. III involving the matter of District Judges robing when on the bench. Is there any further discussion?

MR. E. B. SMITH: Mr. President, it seems to me it won't make any difference what this association's actions might or might not be. They will do it or not do it as they damn please. I don't know why we should stick our nose into that kind of business so far as this association is concerned.

MR. HOWARD ADKINS: I was wondering if any opinion had been expressed by the Judges Association on the subject.

PRESIDENT BROWN: None direct.

MR. HARRY BENOIT: As I understood the resolution, we just say we favor it.

PRESIDENT BROWN: That is the essence of it, as I recall. I will have the resolution read so that there will be no question.

(Whereupon Resolution No. III was again read)

(Whereupon the motion to adopt Resolution No. III was seconded from the floor, the motion was put to a vote and carried.)

RESOLUTION NO. 4

MR. ADONIS NIELSON:

BE IT RESOLVED, That the Idaho State Bar extend its sincere appreciation to the officials and employees of Sun Valley for the efficient and courteous treatment extended members of this Association and their ladies and guests during our stay here at this convention.

Mr. President, I move the adoption of the resolution.

PRESIDENT BROWN: Is there a second?

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

RESOLUTION NO. 5

MR. ADONIS NIELSON:

BE IT RESOLVED, That the Idaho State Bar express its sincere thanks and commendation to Robert E. Brown, President; T. M. Robertson, Vice-President; Paul B. Ennis Secretary, and L. F. Racine, Jr., and their committees, for the excellent way in which they have managed this convention, their fine selection of speakers, and the entertainment provided our members and guests; and that they be particularly commended for their untiring efforts representing this organization throughout the past year.

Mr. President, I move the adoption of the resolution.

FROM THE FLOOR: I second that motion.

PRESIDENT BROWN: I believe the resolution is somewhat out of order, but it is before the house.

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

RESOLUTION NO. 6

MR: ADONIS NIELSON:

BE IT RESOLVED, That the Idaho State Bar and the members hereby extend to Raymond G. Stanbury, Samuel A. Rosenthal, Oliver M. Jamison, T. Newton Russell and Erle Stanley Gardner and our sincere thanks for honoring us with their personal attendance at our annual meeting and delivering to us such inspiring, informative and entertaining addresses.

RESOLUTION NO. 7

MR. ADONIS NIELSON:

BE IT RESOLVED, That the Bar Association endorse and commend the work of Erle Stanley Gardner and his associates in their efforts to carry forward the Court of Last Resort, and that we extend to the Court of Last Resort such cooperation as we are able in his high purpose of improving the administration of justice.

Mr. President, I move the adoption of the resolution.

FROM THE FLOOR: I second the motion.

MR. E. B. SMITH: Mr. President, may I move the name of our Swedish entertainer, Mr. Anderson, be included in that resolution.

PRESIDENT BROWN: There is a motion to amend.

MR. NIELSON: If you had to listen to him twice, would you still do that?

MR. E. B. SMITH: I would.

(Whereupon the motion for adoption of Resolution No. VII was put to a vote and carried unanimously.)

RESOLUTION NO. 8

MR. ADONIS NIELSON:

RESOLVED, Whereas the legislature of the State of Idaho, more than thirty years ago, passed a law permitting the use of typewritten transcripts on appeal in civil actions; and

WHEREAS, if cases on appeal to the Supreme Court can be determined and decided on typewritten transcripts there is no logical reason why the briefs filed in all civil cases cannot be typewritten;

NOW THEREFORE, BE IT RESOLVED, By the Idaho State Bar Association:

That we do hereby request the Supreme Court of the State of Idaho, to amend its rules to permit all briefs filed in civil actions or proceedings in that Court to be typewritten or processed.

Mr. President, I move the adoption of that resolution.

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

MR. ADONIS NIELSON: The following resolution was handed to me just as it will be read. The committee did not have an opportunity to pass upon it, and I will read it to you as it was handed to me. That is read without any recommendation.

MR. E. B. SMITH: Mr. President, I move that wherever you have the word "typewritten" in there that you insert the words "typewritten or processed." I will tell you what that means. We have a service in Boise, and Jim Cunningham down in the Twin Falls area has it, and they call it multilithing, I believe. It is something like a mimeograph machine. They prepare master sheets, and from that they reproduce as many briefs as you desire, and it is very clear. They are very fine briefs, and the cost of those briefs in Boise runs something like $1.25 a page for the smaller quantities and $1.50 a page for larger quantities. The cost is much cheaper than you can typewrite it in your office.

Another reason why the cost angle is important is the court ruling having to do with allowance of costs. I tested the question recently on a motion to deny a cost bill on a processed brief—I believe it was with you, Mr. Nielson.

MR. ADONIS NIELSON: We have had many arguments, but I don't remember that.

MR. E. B. SMITH: No, it was someone else down in the Burley district. Anyway they wanted the cost to be allowed on processed briefs. My motion was allowed by the Supreme Court, and the cost bill was denied. But I have gone to bat on the question presented in this resolution, although the resolution didn't come from me, and I am very much in favor of the resolution.

PRESIDENT BROWN: At this time the resolution has not been formally introduced, and it occurs to the Chair that this resolution might properly be submitted to the membership of the Bar before adoption or rejection, as were the four resolutions submitted previously. It might be considered by the membership of the whole Bar before we recommend to the Supreme Court a change in the rules.

However, at this point, I am simply giving a personal observation. This resolution has not yet been formally introduced.

MR. E. B. SMITH: Well, it is merely a recommendation to the Supreme

Court that they include, within the purview of their present procedure, the prosessed or typewritten briefs in civil actions. This is applicable now in appeals from the Utilities Commission and from the Industrial Accident Board, and I have been hammering on this subject matter in Boise, and the court favors this thing. I know that through the Clerk of the Supreme Court.

MR. ADONIS NIELSON: Would you move the adoption of this resolution?

MR. E. B. SMITH: I certainly do—with those words in there "typewritten or processed."

PRESIDENT BROWN: As I understand it, the resolution now includes processed briefs. Is there a second to the motion?

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

MR. ADONIS NIELSON: That completes the report of the Resolutions Committee.

PRESIDENT BROWN: At this time I would like to extend the sincere thanks and appreciation of the Bar Commission to the Committee Chairmen and the Committee Members who have served at this convention and have served us so well. It was appreciated, I know, by all the members of the Bar.

MR. ABE GOFF: I tried to get Mr. Merrill to introduce a resolution, but for some reason he is modest. I do feel that the program of the American Bar Association for the establishment of this law center is something we ought to approve of at this time. I think it would be of value to all members of the Bar.

If I am not out of order, I would like to move that this association endorse the program of the American Bar Association for the establishment of a Bar center.

PRESIDENT BROWN: It has been moved that this Bar association go on record as favoring the American Bar Center Program. Is there a second?

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

PRESIDENT BROWN: I was derelict in not asking if there were any resolutions to be offered from the floor. Are there any others?

The new Commission is organized, and I am pleased to announce that the new President of the Idaho State Bar Association is Mr. T. M. Robertson of Twin Falls. Mr. Louis Racine has been elected Vice President of the association, and Mr. Paul Ennis as Secretary. (applause)

I am very happy, indeed, to present to you at this time the new President of the Idaho State Bar Association with whom I have served, and I know he will do a great service for this association. I congratulate you, Mr. Robertson, and I now turn the meeting over to you.

PRESIDENT T. M. ROBERTSON: I take it from the way the Commission generally operates that my election to Presideney was as much a surprise as the election that Russell Randall won yesterday. Is there any further business to come before the meeting?

MR. ARTHUR BABBEL: I move that the business of the Bar association be conducted earlier in the convention inasmuch as I think it is disgraceful the way this meeting has been attended this last day. I guess the night before is too hard on all the members, but I think we have had a very poor representation here this morning, and something should be done about it.

PRESIDENT ROBERTSON: Well, I think the Commission is interested in securing as large an attendance as possible at the meetings where the serious business of the association is to be conducted. However, this seems to be about the size of the attendance we generally get for the business sessions.

I think that perhaps the fact that there is going to be a business session the next day somewhat expands the activities of the night before, and I think any time you had the business session, you might find the same situation. However, in planning for the future meetings, I am sure the Commission will give some attention to how to increase the membership at the business meetings. Maybe we can give a door prize or something.

Is there any more business to come before the meeting? If not, I will entertain a motion to adjourn this annual meeting of the Idaho State Bar Association.

FROM THE FLOOR: I move we adjourn.

(Whereupon the motion was seconded from the floor, was put to a vote and carried unanimously, and the meeting was adjourned sine die.)

Apology

On Friday, July 10th, 1953, Mr. Erle Stanley Gardner addressed the members of the Idaho State Bar. To keep publication costs within budget allowances, the Board was compelled to omit a portion of the Proceedings, and the Board sincerely regrets that Mr. Gardner's entertaining and inspiring address is not included. The following introductory and concluding remarks with respect to Mr. Gardner were made:

MR. T. M. ROBERTSON: Ladies and Gentlemen: I take it that very little introduction is necessary. I am sure that most of you here, at least individually, have your own conception of our guest this afternoon and probably cast him in the image of Perry Mason or one of his other characters, however, I think that there are a few general observations that could well be made at this time.

I think we have here a man who has had a rather unique legal career from his training and experience as a lawyer. He branched out to the field of fiction writing. The astronomical number of sixteen million copies of his books—probably higher than that right now—I think clearly indicates that more of Mr. Gardner's writings have been published and read than probably the judicial opinions of all the courts of records in the United States. (laughter)

I think any lawyer who is worthy of the name recognizes that he owes something to his profession. The other speakers we have had here who have come up from California and given of their time without compensation have, I think, shown a remarkable example of that kind of returning back to your profession some measure of what the profession has done for you. I think every lawyer here today who attends the annual bar meetings and gives of his time toward the improvement of the profession, towards the discussion of the legislative reforms, towards improving the administration of justice, in a great measure, is returning back to his profession something that his profession has given him.

Mr. Gardner's contribution to his profession is likewise unique. Not content to stand in the realms of fiction when Perry Mason or the D. A. or some virtuous character always emerges triumphant against political chicanery or the overzealousness of law enforcement officials, Mr. Gardner has taken a very realistic attitude of justice as it is administered in the courts today. And to correct some

of the defects he has found wanting, he has returned unselfishly to the legal profession his services in the well known Court of Last Resort of which he will speak today.

There is perhaps one other thing I should mention. I have a number of friends over in the Galena Summit area to the north, over in the Stanley Basin, who hunted and fished with Mr. Gardner and have reported him to be a thorough going sportsman and lover of the outdoors. To us here in Idaho, where outdoor recreation means so much, I think that we are all indebted to Mr. Gardner for the blows that he has struck for the conservation of wild life resources in the primitive areas of the State of Idaho.

It is with no small measure of pride, Ladies and Gentlemen, that I present to you, Mr. Erle Stanley Gardner. (applause)

* * *

PRESIDENT BROWN: Thank you, Mr. Gardner. The Bar of Idaho is honored by your visit here, sir, and I know these people appreciate that you are doing a marvelous service in the interest of justice. We deeply appreciate it, and thank you.

INDEX

— A —

— B —

— C —

— U —