Proceedings of the
Idaho State Bar

VOLUME XXXVIII, 1964

Thirty-Eighth Annual Meeting

SUN VALLEY, IDAHO

July 9-10-11, 1964

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Speakers

John F. Boland, Jr.
Phoenix, Arizona

The Honorable
William Edward Doyle
Denver, Colorado

Joseph A. Ball
Long Beach, California

Thomas F. Lambert, Jr.
Washington, D. C.

Thursday Afternoon,
July 9, 1964
1:15 p.m.

MR. MERRILL: Ladies and Gentlemen, it is my very distinct pleasure to declare this thirty-eighth annual convention in session. We think we have an excellent program in store for you the rest of the convention. I do express my personal pleasure in seeing all of you here. First on the program, of course, will be the invocation and we have asked the Reverend John F. Rafferty of St. Peter's Church of Shoshone.

REV. JOHN F. RAFFERTY: Oh Heavenly Father, author of the Ten Commandments upon which all just laws are based, look with thy favor upon this assembly. Bless all its members. Send forth Thy Holy Spirit to bless their hearts. Strengthen them in their deliberations. Impart to them the gift of wisdom that will enable them the better to serve Thee and their fellow men. Give them the gift of understanding that in their relations with others they may temper justice with mercy and give them the gift of counsel that in counselling others they may be aided by power from Thee above. Give them the gift of fortitude, that they be enabled to fight with courage for those who need their help, and the gift of knowledge, that they may from year to year benefit from the experiences of their learned and honorable profession so as to share them for the contentment and happiness of those they serve. Finally, may they in all their works pay the highest reverence to Thee the Creator of all good things. Amen.

At this time I want to make anannouncement that Catholics are dispensed from the obligation of the Friday abstinence. They can eat meat tomorrow. In order to make this official I will read the following letter:

> MR. JAMES LYNCH, Box 835, Boise, Idaho. "Dear Jim: This is to confirm our telephone conversation a few minutes ago. I hereby grant dispensation from the Friday abstinence at the evening banquet to those Catholics taking part in the bar convention taking place in Sun Valley on July 10th . . . to those who take advantage of this dispensation on that date. Best wishes.
>
> Sincerely yours,
> Bishop of Boise."

MR. MERRILL: Thank you very much, Father Rafferty. We appreciate your interest and your willingness to come this afternoon. The commissioners do trust that the announcement of dispensation will be accepted by those of you concerned in the spirit in which it was granted by the Bishop of Boise.

I would like at this time to acknowledge the presence of several distinguished guests that we have in the audience and welcome them here, especially Justice and Mrs. E. B. Smith. We have Dean Peterson of the College of Law. I believe we have Dr. John Gavin of Yakima, President of the Washington State Bar. As usual, we have invited the most distinguished members of the Bar. I have in mind Senator Church and Governor Smylie. Governor Smylie did send his regrets that he would be at the National Convention of the Republican Party and he thought he could do more good there than here.

I would like to acknowledge the fact that Clifford Goodman, Pocatello,

Idaho, the court reporter of Judge Oliver, is the official reporter of our session.

I can see the end of my term in sight; actually it's around the corner, and at this time I would like to express to all of you at this meeting, as I have done in the column that I have been writing in the Advocate, my deep thanks for your whole-hearted support during the last three years, and especially this last year. During this last year I have had the opportunity of meeting with a great number of bar associations and going to more conventions than I like to think of, but I am proud to say that the membership in the Idaho State Bar and the functions of the Idaho State Bar are such that at each one of these meetings I attend I am very proud to announce I am a member of the Idaho State Bar. I am very sincere in this feeling because I have found in this last year of work for the Bar that the cooperation, the enthusiasm, and the willingness of the members of the Bar make this truly an outstanding State Bar organization. I have had in these conventions two requests to discuss with other states our organization and our functions primarily so that they can look at them critically to see if they bear a comparison. One Bar indicated that they had in mind some serious changes to conform to the way we do things. This makes me personnally feel good, and I pass it on to you only because it should make you as members of the Idaho State Bar feel good because actually this is your association and only the individuals in the association can make it what it is. I think we have an excellent bar because we have excellent members.

Now the next item on the program is my very pleasant duty to appoint a Canvassing Committee for the election of a new commissioner for the Eastern Division. I would like to appoint as chairman of that committee Mr. Sidney Smith of Coeur d'Alene, Mr. Max Whittier from the Eastern Division, and Mr. William Nugester, from the Western Division. This, gentlemen, will take you maybe 15 or 20 minutes at the conclusion of this meeting, and if you would, Mr. Smith, contact Mr. Lynch at the first coffee break for the instructions and ballots. Thank you.

The first formal item on the program is one I exercise with what little authority I have, and I have retained the right to introduce this first speaker. Our first speaker is an attorney from Boise. During the last year the commissioners have appointed a committee entitled Committee on Reform of Lower Courts composed of Thomas A. Miller of Boise, and George Bell, of the University of Idaho, College of Law, and as a liaison member from the Supreme Court, Justice McFadden. Our speaker who will start our proceedings this afternoon is a member of that committee who will report on the current work of the committee. He is a practicing attorney in Boise, associated with the law firm of Hawley, Troxell, Ennis & Hawley. He's a past secretary of the Idaho State Bar for four years; graduated from the Idaho College of Law; a real gentleman, wonderful person, and as far as I am aware has experienced one failure in the last few years either in his work as a secretary or otherwise and that is that he has failed completely to get me on the golf course. Gentlemen, I would like to introduce to you Mr. Tom Miller of Boise. (Applause.)

MR. TOM MILLER: Thank you, Mr. Merrill. There is virtue in defeat sometimes. President Merrill, Vice-President Hull, Commissioner Benoit, and

Commissioner-Presumptive Kidwell, Justice Smith, and other distinguished guests. Our committee was handed a small task this spring, of (in a few pages) having the presumptuousness of telling you and the judges and the 700,000 citizens of Idaho how the lower courts, or how the entire court system should be reformed. Probably being ignorant of some of the problems we launched forth with vigor, and we have spawned a report about 18 pages long, which will be handed out to you after the session this afternoon.

To briefly describe the recent history of court reform in Idaho, we should go back at least to 1962, when the people adopted H.J.R. 10 by a constitutional amendment, in effect taking the justice and probate courts out of the constitution and permitting the legislature to establish inferior courts and, secondly, providing that the entire court system be integrated under the supervision and administration of the Supreme Court. The people spoke in general and the legislature, the representatives of the people, are awaiting the Bench and the Bar to come forth with a specific plan. Unless the Bench and the Bar move, undoubtedly other groups, perhaps less qualified and experienced, will move, and we may have a sad experience, as in Pennsylvania where just that happened. So this is our recommendation in a tentative form, and we hope that every member of the bar and every judge will be very critical of the report; that is, that they will analyze it carefully and see how it actually would apply, and most of all to come forward with their recommendations either for using some of our details or for changing them or adding to them. Now there is one possible pitfall in court reform. We may be in the process to do away with a worthy body of folklore—such as tales of what has happened before justices of peace and other lay courts. I'm thinking of a classic case in Owyhee County in which Earl Garrity was the new prosecuting attorney and Gene Anderson was the newly admitted member of the bar defending a criminal on a misdemeanor charge. The case was tried before a new justice of the peace before an audience of ranchers who came to see this exciting event. Any kind of a trial was a worthy event in Owyhee county—just like a circus. Anyway, at the end of the prosecutor's case Mr. Anderson made a motion to dismiss for lack of evidence. The judge said, "Do I hear a second?" Gene Anderson nudged his client and said, "Second it." He did, and the judge said, "All in favor of the motion signify by raising their right hand." And everyone's hand (except the prosecutor's) was raised. He said, "Motion is carried, and the case is dismissed." (Laughter.) Sounds phony, but supposedly true, and we may do away with situations like that. Perhaps justice prevailed on that occasion, but it would seem there was a more scientific way of arriving at justice and truth.

Now as you will see from reading our report that it has several main or salient points. First of all there should be established—and this, at least, should be done in the next legislature—an administrator of the courts, the head of which would be appointed by the chief justice and he would be the business director, more or less, of the court, and a servant of all the courts. He would handle recommendations for budgets, for expansion of court facilities, for salary increases, and, of course, assisting in submitting requests for appropriations, handling expenses, for studying case loads, for determining where judges are not working full time and other places where they are over-worked and behind so that our judges may be utilized efficiently.

Judges may be shifted temporarily to even things out, and we think that the court administrator could perform an additional function of handling administratively at least, not advising, but administrating the program of continuing education for the judges, particularly lay judges. And we may have lay judges for awhile. We don't believe there are sufficient lawyers who will accept salaries which might be paid in the near future.

We think that he might do other things upon request of any judge—a Justice of the Supreme Court, the Chief Justice, District Judges, or any of the lower court judges. We have recommended adoption of a model act proposed by the Commissioners on Uniform State Laws, which is attached to our report.

Now our second point is to transfer into the district courts, all probate matters, including insanity proceedings, juvenile proceedings (including proceedings under the Youth Rehabilitation Act), guardianship of the persons and estates of minors, compromise of minors' claims, adoptions and child custody, guardianship of adult incompetents (person and estate), and probating of decedents' estates.

Our third point: Most of the work in probating estates is clerical. We do not think that the work of a district court will be increased very greatly by the addition of these duties. Most of them can be handled by the staff of the clerk, but on the other hand when you have a contested will or other contested proceeding if it amounts to anything what you have now is two trials; you have a trial in the probate court and somebody appeals and it's tried **de novo** in the district court. We think this is wasteful and should be tried there initially. Furthermore, these family court matters, matters intimately involving the lives of our people should have the attention of our best judicial talent, and we should expect, and ordinarily you will find the best trial talent is in the district court. We also recommend that there be new legislation; correction of birth certificates should be taken out of the Department of Health, Bureau of Vital Statistics, and made a judicial matter, and that there should be a proceeding to establish dates and places of birth by judicial proceeding.

Now also in addition to the other recommendations, and to offset the burden on district courts, we would recommend strongly that the district courts have the right in their discretion to assign cases, many of these cases involving juvenile matters, maybe some estate matters, particularly accountings, to circuit judges—the lower court judges that we call "circuit judges for want of a better name—which judges will be termed "masters," or something to that effect, who will hear evidence in reported hearings and make recommendatory findings, conclusions and others which will be subject to modification, change or remand by the district court. In other words, here you have the district court with an additional tool, additional procedure to allow someone else to help him, hear ordinarily routine matters, subject to his approval and subject to appeal.

Now our fourth point and probably one of the most important points is to abolish all present inferior courts, justice courts, probate courts and police courts. There are probably in the neighborhood of 150 judges in our probate, justice and police courts, maybe more than that. Some of them are paid

maybe $50 to $100 a month, maybe less. They have almost no experience when they go on the bench, you might say, and they never have a chance to acquire any experience, the number of cases they hear being so insignificant. Yet the total amount paid to all of these judges is significant; it's a tremendous amount. Very few lawyers have any idea. I believe in Bonneville County there is $30,000 budgeted for these lower courts, and still you have lay people except, I believe, for the probate judge who is a lawyer. Now the charter cities, Lewiston and Bellevue, would require specific attention. Their status requires special study.

Now our fifth and most important point is, in lieu of these abolished lower courts, to establish a new system of courts which we term, for want of a better name, a circuit court of statewide jurisdiction, and as a tentative suggestion only we have recommended seven districts, or seven circuits. There is a map attached to the back of our report showing our recommended circuits. Briefly, the First Circuit in the north would include the Eighth and the First Judicial districts. Coming down, the Tenth and Second (Lewiston, Moscow, Grangeville). The Seventh Judicial District which is composed of Payette, Valley, Gem, Washington, Canyon and Adams Counties, would be third circuit. The Third Judicial district of Boise, Ada, Elmore and Owyhee Counties could be a fourth circuit. Perhaps Owyhee County should be split because it's such a large county. It has a population at the extreme northwestern corner near Homedale, and has a fairly sizeable concentration of population around Grandview. The Homedale area is more closely connected with Caldwell and Nampa, and perhaps should go in there. Grandview perhaps should remain in the Fourth Circuit centered at Boise. As a Fifth Circuit we suggest Camas, Blaine, Gooding, Minidoka, Jerome, Twin Falls and Cassia Counties, the present Fourth and Eleventh Judicial Districts. The Sixth Circuit we suggest would be Power, Bannock, Caribou, Oneida, Franklin and Bear Lake Counties, the present Fifth and Thirteenth Judicial Districts. The Seventh Circuit would take in the balance: Butte, Clark, Fremont, Jefferson, Madison, Teton, Bonneville and Bingham, and then the three small counties—I should say large counties with not too many people—Lemhi, Custer and Butte. Perhaps if there were a district judge in those three counties, there should be a circuit made up of those three counties. As you will see, we have tied these circuit courts in with the district judges, and, therefore, thought that Lemhi, Custer and Butte would have to be included with counties having district judges chambered there.

We would have this circuit court a court of record with venue provisions and procedures similar to district courts now. This court would have jurisdiction and power to try any case within its granted jurisdiction; that is, if the defendant lived in Ada County one could sue him in Canyon County, and if the defendant did not move to change venue it could be heard in Canyon County. The number of judges will have to be fixed by the legislature and we simply do not have the statistics or analysis of statistics to decide how many. We would guess in the neighborhood of 35 judges working full time to cover the entire state. We would authorize the chief justice to assign the judges within the circuit and between the circuits. Now in practice we assume the district judges will really handle this as a practical matter because they are more closely attuned to it, but this can be worked out, and whichever plan would work the best and more conveniently should be

adopted. We don't think it's a matter of principle or matter of prestige or anything; it's who can do the job best. Perhaps it will be the chief justice. Perhaps the chief justice will merely accept a recommendation of the district judges. At the present time the governor may assign district judges, and yet I'm sure he exercised little or no discretion in the matter. The supreme court advises him that they need a judge assigned from one district to another. I'm sure he signs the order without more than reading it. Incidentally I'm sure the governor would like to be shed of this duty.

The circuit judges should be appointed by the senior district judge within the circuit, or if the circuit comprises more than one judicial district, by a concurrence of the senior district judges. If there is any dispute it will have to be resolved by the chief justice. Now you could say, why not let the chief justice do it initially? Perhaps that would be all right. He would probably follow the recommendations of the district judges in the area involved anyway. I don't think that's too important. We may have to have some flexibility to try out both methods. I'm sure that we will arrive at the method that is best suited to achieve efficiency and to carry out the goals of any court system, that is, to dispense justice fairly and impartially and without undue delay.

We would recommend a term of four years co-extensive with the terms of the district judges. In case of a vacancy for any cause the successor should be appointed for the balance of the term only.

Removal or retirement. We think this is tied in with removal and retirement of all judges—district judges and supreme court justices. As I understand it the bench of this state is studying very carefully the California system and other systems for removal of judges for various reasons, whether for want of incapacity or illness or any other reason, wilfull neglect of duty and so forth. I do believe the bar has studied the same matter from the aspect of the attorney because it's a problem of the bench and bar alike. We recommend the comparison and study of the California provisions which are handled by the California constitution, more or less, authorizing the supreme court to adopt rules. These pertinent sections of the constitution and rules of California are cited in our report.

As to qualifications, frankly we would like to see that all of these circuit court judges be lawyers. This is the ideal situation, but we think it is utopian; it is not possible at the present time. It is difficult enough to find ready candidates for a district bench. Certainly we could not hope to pay salaries commensurate with the present salaries of district judges for these circuit courts. Therefore, I think we are going to have to have some laymen, with the qualification we discussed—that the judge be an attorney admitted and licensed to practice in Idaho, or a layman who is learned in the law and who is required to attend schooling prescribed by the chief justice. From what I've heard the lay judges would be very enthusiastic about a schooling requirement. He should be, of course, a citizen of the United States, a qualified elector within the circuit. I believe there should be a sufficient qualification as far as period of residency. I must say that the supreme court justices at the present time need not be lawyers. It would be rather anomalous, therefore, if we required the most inferior judges in the state to be lawyers. Of course, the logical answer is, why not change it for all judges, require all

judges to be lawyers? But here again the Bench and the Bar would make a sad mistake to have enacted a requirement that could not be carried out because it would result in vacancies on the circuit courts which could not be filled.

Now we would contemplate that the salaries, travel expenses and miscellaneous current expenses of these judges would be paid out of state appropriations out of the general fund to the supreme court, just as is presently done with district courts. The district court appropriations are through the supreme court. Our able clerk, Mr. Bideganeta, actually handles that. Perhaps all these budgetary fiscal matters should be transferred to the court administrator's office. Maybe Mr. Bideganeta is the man to go into that office. I don't know. We have to look to the future, and project needs and desires for 20, 30 years hence. We would contemplate capital facilities like courtroom facilities, furniture and equipment, should be furnished by the counties within the circuit, perhaps on a pro rata basis as determined by the tax commission's report to the auditor every year as provided in Chapter 6, Title 63 of the Idaho Code. At the present time I believe these capital expenditures of the district courts are parcelled out among the counties more or less at the whim—I'm sure the well considered whim—of the district judges, but perhaps there should be a more definite way of doing it.

We would think that the circuit judge should have a clerk, a person whom we call a registrar, in each county, and perhaps this person could take over the present probate court facilities, the office and so forth. This registrar should be appointed by and serve at the pleasure of the senior district judge. Of course, he would make the appointments in all counties within his district. The same with deputy registrars and other assistants. Perhaps the circuit judge should appoint those, but this should be with the concurrence and subject to modification by the district judge. Now it may be advisable in some counties, perhaps in all the counties, to appoint the circuit judge as ex-officio registrars as we do in the probate courts now. Of course, he could have deputy registrars. He would not receive two salaries. He would receive only the judge's salary. All of these salaries of registrars, deputy registrars, assistants, since they are paid out by the county, should be fixed by the county commissioners. We don't like this too much but we think probably this is what would have to be done. Now it may be advisable in some small counties to appoint the clerk of the district court as ex-officio or deputy registrar. We are not positive. There are some constitutional or statutory provisions that may cause some trouble. Perhaps we would have to study further, but, ultimately, if a system of lower courts is established we think there should only be one clerical person called the "clerk of the courts" to handle all district court and circuit court files; the other duties of the clerk (ex-officio auditor and recorder, clerk of the county commissioners, clerk of the board of equalization, clerk of the county library, and hospital board) should be divorced and unified probably in another county official.

Now we would recommend also that the senior district judge of the county should be authorized to appoint one or more circuit court commissioners in each county for the following purposes: One, to accept pleas of guilty and enter a judgment, fine or imprisonment in minor criminal cases subject to the prompt review of the fine or punishment by the circuit judge. This prompt

review should be spelled out in court rules. Two, authority to arraign on misdemeanors, fix time to appear for trial, fix and receive bail. This could be subject to limitations, of course, and all subject to modification by the circuit judge. Authority to issue summons, subpoenaes, writs of attachment or execution, warrants of arrest, and search warrants, but not bench warrants.

We would contemplate that civil jurisdiction should include all cases involving not more than $2,000 exclusive of interest, costs, penalties and attorney fees where applicable, and also unlawful detainer for forcible entry, and, of course, authority to marry people. We would not permit the circuit court to hear cases involving title to boundaries of real prperty. Judge Oliver said, "Why couldn't the circuit court hear lien foreclosure cases involving $100 or $200?" Well, I think that's a good suggestion. Perhaps the circuit court should have such jurisdiction, within the $2,000 limitation. Although we did not mention it in our report we think that the circuit court should have a small claims department such as the ones presently existing in the justice court. Perhaps this should be raised to $200.

Criminal jurisdiction. Act as committing magistrates for all indictable misdemeanors, felony cases, and hear all misdemeanors, and of course, the court should have provisions spelled out giving him authority to make all necessary and proper orders in furtherance of granted civil or criminal jurisdiction. We think that the juries should be limited to six men. This would require a constitutional amendment. Until then we should probably—if there is a statute enacted covering this reform before the constitution is amended—perhaps the law should provide that in cases involving not more than $500 to a six-man jury, and in cases of $500 to $2,000 it would have to be 12, absent express agreement of the parties. Jury lists should be handled similar to those in district courts.

There should be procedures and rules spelled out for the keeping of records, and there should be special rules of procedure to adopt and implement the Idaho Rules of Civil Procedure where they apply, and where they do not apply they should be modified and changed appropriately.

Now we would make a startling recommendation that will probably receive much comment; that is, to use tape recorders rather than shorthand reporters in these cases, and only when it is appealed would the tape be transcribed. The record can be settled by procedure such as used in district courts, and we would specify that the tape be saved for, say, a year unless a specific tape is ordered to be preserved thereafter. There are not, and will not be enough shorthand reporters to take all these proceedings, and yet this is going to be a court of record and a court in which a verbatim transcript is taken.

Now our plan would envision appeals from the circuit court to the district court and from the district court to the supreme court. We doubt that there will be very many cases appealed beyond the district court. The time for appeal should be about 20 days from the date of entry of judgment or appealable order.

Perfection of appeal. We could either use the justice or probate court appeal statutes, or we might adopt a modification of the district court

statute. Appeal might be taken on questions of law and fact or one or the other. Of course, when it's on a question of fact that would have to have a verbatim transcript of the record or portions to go up, or perhaps a stipulation of the pertinent facts. Now we would recommend abolition of the ridiculous requirement that all the pleadings be typed up. The pleadings and case records in court should be copied by photographic means, verifax or some similar copying method. I understand that is actually being used in one or more of the districts right now. If the supreme court likes it and agrees with it I don't know who is to question it, although it is a departure from statute or the present rule. Now we anticipate that the district court should be permitted to affirm, reverse, modify or remand, of where warranted and upon proper showing the district court may order a trial **de novo** in district court. We doubt that this would be used very often but may be a worthwhile escape valve."

That, gentlemen, ladies, is a fairly exhaustive outline of our plan. We realize that this is like throwing a couple of bottles of ignitable fluid on a very inflammatory crowd, and we expect a like reaction. We got a reaction in the judicial conference, and the least one can say about it, is that they are not unconcerned about the question of organization and administration of our court system.

Our committee has enjoyed working on this report. We are sure that all of you will examine this carefully, and all we ask is that, where you have criticism, we would appreciate hearing a better alternative. Thank you very much. (Applause.)

MR. MERRILL: Thank you very much, Tom, I might announce that copies of this report will be made available after the first part of our session this afternoon at the first coffee break. Secondly, That we will have available an opportunity for more discussion on Tom's plan that he's presented. I say Tom's plan—it's the committee's plan—on Saturday morning; and third, you will have ample opportunity each and every one of you after you have had a chance to study the proposal to discuss with them and bring them up in your local district bar association meeings. As Tom has mentioned, I would like to read one sentence from the preamble of his report. It says, "That details can only be resolved after a broad plan has been considered, accepted or rejected after a free and open discussion by all concerned, particularly between the members of the Bench and the Bar." It is the plan of the state bar commission to give you gentlemen plenty of opportunity to voice your objections and your approval or your recommendations. As you can see there has been a tremendous amount of work put into this matter by Tom himself, George Bell, and by Joe McFadden. We certainly wish to thank them again. I would like to recognize the presence of some additional distinguished members. From the bright lights I can see Judge Martin, Judge Monson and Judge Webb who are with us this afternoon. Glenn Coughlan, immediate past president of the state bar, says that the responsibility is no longer his and he is free to walk out. I think he's gone. I would also like to acknowledge the presence of Judge Benson, Probate Judge, Blackfoot, probate judge of Bingham County. We are certainly happy to have you here, sir.

One other announcement. You might have noticed a considerable number of gentlemen, looking like tax attorneys walking around—they have a different

look than the rest of us. We have associated with us in our convention the Western Regional Association and Internal Revenue Service Liaison Committee. Now that distinguished committee is actually composed of one member of each state bar from the western part of the United States, one member from the American Bar Association and six members from the Internal Revenue Service. They are holding their annual meeting in Sun Valley today, and as you will note from your program they will assist us tomorrow afternoon. I would like to acknowledge the fact that they are with us in a coordinated type of convention.

Now at this time it is my distinct pleasure to request William C. Roden, one of the official hosts of our next speaker. Mr. Roden.

MR. RODEN: Mr. President, Members of the Commission, Members of the State Bar Association. It is a real pleasure to be given the opportunity today to introduce the first speaker at our annual meeting. I know the story and the address which he will bring to us will be a highlight of this convention. Our speaker was born in Stewart, Iowa. He is a graduate of Creighton University and University of Southern California. I talked to him briefly, very briefly about the biographical data I had. I asked him if there were any additions or deletions to it because it's a very formidable list of credentials. I think it is very important for the bar association to be fully familiar with it. In bar association work he has been most active. Served as president of the Long Beach Bar Association from 1951, '52. He was a member of the Board of Trustees of the Los Angeles Bar Association 1946 and 1947, and state president of the California Bar Association in 1956 and 1957, and served as a state delegate to the American Bar Association 1957 to 1960 and in 1962 and 1963. He is also a member of the California Law Revision Commission. National Conference of Bar Presidents where he served as chairman during 1960 and 1961. He is a member of the California Jury Instructions Criminal Committee which I'm sure many of us have had occasion to use in Idaho. Also during—on this commission from 1959 to 1963. Has served on the Board of Regents of the American College of Trial Lawyers from 1952 to 1955. The special appointments which he has had have been most outstanding. He is a member of the Advisory Committee on Federal Criminal Rules. He was appointed to that position in 1960. He is a member of the commission to revise the constitution of the State of California. He was appointed to that commission in 1963. He also served, and I have a little problem with wording this exactly the way it was because in Idaho the politics sometimes get involved, and I'm sure this is not a political position, but the way I have it down here he is a fifth disaster governor of the state of California, and that caused me a little trouble. I was afraid I might make a slip, but in any event that is what it is, and I think the most—a great deal of interest to all of us is the fact that he is a member of the senior counsel to the committee on the Warren Commission to investigate the assassination of President Kennedy. He was appointed to the committee in 1964. In addition he is a professor at the University of Southern California Law School where he teaches criminal law and procedure. It is a real pleasure for me on behalf of the Idaho State Bar Association to welcome him to Sun Valley to our annual meeting and hope his stay is most pleasant and most delightful, Mr. Joseph A. Ball.

(Applause.)

MR. BALL: Mr. President, Ladies and Gentlemen. I wish to comment on one of those last remarks, and that is, it would be a great disaster in more ways than one to California if I ever became Governor. It is a pleasure for me to again renew my acquaintanceship with any group of lawyers because I have been out of the practice of law since the 6th day of January and only returned to my office last week. In Chicago last winter several members of your Board of Governors invited me to speak at this meeting. They asked me for my subject. I gave them a variety of subjects from which I would work out some kind of a talk between Chicago and July. They said, "speak on anything." So out of the air I picked a subject, "The Hearsay Rule." I suppose you wonder why I picked "The Hearsay Rule"—the definition of hearsay—about which to speak to a bar association. You probably thought when you saw the subject on the program, "I studied hearsay in college; I learned all I needed from Wigmore; I use it every day in court, and what else do I need to know about it?" Yet I believe there is a certain romance in a discussion of changes in the hearsay rule as developed in the last 20 years. It might be of professional interest to the lawyers as well as to the wives of lawyers. I notice some ladies in the audience and I assume that they are wives of lawyers. It might be of interest to the wives of lawyers to know that there is a work being done on subjects of this sort, on the tools we use in the courtroom. They say that behind every successful lawyer there stands a woman who is continually telling him all of the mistakes he has made throughout his life.

In 1943, you probably remember, the American Law Institute published a book, "The Model Code of Evidence." It was hailed by Professor Morgan of Harvard as a move to restore to the trial judge "his historic role as master of the courtroom." But the Code was taken with bad grace by every bar association in the nation for the reason that lawyers do not wish to restore the judge to that important position. It is the tradition of our American Bar that judges should be bound by rules just the same as the lawyers. Our rules of evidence have always been strict. The judge is just another lawyer who sits on the bench and must follow the rules. We have had experience with tyranny on the bench; with the impression that when a judge is once robed he acquires some type of omnisciesnce. We ought not to make a judge the complete autocrat so that he can admit evidence or not admit evidence at his will.

The modern Code of Evidence took small rein on the judges and it failed in acceptance in every state in the nation. And yet there was a need for such a code. We as lawyers are bothered somewhat by the perfunctory way in which our judges handle the rules of evidence. They use them as so many rules of thumb. How many times have you seen a decent analysis of a problem of evidence coming from our appellate courts? But the lawyers are prolific with their discussions of the law of evidence and with criticism of the cases which have come down discussing that subject. I think there is a universal cry in our profession for uniform rules of evidence. If we go from state to state or federal court to federal court, we should know what to prepare for. It should not be necessary to prepare a case for Judge Smith and a different case for Judge John Doe. If we try a case in Arizona, we should try it under the same rules of evidence as one in California. In the modern age state lines are more or less imaginary.

In 1953, in response to this universal demand, the national commissioners on uniform state laws approved the Uniform Rules of Evidence. These have been sent out to the various state legislatures for their consideration. But I know of only three states that have made a sincere effort to study these rules. New Jersey immediately commenced the study in 1955. The New Jersey legislature has adopted some of the uniform rules and by legislative act has granted to the supreme court of New Jersey the power to make rules which control the admission and rejection of evidence in courts of law. The Utah State Bar has studied the rules of evidence. In 1955, the legislature of California authorized the Law Revision Commission of California to study the uniform rules of evidence. In 1957, the State Board of California paralleled this study by the appointment of a committee authorized to study the proposed rules. I was personally authorized by the board of governors to select a committee and with characteristic modesty I appointed myself chairman. We studied the rules along with the Law Revision Commission. We met with them regularly, two or three times a year, in order to compare notes of research. I was later appointed by the governor to the Law Revision Commission, and for the last five years we of the Commission have studied the hearsay rule alone. In 1965, the Law Revision Commission plans to submit to the legislature of California a code of evidence which will be the most modern code of evidence ever produced in the United States. We did not adopt the uniform rules as written. Many times we differed only with the language of the rule. Many times we differed with the substance of the rule. For example—now I discuss this before I discuss the important subject—in the uniform rules exception number one to the hearsay rule would have permitted the statement of a witness to be introduced into evidence provided the witness was available for cross-examination. Now think of what that means. A carefully prepared statement in the lawyer's office, in his opponent's office, or in the district attorney's office could be put into evidence; a carefully prepared statement by a police officer, an insurance adjuster, or by other parties who were interested in the outcome of the case could be put into evidence as a narration of events. What would be your recourse or protection? To call the witness under cross-examination? We promptly rejected this approach because you and I know from experience that the narration by a witness can many times be colored. If the witness, while on the witness stand, instinctively tells what is in his mind, that's one thing, but if it comes through the words of a lawyer or some other interested person who is rather clever with words, another impression, an entirely different impression, may come from the same set of events. The uniform rules of evidence are good and well prepared but they must be carefully studied before we as a bar can accept them.

Now I come to the definition of hearsay. As I said, we spent five years on the subject of hearsay alone. In the short time allotted to me this afternoon I can only give you the most superficial approach to this very important subject, and, therefore, I can only discuss the definition and not the exceptions to the rule. The exceptions in general will remain the same under our modern code of evidence but with some modification. But the definition of hearsay is different because we have limited hearsay more than it has ever been limited by American courts in our lifetime. What is the definition of hearsay as suggested under our proposed uniform rules, and the rule which we hope California will adopt this coming winter? "Hearsay

is a statement made other than by a witness while testifying and offered for the truth of the matters asserted." This is no different than the definition which we learned in school. Yes, that definition is traditional Wigmore. The definition distinguishes between an extra-judicial and a judicial statement, an in-court and an out-of-court statement; we make the latter statement inadmissible. We realize that such a statement, an out-of-court statement, is not made under the restraint of the oath, is not subject to cross-examination, and therefore is unreliable. We accept statements in court which are under oath and subject to cross-examination because we realize that if a statement is made by a witness under the restraint of oath there is a penalty if it is false, and more importantly we realize that a well planned cross-examination tends to test a witness' statement as to his observation, as to his recollection, and most important, as to the details of narration, which can be so garbled when they come third-hand or fourth-hand. We continue to choose the in-court statement as the only one we will accept (except those out-of-court statements which are subject to the exception of the hearsay rule).

If you will recall in the definition of hearsay, I said "a statement other than by a witness while testifying and offered for the truth of the matter asserted." A statement may be a mere circumstance in a chain of evidence. For example: Suppose the sanity of an individual was in question. A witness under oath testified, "I heard this man say he was the Emperor Napoleon." Is that hearsay? Obviously not. This is a circumstance which is offered to prove that the man was insane. It is not offered to prove the truth of the statement. It is offered to prove conduct. It is offered to prove only that the man in question at one time said, "I'm the Emperor Napoleon" and from that conduct an inference of insanity is drawn. Or, for example, suppose the district attorney puts a question to the witness and the witness testifies, "In Las Vegas, Nevada, this man said that his name was John Doe." The man's true name was Richard Roe. The district attorney does not offer to prove that the true name was Richard Roe. He proves the circumstance of the statement; that the man said his name was John Doe and he infers that that is a lie. It was a statement in the nature of a circumstance from which the inference is drawn that the man who made the assertion intended to deceive by concealing his true name. We have never thought that such expressions were hearsay. The evidence is offered to prove conduct and not the truth of the words.

It is in the definition of the word "statement" that we part from the past. This sounds simple. Actually the meaning of the word "statement" is not very complex, we have defined "statement" to mean this: "An oral or written expression, or conduct, intended by the declarant as a substitute for words." We have employed Wigmore's distinction that he made years ago between assertive and non-assertive conduct. Assertive conduct is a communication, for example, between you and me in which I make a statement which I ask you to believe. If you do not believe my statement, you believe my inferred assertion that I am telling the truth. But a non-assertive statement consists of words or conduct by the declarant which are spoken or done with no intention to communicate with anyone, with no intention to assert the truth of the statement. In the past we have acknowledged the difference between assertive and non-assertive conduct. We have accepted the fact that all

words are not hearsay, yet ordinarily the type of hearsay which we consider in the courtroom are words or writings, aren't they? And we have expanded the definition to include conduct intended as a substitute for words, such as a nod yes or no, or sign language by a deaf mute. Most important is that in the definition of the word "statement" we make a requirement that words or conduct be assertive; that is, be intended as a substitute for words before we classify such words or conduct as hearsay.

We come now to the question of conduct. Is conduct ever hearsay? Professor McCormick in discussing this subject has used the delightful expression, "The Borderland of Hearsay."[1] Our courts universally throughout this nation have held that conduct from which you draw an inference is hearsay and they exclude such conduct whether it be assertive or non-assertive. Now what about conduct? There is a case in California, **People v. Mendez,**[2] that presents this problem. A rancher in Imperial Valley was murdered. Mendez was charged with his murder. At the trial he wished to fasten guilt upon a Mexican laborer who was a boarder in the home of the deceased. The day following the murder the Mexican laborer quit his job, jumped his board bill, and fled to Mexico. This conduct was offered as evidence by the defendant. Question: Does the conduct of the Mexican laborer constitute a "statement"? Most courts would exclude such conduct upon the theory that the conduct amounted to "an implied assertion" by the Mexican laborer of his own guilt and would hold such conduct inadmissible, the same as an out-of-court confession of the Mexican laborer that he is guilty. "Circumstances of flight are in the nature of confession by such persons and are therefore in the nature of hearsay evidence." (**People v. Mendez,** at p. 52, 223 Pac. at 70.) The California court reasoned that if the Mexican laborer who had fled to Mexico had made a statement to a third party, "I killed the rancher," it would be excluded as hearsay. Granted. We all agree. The judges reasoned: When you wish to infer that he killed the rancher by reason of his flight to Mexico, you are implying such an oral statement, and the implied statement has no better place in the courtroom than the express statement; therefore, the implied statement is hearsay and excluded. The court relied upon Baron Parke's reasoning in the famous case of **Wright v. Tatham,**[3] which presented the following set of facts to the English court: The sanity of a decedent was an issue. A party offered a letter written by a businessman to decedent a week or two before decedent's death. In the letter the businessman discussed certain intricate business matters. This was offered into evidence and rejected. Baron Parke said that if the third party who is not on the witness stand had expressed the conclusion that the decedent was sane, such an expression would be excluded as hearsay. But the letter was offered in order to imply that when the man wrote the letter he thought that the decedent was sane. The letter, therefore, is the same as an out-of-court statement by the writer of the letter that he believed the decedent sane. This was an implied statement by the writer of the letter that he believed the decedent sane. This was an implied statement and therefore hearsay. In the course of his opinion, Baron Parke used the following examples: Suppose an experienced sea captain was about to embark upon a sea voyage with his wife and children. The ship was lost at sea. The issue at the trial was whether

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[1] McCormick, "The Borderland of Hearsay," 39 Yale Law Journal 1489 (1930).
[2] *People v. Mendez* (1924), 193 Cal. 39, 223 Pac. 65.
3. 7 ADOL. v. Ellis 313, 388-9, 112 English Reports 488, 516-7 (Ex. 1837).

the ship was seaworthy. The above evidence was offered. Why? To imply that this experienced sea captain had inspected this ship and would not have booked passage for himself, his wife and children unless he had found it seaworthy. It is, therefore, an implied statement by the sea captain that the ship was seaworthy. Another example: Lloyds of London paid off a loss of a ship at sea. This evidence was offered so that the trier of fact might draw an inference that the ship was actually lost. Baron Parke would have excluded such evidence as an implied statement. Or another example: A man was elected to official office. This was offered to prove that the man was sane at the time of election. Again, Baron Parke would say that this is an implied statement offered to prove that the voters believed the man sane or they would not have voted for him.

A California court in **Estate of DeLaveaga**[4] followed the same reasoning. Evidence was offered that the members of the DeLaveaga family in their conduct with the decedent acted as if the decedent were sane. This conduct of the DeLaveaga family was excluded as hearsay under the rule of **Wright v. Tatham.**

Conduct from which the trier of fact would imply a statement has been excluded in all the courts of the United States. I know of only a few exceptions which I will discuss in a few moments. But the general rule of **Wright v. Tatham** is the rule in the state courts and in the federal courts today. Implied statements are hearsay.

Now, with a new approach to the problem, let us analyze the reasoning of Baron Parke in **Wright v. Tatham,** and the reasoning of the California court in **People v. Mendez.** The conduct offered is certainly not "assertive conduct." It is not a communication from one person to another with the intention that the conduct is to be used as a substitute for words. It is clear that in the above examples the actor did not intend that his conduct should be a substitute for words nor that any inference should be drawn from his conduct in the way of a communication to another party. If the Mexican laborer had said to a police officer, "I killed the decedent," these words would constitute "assertive conduct" and would be obvious hearsay which we exclude. But when the Mexican laborer fled to Mexico, he was not attempting to assert by his conduct or have anyone believe that he killed the decedent. He was trying to prevent anyone from drawing that conclusion. So the problem of the veracity of the Mexican laborer is not before the trier of fact. In all of these instances of non-assertive conduct, such as discussed in **Wright v. Tatham,** the parties were not attempting to communicate to another by conduct. The man who wrote the letter was not attempting to assert to anyone that the man to whom he was writing was sane. He was, by his conduct, unconsciously indicating that he believed the man to whom he was writing was sane. So obviously non-assertive conduct which we are here considering is not the same as the usual hearsay statement which is regularly excluded and always will be.

It is clear that the relevancy of the evidence under the modern rule requires reliance upon the belief of the actor. If the mind of the actor were blank, his conduct would be irrelevant; therefore, the conduct is relevant only as it permits an inference from his conduct as to the belief of the

4. Estate of DeLaveaga 1913, 165 Cal. 607, 133 Pac. 307.

actor. His veracity is not in issue as it is in the ordinary hearsay declaration. We would exclude the statement of a witness who said that some third party not present in the courtroom said that he saw a man run a red light. We know that is hearsay because we have to depend for the truth of the statement upon the veracity of the unknown third man and not upon the veracity of the witness on the stand. But the veracity of the man who wrote the letter in the example used by Baron Parke is not in question. He wrote the letter sincerely and with no intent to deceive. So we have a distinct difference between the assertive conduct of a third party which we do exclude as hearsay, and the non-assertive conduct of a third party which is also excluded under the present rule.

The absurdity of the position of the modern courts with respect to non-assertive conduct is best illustrated by court-made exceptions to the rule. For example, the bookmaking cases. Police officers go into a place of business and find a man sitting there with betting markers. The police officers stay there for an hour and answer all telephone calls. Every two or three minutes the phone rings. The police answer and hear, "give me $2.00 on the second race at Jamaica," or similar expressions. Is that evidence to be excluded as hearsay? The evidence offered is conduct on the part of the third party from which we draw the inference that the third party calling on the telephone believed that he was calling a bookmaking shop. There is a repetition of these calls, 25 in half an hour. Is such conduct to be excluded? Would it not be contrary to common sense that we should exclude such conduct of third parties from evidence and not draw proper inferences from that evidence? Aren't these telephone calls circumstances which point powerfully to the proof that this is a bookmaking shop?[5] Let me give you another example: Suppose we were trying to prove that it rained in Sun Valley on July 4th. The evidence that we had available was this: A witness who was not out in the weather saw people go from cover into the street with raincoats on and with umbrellas up. This is non-assertive conduct, isn't it? You imply from their conduct that it is raining outside, don't you? Would you exclude such evidence? Is such conduct hearsay? It would be hearsay under the rule of Baron Parke. You imply that if those people were called they would say that it was raining outside. This statement would be hearsay if repeated by a third party.

We have the situation where an inference is drawn from negative conduct. A man was on trial charged with the fraudulent filing of an insurance claim against a certain railroad. It was a railroad operating within the city of Los Angeles. He claimed that he was injured by a collision with a city bus on a certain day. What was the proof? Every motorman on that certain run testified, "I didn't have an accident that day." Business records were produced which showed no report of an accident filed that day. Regulations were proved which required an employee to report an accident if one occurred. Would you exclude such evidence? What is the inference you draw from this sum of evidence? It is a series of implied statements. You are asked to draw an inference from the lack of report that no accident happened.[6] This is traditional hearsay possibly if we accept Baron Parke's reasoning.

Another example: Suppose you sat as a judge in a case where a plaintiff

5. *People v. Barnhart* (1944), 66 Cal. App. 2d 714, 728-4, 153 Pac. 2d.
6. *People v. Layman* (1931), 117 Cal. App. 476, 4 Pac. 2d 244.

claimed that he had been poisoned by food in a restaurant at a certain time on a certain date. He testifies that he ate shell fish and became ill. The defense offers to prove that fifty customers were in the restaurant on that date at that time; the fifty customers ate the same shell fish from the same sourse of fish and not one of them complained of resulting sickness. Would you offer that evidence if you were the defendant's lawyer? Would you accept it is you were the judge? Is that evidence hearsay? This is a negative approach, that is, an offer to prove negative conduct or negative results from which it is inferred that all fifty of these people would testify, "I ate the shell fish on that day at that restaurant but I did not get sick."

Now from this reasoning we conclude that non-assertive conduct; that is, conduct or words which are not intended by the individual as a part of his communication to another person and which are not offered on the veracity of the declarant himself are not and should not be considered hearsay. Hearsay should be narrowly confined to words or writings or conduct which is intended by the declarant as a substitute for words and which is offered for the truth of the matter stated. An implied statement, those inferences which we draw from conduct, should be considered the same as other circumstantial evidence. Proof that the man said, "I am Napoleon" is not different than the proof that people left shelter and went onto the street wearing raincoats. Proof that the man called himself John Doe in Las Vegas is no different than the proof of the conduct of the Mexican laborer who flew to Mexico after the murder of the rancher. The implied statement reasoning of Baron Parke is out if our very narrow definition of hearsay is adopted; that is, if the definition of uniform rules of evidence is adopted. So we have narrowed hearsay more by this definittion than it was ever narrowed when we went to school and more than it has ever been narrowed by the courts of the United States. There are a few exceptions because the courts in the bookmaking cases have ignored the implied statement reasoning and have permitted such evidence. And, of course, the court in the fraudulent insurance case ignored the implied statement rule and permitted the inference from the negative evidence. We think there should be some consistency in the reasoning.

Now, does this mean that all implied statements, non-assertive conduct is to be admitted because according to our definition it is not hearsay? Of course not. It may or may not be admitted depending upon its relevancy and depending also upon whether or not it is to be excluded for other reasons, other rules of evidence, or other reasons of logic. Let me give you an example: It must be determined whether a flash in a chemical laboratory contains lethal liquid or not. Suppose you offered evidence that a chemist who had charge of the laboratory and who was skilled in his work carefully avoided any contact with this flask. You offer this conduct of a skilled chemist who should have knowledge of the contents of the flask as evidence that there was lethal liquid in the flask. You draw the inference from proof of his qualifications as a chemist, his skill, his familiarity with the liquids in the laboratory. The uniform rules of evidence would admit this evidence. But suppose some newsboy comes into the laboratory and you offer to show that he carefully avoided the flask. No evidence is inherent that a lethal dose was contained in the flask because of the newsboy's conduct. Obviously it should be excluded under any reasonable theory, not as hearsay, but

because of the fact that it would be unreasonable to draw the conclusion that the newsboy knew anything about the contents of the flask. We simply say that this conduct should be subject to the same rules of admissibility or exclusion as any other type of circumstantial evidence. We now classify non-assertive conduct as circumstantial evidence.

In closing this short discussion on the hearsay rule, let me say that the uniform rules provide that all evidence is admissible and the rules that follow are only rules of exclusion. All revelant evidence is admissible. The rule provides that all hearsay is excluded but then are established thirty or more exceptions which to a great extent are the traditional exceptions with which we are familiar. We have enlarged the dying declaration rule so that it applies to criminal and civil cases. We have rejected the rule that a statetment used for impeachment can only be used to impeach and cannot be used to sustain a finding by either court or jury. A statement used to impeach goes in for all purposes as evidence. I will not impede these proceedings further and discuss any longer the exceptions except to say that the exceptions that we propose to adopt are to a great extent the same as those with which we are familiar. But one other exception I would like to mention. You are familiar with the exception of a statement against interest. It is narrowly confined now by the rules of evidence. We have enlarged it. We would accept the statement of a person which is against his penal interest. The California supreme court has just made such evidence admissible.[7] In this case the California court overruled the case of **People v. Hall.**[8] **A** man was on trial for burglary. He offered evidence that a convict on his death bed admitted he committed the same burglary. This was excluded by the California court. Such evidence is now an exception of the hearsay rule in California. It should be admitted for whatever it is worth. The uniform commissioners agree.

As you noted in my introduction, I spent some time in Washtington with the President's Commission on the Assassination of President Kennedy. I was asked if I could say something about my experience with the Commission, and I would be glad to say a few words this afternoon within the limits of my authority. I have been working with the Commission in Washington since the 6th day of January. I know something about its procedure, but you can well appreciate that I cannot discuss the report that is about to be published, or its conclusions, or anything about the report that would in any way give anyone advance information of what can only be contained in the Commission's report. My status has been that of a staff officer. I was not a member of the Commission and I will have nothing to do with the final decision. I did have something to do with the preparation of the report. My work was submitted to the Commission and they are at liberty to adopt or not to adopt it. But there are several things of which I can speak with reference to the Commission that might be of interest to you.

As you know after the President's assassination there were wild rumors that went throughout the world. We were not subjected to those rumors as much as were the people of Europe and South America. You can read them in the press of those nations. You will see that there were speculations as to the President's assassination which went so far as to blame some of the

7. People v. Spriggs (1963), 60 col. 2d. 686
8. People v. Hall (1892), 94 col. 595.

highest officers of our nation for this particular murder. There were rumors of right-wing conspiracies, and of left-wing conspiracies. There was a question of some connection between Jack Ruby and Oswald. These various questions had to be answered. You will remember that after the assassination of President Lincoln his assassin was killed without trial; therefore, we only had a trial of conspirators before a military court, rather a perfunctory proceeding for which very little investigation was made, so we know little about that conspiracy. We know very little about the details of the activities which preceded Lincoln's assassination. It was decided in 1963 that this would not happen again and that history should have the murder of President Kennedy well documented as the people had been deprived of the right to hear the matter tried before a jury and know all the facts. Early in December the President of the United States, pursuant to a joint resolution of the Congress, appointed a Commission to investigate this assassination. The President was very careful in his appointments to the Commission. He appointed four legislative members, one a conservative democrat, Senator Russell of Georgia; one a liberal republican, Senator Cooper of Kentucky; a very conservative member of the House of Representatives from Michigan, Gerald R. Ford; a liberal member of the House of Representatives from Louisiana, Hale Boggs; and as a lay member, he appointed John J. McCloy, a Republican, formerly High Sommissioner of Germany and chairman of the board of the Chase National Bank; and he appointed Allen W. Dulles, whom you all know. Mr. Dulles has been in the service of the nation for years. He was with the diplomatic service, and at one time the head of the C.I.A. Then came a question of who should be the chairman. President Johnson insisted that Chief Justice Warren be the chairman. The Chief Justice advised the President that he had enough to do as head of the Supreme Court. There was quite a bit of correspondence back and forth. Finally, with the approval of the members of the Supreme Court and at the insistence of the President, Chief Justice Warren reluctantly accepted the appointment as chairman of the Commission. I have said many times since that it is fortunate that he did so because Chief Justice Warren is a man of great integrity and has the confidence of the people of the world. Reports came into our office from all over Europe and South America reporting that these people regarded Justice Warren as a symbol of American integrity. In addition to that, as time went on there were differences and problems which arose and the Chief Justice is a man who was able to solve them easily. He is an expert administrator. In spite of his work on the court, Chief Justice Warren was at the Commission every day we took evidence. We started the take of evidence at 9:00 in the morning. The Chief Justice would leave the Commission about 10:00 o'clock on these mornings when he sat with the court. If evidence continued, he would be back that afternoon. Every weekend he took transcripts home and read them. His diligence was also matched by the diligence of most of the Commission. Some of the members, such as Senator Russell who had been busy on civil rights matters, appointed a person to our staff who worked with us and reported to Senator Russell daily and digested everything that went on for Senator Russell.

The appointment of the staff might be of interest to you. It was first decided that five senior members of the staff would be assisted by five junior members, and that the investigation would be divided into five different areas of study: the assassination itself, the identity of the assassin,

the Jack Ruby problem, the problem of a national or international conspiracy, red or white, left or right, and the biography of Oswald himself. The staff was also to study the relationship between the various services, such as Secret Service, VIA and FBI. We on the staff were to make our investigation and submit our findings to the Commission in writing. The Commsson then was to report to the President of the United States.

We adopted a policy that we would accept nothing either oral or in writing from any investigative agency. We decided to investigate everything ourselves. By that I mean we did not go into the field and investigate in all instances. Many times we did. It meant that we reviewed all of the investigative data. We took evidence under oath if we wanted additional investigation, we called the agencies and asked them to go out and bring us in the evidence. We then reviewed the investigation. If we wished to use the information, we would place the person who had knowledge of the events under oath.

When this report is filed, it will be 18 or 20 volumes of testimony, some 18,000 pages. All witnesses will be under oath. If you wish to refer to any statement of a witness who appeared before the Commission, or if you wish to check any conclusion of the Commission, you will be able to go to one of the libraries in your state that has the report, check out the information and see yourself if it is accurate.

There was one statement attributed to Justice Warren some months ago that received publicity to the effect that perhaps we would not know in our day the details of the assassination. This was a statement which was completely out of context and did not mean what the newspaper implied that it meant. Everything which deals with the assassination of President Kennedy will be printed in the report. Everything that could possibly refer to a question of whether there was a conspiracy or not and who was responsible for the assassination will be printed in the report. Everybody throughout the world will be able to read the evidence on these matters. But there are certain matters that have to do with the relationship between the various services, such as FBI, CIA and Secret Service and procedure connected with the protection of the President that obviously cannot be printed. The Secret Service has regulations providing for the protection of the President. I do not want to know about them and neither do you. If I knew about them I would not tell you, and that goes for all of the security precautions. But as far as I can, I will assure you that anything that is important to this inquiry of who killed the President will be in the record and can be read in the report. The conclusions which will be made by the Commission will be published this summer. They are conclusions of seven men of different philosophies and different political affiliations, but these men are zealous, interested and sincere and are trying to determine the truth.

I have been asked about the staff. People say, "How was the staff picked? Did they pick them because of their political affiliation?" I know one person who said, "Did Governor Brown of California get you that job?" I said, "No, I was out of the state two months before Brown knew where I was." The younger members of the staff were picked because of scholarship. The ten young men on our staff had records which almost gave the seniors an inferiority complex: Phi Beta Kappa, Order of the Coif, high men in their classes at

Harvard, Yale, Columbia, Chicago, Michigan, and the life. These men were picked from variouse places throughout the United States. Someone said, "Are they all democrats?" I said, "No, one of my best friends on the staff was a Goldwater republican." I suppose when an ardent Democrat makes a friend of a Goldwater republican there must be a confirmation to the suspicion around the country that the sudden rise of Mr. Goldwater's party is just another example of the great political imagination of that man Lyndon Johnson. However, there were republicans, there were democrats on our staff. These young men were picked for one reason only and that is because of their ability. The young men—I don't mention the older men—but the young men. Well, that's about as far as I can go to tell you about the work.

We went to the source of the problem. We took 250 depositions in Dallas. We have discovered witnesses that did not appear in Time Magazine or Life Magazine. In many instances we found that the reports of the investigative agencies, FBI and Secret Service were wrong, but they were more times right than wrong. Many times the journalists were wrong. Time and Life did not know the facts. The most outrageous misstatement by journalists came from France where a man by the name of Buchanan had written a book, published in England recently, in which he made the statement that the shots which killed the President came from the overpass and the front of the President's automobile. If Buchanan's facts were true, Oswald would have been found not guilty. You would be surprised how many people in Britain believe this. One of the values I think that will come from this report is that a report by this Commission from facts taken under oath—facts which were obtained under the most desirable circumstanes under which truth can be obtained, that is, by an impartial group of men trying to find the truth; a decision by an impartial tribunal sitting upon the facts—will answer all the questions which the world has been asking for the past six months.

I have taken a lot of your time here and I want to thank you again for the privilege of addressing you. It has been a distinct pleasure to come to Idaho and address this Bar.

JULY 9, 1964
4:00 P.M.

MR. MERRILL: We are very happy to acknowledge the precence of the president-elect of the Wyoming State Bar, R. R. Bosick. Thank you very much for coming. (Applause.) I think we are very fortunate in the representation we have as you might be keeping count on your fingers this afternoon. We have the President of the Washington State Bar, President of the Utah State Bar, the President-elect of the Wyoming State Bar, and we are very, very happy to have them here.

Now the next item on our program appears to me to be very interesting, both the individual and the topic he has chosen, and I'll ask George Greenfield if he will introduce the next speaker. George.

MR. GREENFIELD: Mr. President, commissioners, lawyers and their

ladies. I am sure you are familiar with the American form of introduction. There seems to be an abiding fear among those chosen to introduce a speaker that the identity will slip out before the appropriate time. I am not going to go that route, and assure you that in my own good time I'm going to introduce you to Tom Lambert. Let me tell you just a little bit about Mr. Lambert's distinguished career. Tom graduated from UCLA with honors with a bachelor of arts degree. He was president of the student body. He was Pacific coast debate champion at a very young age. He was elected to a Rhodes scholarship at Oxford University. Received the English equivalent of a bachelor of law degree honors in the school of jurisprudence at Oxford. He received a bachelor of the civil laws degree equivalent to the master's degree in the school of jurisprudence at Oxford University. He was awarded the Sterling Fellowship in graduate law at Yale law school. At the age of 25 Mr. Lambert was dean of the John D. Stetson College of Law in Florida. The youngest dean of the law school in the history of legal education in America. He was trial counsel after the war on the staff of Justice Robert H. Jackson, Chief Counsel of the Nuremberg trials. Mr. Lambert wrote the United States' trial brief on criminality of the Nazi party. He presented to the international tribunal the United States' case against Martin Borman, the chief of staff of the Nazi party under Hitler. Then for 10 years he was a professor of law at Boston University of Law teaching torts, conflicts of law and legal theory. In 1955 Mr. Lambert replaced Dean Roscoe Pound, the former dean at Harvard Law School, as editor in chief of the Journal of the National Association of Claimants Counsel of America. A distinguished career, I must say. His duties as editor in chief of the NACA Law Journal consists in some measure on renewing the significant cases of the courts of all the states and appellate courts of the United States, each month capitalizing them and putting them in shape for the monthly news letter and then utimately the Journal itself. Mr. Lambert has addressed bar association groups in 46 states—soon 47. I asked Tom at dinner last night if he liked his job, and his sincere reply was this: "If I were to dream of work that I want, this job is that dream."

It is my pleasure to present to you a teacher, and an author, a singular scholar of law, Tom Lambert. (Applause.)

MR. LAMBERT: My great and good friend, George Greenfield, President Merrill, Vice-president Hull, Commissioner Benoit, unstinting professional from Southern California, Joseph Ball, the distinguished President-elect from Washington, Utah and Wyoming Bar Associations, and ladies and gentlemen.

George, after that miracle rhapsodical introduction I can hardly wait to hear what I have to say, but I strongly suspect that the real reason I have been favored with the privilege of this platform this afternoon is that President Merrill and his associates in high endeavor were trying desperately to get a real good speaker lined up and left in the lurch the last moment and they were left with what has been known in Boston as an inferior member of the legitimate Mafia. (Applause.) I recall a story of a friend of mine who was traveling in southern California during the depression days and there was this big inviting sign that said "Come one, Come all. Free strawberry festival," at the nearest church. And when he got up there a little closer in small print it said, "Due to the existing depression prunes will be served." So in shirt sleeve English you're getting prunes for straw-

berries this afternoon and are being critically cheerful about it. In view of the fact that your charity in inviting me is being matched by your generosity in listening to me. I hope when I am done you will receive these few words of faith and doubt in the compassionate spirit. Dr. Johnson and his landlady saw a dog walking on its hind legs, and the landlady exclaimed, "How grotesque." Dr. Johnson says, "Madam, the notable thing is not that he does it so poorly but that he can do it at all."

George mentioned that this represents the 47th Bar Association that I've been privileged to make a little talk at and visit with the local lawyers, and I am deeply chagrined that in the remaining three states, Wyoming and Utah and Mississippi—it seems that more people are visiting Mississippi these days by assignment than by invitation. With the distinguished presidents of the Wyoming and Utah bars perhaps present at this moment I will forfeit once and for all a chance to round it out to an even 50, but I can't help but reflect upon a time that I was introduced in a somewhat less generous fashion than George has this afternoon. George, of course, is a great trial lawyer and, therefore, a great salesman, and someone said that a salesman is a man who can make his wife feel sorry for the poor girl who left her hairpins in his car all night. Great salesman, I say. This other introduction I got was when I was visiting in Minneapolis. I was introduced by the mayor of Minneapolis who is rather an unusual mayor; he's personable and literate, and he said, "Lambert is an editor and a professor." And he said, "I heard a definition of a professor not long ago: 'A professor is a man who looks like a foreigner in any country.'" I thought that was real good and adopted it for my own, and if that weren't bad enough an editor has been defined as a man who approaches all questions with an open mouth. You have heard a real honest-to-goodness lawyer this afternoon—Mr. Ball. Mr. Ball's reputation has preceded him. He's a man who was shaped, as I understand it, in the crucible of the courtroom, as George and the other lawyers here on the platform have. There is no substitute for experience, unless it's being 16 years old. I mean apart from that, and you can tell when you listen to a man for five minutes whether he has authenticated experience or not. I remember this old lawyer whose hair had been kissed by the snows of 80 winters, and he said, at this bar association, he said, "When I was young I lost a lot of cases I should have won, but when I was old I won a lot I should have lost, but by and large justice was done." Now there's something in that equation being what it is but it just doesn't sound right. There's no substitute for experience.

The dictionary is the only place where success comes before work. As Paderewski said, "Before I was a genius I was a drudge." And I think it's very graphical when you look around at this beautiful spot. I felt when I came in on the plane this morning it's almost like touching the rim of heaven to see it. I wonder how anyone can resist the seductions and the allurements of the golf course and all the other things that beckon out here to listen to the dreary declaration of these insipid rhapsodies. It must be that you are displaying a loyalty to a more beautiful cause than I know about, but I think it is a wonderful thing that your Bar Association does from time to time have these learning sessions. We are seekers and questioners. I recall what a minister of education in England said once when he was visiting our country. He said, "Some babies are born to be dukes, and some

are born to be chimney sweeps, but the stork is such a foolish bird that it keeps dropping babies off at the wrong addresses so the commissioner of education is to correct the stork's mistakes." Now we all know that we have law schools but we don't yet have lawyer's schools so the trial of personal injury cases, therefore, is kind of like playing a violin in public and learning the instrument as you go along. Where you learn these things. See, I think it's important to remind ourselves that 75 per cent of all the reported appellant decisions across the boards, Portland, Maine, to Portland, Oregon, from Canada to the Gulf involves accident law. You see, personal injury laws are what people live. How many people are ever involved in the assailing of the constitutionality of the tax on public utilities. When do people touch the law? I suppose obviously over-parking. Apart from that the people touch the law in the field of traumatic injury. And, of course, ours is the most beautiful and wonderful society ever well wrought by the hands of the forefathers and the man, and I think it's possible to visualize our country as you know a cornucopia. Remember that mythical horn of plenty. You see our whole economy pouring out a tremendous volume of machines and products and goods and creature comforts; that's why Americans live high off the hog, an envied people. Since man began his long, slow climb up from the Paleozoic slime into the cities and the semblance of civilization.

But, of course, the thing about machines and products and our wonderful rich economy is that danger and risk were in the machine. I mean, just think of a jet flight that most of us have experienced. Of course, I shudder every time—you know go through the gate and go aboard the propellers look so rusty that at that moment your faith is shaken in the validity of the principles of aerodynamics, and I remember once with this little old lady sitting across the aisle, she says, "Flying is hours of boredom dispersed by moments of pure terror." That sums it up for me, anyway. Like that social critic many of us have rejoiced at his records said, "Flying is contrary to my religion. I'm a devout coward." Take the automobile and who doesn't take the automobile, but someone said the other day, "The road to heaven is paved." This year we have 82,000,000 automobiles on the highway. Someone defined a pedestrian as a father who thought that three cars was enough for one family.

But just take the automobile and the tremendous accident toll. We have had one million people killed by the automobile alone. About three years ago we got our millionth victim. More than all Americans that have been killed in all the wars we have fought since Ethan Allan took his musket off the wall. The driver of today behind the wheel of the car of tomorrow on the highway of yesterday. A father said to his little boy, he says, "Son, when Billy the Kid was 21 he had killed 25 men." The little boy said, "Daddy, what kind of a car was he driving?" Forty-two thousand five hundred Americans slaughtered by the automobile and over a million maimed and crippled. We haven't said a word about the staggering economic taxation, the toll that is involved in the killing and disabling of all these people just by the automobile itself. I suppose just thinking at random that if there were any other product in our society that we knew in advance would kill 42,500 Americans they might very well suppress it.

Now you have often heard people say there is not enough tea in China or gold in Fort Knox to be worth precious eyesight. I wouldn't sell my eyesight

for all the gold in Fort Knox. What would you sell your leg for? I think most people wouldn't sell their leg for $500,000. This is how we are supposed to feel, but is this how we really feel. I don't think it is. You see, the actuaries, the fellows that keep books on these things, the statistician, they can tell us right now that if you try to build Boulder Dam or the Golden Gate Bridge across the bay, or build the Empire State building, they can tell you almost to a man how many people will be killed and disabled in the course of building the dam or erecting the bridge or building the United States liner, the Queen Mary or the Empire State building. Now what do we do? Do we recoil in horror and say, no, all the things of technological civilization are not worth the loss of sight and maiming, paraplegic injuries, to human beings. Is this how we really feel? Oh, no, my friends. Our natural response, and I guess it's an honest consensus and all we feel about it is let her rip. We all want to enjoy the fruits, the advantages, rapid transit and a mechanized 20th century civilization. We want to hurl these skyscrapers up into the blue and white stars. We want to make the oceans and have all the advantages of the flow from a wonderful mechanized society. When it comes to the price, the price is what happens to your fellow Americans.

So I must be very conscious as I converse with you what is really an arbitrary selection of the top 10 tort cases in 1963-64. I must be very conscious of a very humble experience I had in Biloxi, Mississippi, about three years ago when I was engaged in debate with Mr. Josh H. Gross, whom many present will know. He is a ferocious defense trial lawyer and a distinguished president of the Defense Research Institute of America, and I can just sum up my experience in that debate by saying, I put my nose between his teeth and I had him. The fiasco is over. A little old lady came up, she was so sweet-faced, white hair—she sort of looked like Whistler's mother, and she said, "Your speech was superfluous." You know, I thought she looked so fetching and bewitching so I said, "Thank you very much, Madam, and I'm thinking of having it published posthumously." She didn't bat an eye. She said, "I can't wait." A humble experience, I can assure you.

Now the problem of selecting the 10, of course, becaues it's an embarrassment—it's important to try to select as best you can the 10 best. I think of that popular band leader who was celebrating his 10th anniversary, and a reporter said, "What have you had the most requests for?" And he said, "Where's the men's room." I so agree with him. I'm sure that was the most popular request. Now I want to get the 10 most notable. Now I have a confession to make, which really isn't necessary. George said it and implied ie. I work for a bar association of about 16,000 trial lawyers all over the United States who principally represent accident victims. In other words, what you're getting this afternoon from me try as I might, is a sort of one-sided picture of this thing. Now you all know as does the peeping Tom and the astronomer that the angle of observation has a great deal to the property of the thing observed. So when you listen to me it's going to sound like plaintiffs win all the cases, but you know better; I'd say it's about a 50-50 chance if you add it up all across the country; plaintiffs don't win them all, not by a long shot, even those that go to the jury. In fact, what you are finding more and more around this country is that the casualty companies are insisting on the right to a jury trial. Sometimes—I confess to you that I suspect the reason for that is the success they achieve, and I

hope you will pardon me for calling it somewhat of a brainwashing operation around the country—you know you have got the stockholders in the casualty company and they get their annual dividend and they get a little slip in there when you go in the jury box you just think now everything in the super market is going to cost more and so on. You take these placards in the buses that say when you go in that jury box you just think that everything is going to cost more in the super market. So the defense is asking more and more for a jury trial. Well, I think that is just fine. I was very much impressed with Mr. Ball's emphasis that the Warren Commission is kind of a—I suppose you could say, a judicial process in this inquiry as to all that surrounds the heart-breaking incident. Now they didn't have to have a judicial inquiry. We didn't have to have a Nuremburg either. How about that. A lot of the people have said that the Nuremburg trial itself was a war crime. Sure you have heard that. Some of you may believe it. You know Napoleon didn't get a trial. When you take the victors in World War II after they had smashed the German armies between the Rhine and the Elba, here was this back twisted, emblem of the third reich. I tell you you remember that day and you remember May of 1945 when a tremendous jubilation spread throughout the world that this thing was over at last and that the third reich had been brought to its knees. Now when you take the victors flushed with victory and a fine frenzy of their power they could have taken those 20 odd men, lined them up against the wall, cut them down with tommy guns. This was war and they lost, but Justice Jackson's approach on behalf of the United States of America was: If we could assassinate, if we could liquidate and that would be legal surely it would be no less legal to give them a judicial trial with an indictment spelling out chapter and verse of the specific crime of which they were accused, providing defense counsel for them, give them an opportunity to examine every document of the 100,000 that were authenticated and put into evidence, allow them to confront their accusers with that searching, sifting cross-examination which is the greatest engine ever devised by modern man for establishing the truth, the contested fact, questions, and give them what they never gave six million people, six million human beings that went up the smoke stacks in the charnel houses of Germany without due process of law. Justice Jackson said, "The same law by which you will try these men and the records on which a judgment of guilt is entered will be left behind us for our criticis to criticize us for the next 1,000 years." So said Justice Jackson. "I want a judicial trial and I want you to build a record that will outlast all the hammers of the critics, the record that will last until lips are silent and tongues are dust."

This you see is for the glory of the adversary system, and you may not think in the sweet and stable land of Idaho the jury trials under searing condemnation today, but it is. If you in your lifetime enjoy the benefits of a civil jury system I'm not at all sure that your sons will. Our day is much disfigured by those who want to bury the civil jury system. They want to read its obituary. They want to cast it into the boneyard of discredited area, and I think of men who are trying to do this. They are great men of unimpeachable credentials. Chief Justice Deslate who is an orator and the great believer in the court of appeals, and Judge David Peck. The New York Times, that swath pillar of middle class respectability and Dean Griswold of the Harvard Law School, that instiution on the Charles where they cast artificial

pearls to genuine swine. I can only say that you will really love old Harvard as I do. It's the greatest legal academy on the planet. And there is Dean Griswold saying the jury trial is second on his list of urgently needed law reforms. And there are others who are joining the chorus. Second to none by esteem is Governor Brown of California. He's got a commission organized to study the replacement of our civil jury system with a bevy of workmen's compensation commissioners and turn over the trial of automobile accident cases to them. Scheduled benefits so that you get the same for the loss of a finger whether you are concert violinist, a watchmaker, a man with a pick and shovel, or tap dancer, or radio announcer.

I realize that you know that nobody really wants to serve on a jury; let's face it. One of the most vigorous dances ever done in an American court is men trying to wiggle out of jury duty, you know that, but we want to see our neighbors there; that's the point. It is not enough for justice to be done; it must appear to be done. And it's easier for Americans to recognize themselves and to see themselves reflect what I like to call the twelvers, a cross-sectional slice of the neighborhood. The colonel's lady and Judy O'Grady, the butcher, the baker, the candlestick maker, the garage mechanic. I ask you, aren't they better fitted to make the neighborhood judgment, the community judgment on what is fair or fitting than the single judge who, whatever his background, goes to the bench conditioned by a fragmentary experience and by insinuations of a professional lawyer. Now I don't say that judges are biased or arbitrary or inept, although we did have one judge in Massachusetts who resigned in frustration because he couldn't decide. We had a judge down in Florida while I was teaching school there who once said, "In this courtroom I'm neither biased on the one hand nor impartial on the other." Then you have your dissenting judge. My favorite dissent by a Utah judge. He said, "I dissent for the reasons stated by the majority." So we don't say that these judges are bad men, or evil men, or inept or prejudiced or partisan, no. But they do have their leanings; that's the point. Every man does. You see, the wine must taste of its own grapes. It was no accident when Justice Brannon was nominated to the Supreme Court of the United States. Seven past presidents of the American Bar Association appeared to argue against the confirmation of the nomination. The reasoning I think was very logical as far as it went. They said here is a man who has always represented depositors in the bank, but not the bankers. He's represented unions and not management. He started five cent savings banks in Massachusetts. He was always counsel for the situation. He must be a composite, an assembler of all these felt feelers of what's going on. This is my submission of every judge.

What would you like to know about a man who's nominated to the bench? would you like to know his diary? Would you like to see a full F.B.I. field investigation of him? Would you like to look into his strong box? I think the favorite place I would like to look would be his library. Now just test that out in ordinary simple human experience. You take a cigarette cancer case like Pritcher against Liggett & Myers, 205 Fed. Second 292. The Third Circuit in 1962, a very strong court, and there they had this tremendous trial that went on for weeks and weeks on whether or not protracted smoking of Chesterfields could cause lung cancer in this 63-year-old carpenter. Of course, on the one hand the cigarette industry was saying, "We had no reason

in the world to understand that there was any kind of a carcinous ingredient in cigarettes." "No reason at all to anticipate this or to warn against it." "On the other hand, you fully appreciate the risk when you smoke and you assume the risk." "He knew it was lethal and dangerous." Now both sides put in their proof, and the judge turned to Jim McCarver who tried it for the plaintiff and said, "Mr. McCarver, do you have any more proof here?" "No, sir." And turned to the defense and said, "Do you have any more proof?" He said, "No, your Honor." And said, "Now if you gentlemen will join me in chambers we'll light up a Chesterfield." This is one point where a judge takes a dim view of cause or connection. Now if you would get a judge that would say, "If we had as much evidence that the Brooklyn Bridge would collapse tonight as we do with our cause and connection from protracted smoking of cigarettes we'd close that bridge down in five minutes." How do you know which judge you are going to get. You take a whiplash case. The most dramatic contribution to our committee on vocabulary. You know how some judges take it. You say, "This is a whiplash case, your Honor," and they begin to blow their nose right away. Do you remember that one doctor, Dr. Foster Kennedy, who said, "A whiplash is a condition precipitated by an accident, nourished by adults and cured by a greenback poultice." It's a point of view.

Now on the other hand I know an Ohio judge, and if you want to give face value to what he says, and I do. His wife is a neck cripple from an automobile accident. So to him it's highly credible that people can have disabling injuries from herniated or intervertebral discs or injuries to the cervical spine. Which judge are you going to get. Take a dog bite case. Some of my favorite cases are dog bite cases. Now one judge will start out by saying—you know the maudlin sentimentality—"A man has no more faithful friend than his hound dog, and there is only one place to buy a man's dog and that's his heart. He teaches a boy such beautiful things, loyalty and perseverance, and how to turn around three times before they lie down," and so on and on. Then another judge will say "There is no more predatory, carnivorous thing on the universe." And which one will you get?

Now take a case, a most intriguing case in products liability. Boy, that is the expanding field today. The most numerous category of cases involved is automobile accidents, excepting slip and fall cases, but third, dramatically expanding at a pell-mell rate like liquid fire is the field of products liability, and this is a case that might come into your shop. It's very simple in its facts. Mother bought a bottle of something, and within a half hour or so it's going to sound like something most appetizing. It was a bottle of old English red oil furniture polish, and she was in there polishing the top of a bureau when the phone rang, and so she left the bottle uncapped there when she went out to answer the phone. A little baby 14 months old in a nearby crib reached over to the dresser top and pulled it over and got the bottle, chug-a-lug, and within 24 hours the baby was dead of chemical pneumonia. Now when you hear of that you might think that's highly extraordinary; that's kind of a freakish accident. You can't blame that on the manufacturer of the furniture polish. Well, just think about it a little bit more. Would you be further surprised to learn that every year in our country there are 500,000 examples of injury or death to children from the ingestion of toxic

substances. These little fellows you know when in doubt eat it or drink it. That's the law of the child.

There was an advertisement gimmick put out on these firemen hats. They were very popular with children. The only trouble is these hats turned out to be highly inflammable. Now the oil company called them back. You may wonder the source of this. It was in a publication of the insurance industry. They did their best to call them back.

That is something General Motors didn't do when they put out the 1953 Roadmaster. They didn't get a list of the retail purchases, and sent out the S.O.S., bring them back and we'll replace all. They sent out clandestine notices to the independent retail distributors and service stations and said, when a fellow brings one in for a lube job or goes off to play a little golf just substitute and we'll send you the new substitution.

So here you got these kids, and finally they called them back in, you know, these firemen hats, and put out some that were not inflammable, and then what did the kids do? They ate them. They ate the brim, toxic substance. They started to get ill, and worse. These things are commonplace with children. Every year 500,000. You and I may not know this, but we are not in the manufacturing industry. You see, the amateur is in the hands of the professional. He's got to keep abreast of scientific knowledge. He has to know. Now if this case comes before a judge the question is whether or not the manufacturer is negligent for failure to give ample warning. They got all this writing on the bottle, directions for how to use the bottle, but the rule of law is direction for useage, no subsitute or warning of danger from misuse. You must put that on there, too. Now in a way you can't blame these manufacturers. They like to put how to use it on there, and then they also like to advertise about the efficiency of the product, of what it is, how beautiful it is, how safe it is and the like, but they are understandably reluctant to tell about the dangers of it, and you can see how this is. Suppose the engineers in charge of quality and safety control send a big memoranda to the board of directors and say, "You've got to put some warnings on the sides of this can of carbontetrachloride, or on this under-arm deodorant. You have to put 12 warnings on it." And then make some claims about how safe and beneficial it is. Then the salesman comes in and says, "How can we move a product that is going to have 12 warnings and two claims of beauty and safety and efficiency. This thing is a dud. We can't move it." So the board says minimize the warnings, and, of course, you have the claims of beauty and safety, and knowing the faults the board as an economic decision says that's the way we're going to do it. But when some poor housewife comes down with galloping dermatitis they are disagreeable from using New Dit, or an underarm deodorant, Ban or something like that. It is no defense to say, well, we sold 287,000,000 jars of this and we only got 17 complaints.

You might think this is a good defense. This is one of the most intriguing insights into the whole law of products liability, and negligence law, gentlemen, negligence law is not a question of majority vote. You can't dispose of it by a mere calculus of numbers. I mean just test that. Suppose I stand up here and say I have a six-shooter and then play a game of western roulette, but don't get nervous, only one out of six. How about it, can I persuade you with this argument on negligence less than 50 per cent. In other words,

what I'm suggesting is that the chance we run or the likelihood of harm is a relevant and waiting consideration, in the calculus of negligence law, but that is not the only factor, we've got another one that's equally important, the price of threatened consequences so that a slight risk of death or great bodily harm can be condemned by the triers as a reasonable risk or the burden of adequate precautions is relatively slight. If only 17 out of 287,-000,000 is going to hurt anybody maybe you don't have to alter your formula and keep on making it by the way you have been making it, but let me warn you now, beware. A small percentage of people may be allergic or hypersensitive. So before you smear the salve or goo or the cosmetic item try a little patch test. Now that's not going to bankrupt them. The board may say we're not going to do that, either. Not going to follow that, either. Theirs is an economic judgment. But I'm afraid when it's a small percentage and you harvest the harm then take out the checkbook, or at least that's the way I read cases. See White against the Carter Produce Company 242 Fed. 2nd 43, where the court said, "The statistical infrequency of harm is relevant but not a conclusive consideration." You have to consider the gravity of the consequences.

Now what is the relevancy of all this? What payment do you make out of this little ray of sunshine? Go back to the case where the baby swigged the furniture polish. The problem is one of the expectable behavior of little children, and I'll put it to you, who is better fit to formulate a community judgment on whether or not reasonable risk was unleashed by the failure of the board? The twelvers? Now they are not Nobel prize winners up there in the box but they know the behavior of children. They know that a child is a poor man's riches. It's God's opinion that the world should go on. They know the cost of baby's shoes, and rent, and the like, even though they may not be able to catalog the cosmos, but I submit they are better fit to understand the nature of children and the hazards of household products than a single judge. The single judge may be a bachelor. He may be descended from a long line of bachelors. As a man said, "I can trust 12 ordinary men but no one ordinary man." Now I suppose it's true that there are lot of things juries don't understand. There was a tremendous murder case tried up in New York recently. Did this man kill this woman or not, and the prosecution proved he had some brains on his sweater. He was a fisherman. Defense counsel insisted with his proof and he had his experts there to back it up, that the pathologist could not distinguish between human brains and fish brains. Is that too much for the twelvers? Look at the questions we turn over to them every day, ballistics, toxicology, and—you say it's too much for the twelvers. Ladies and gentlemen, it's too much for the single judge. These judges do not come from M.I.T. They are not Nobel prize winners, either, and the best of them will say that. If it's too much for them it's too much for me. The problem of society is to make the fair, educated guess; it can do no more, and society is all it should and does all it can; that's the best thing we've found yet, and some of these critics that you know will say, Now look, sir, I don't want to eliminate the criminal jury, just the civil jury. If we pull the change on the civil jury how long are we going to have the criminal jury, I ask you. You see, what they are really saying is in effect—I thought of this the first time I heard Chief Justice Desmond make his great plea to scuttle the civil jury, made in September shortly before the assassination. I said to myself, what this thing really boils down

to is that Ruby would get a jury and the shield of the Bill of Rights but Mrs. Kennedy and the children would not. Jimmy Hoffa would get a jury but how about the men who were killed in railway accidents, accidents on the docks and the wards, and the highways, the steel rights, construction workers and the like. They would be remitted to the tender mercy of a single judge or that bevy of workmen's compensation commissioners. I marvel at the self-restraint of these critics who want to kill the civil jury but leave the criminal jury undisturbed for the time being. It reminds me what Clyde of India once said, "I stand astonished at my own admiration." Remember back in New England when the Long Island Railway was having one of its weekly wrecks?

It was almost like secular training they were having these wrecks, and an engineer drove a train through a drawbridge into the river that caused all these commuters to die a discomforting death. Now the engineer was indicted for manslaughter. He would get a jury trial, but the widows and children of all the surviving commuters they would get a single judge of the workmen's compensation commissions. Juries, of course, make mistakes. Every man born of woman makes mistakes. Judges make them, too. Juries do foolishly also. They will break your hearts sometimes, but it's like the bailiff said once. He stuck his head out of the door and said, "Eleven lunches and one bale of hay." You know and I know if that jury goes sour or makes a career out of making mistakes they are there to go. They are not going to be around more than three weeks, two months at the most, depending on what your local practice is. It's like the waters in the roadbed of the river. The waters are always changing. The roadbed remains firm, but that judge who suffers hardening of the arteries in the catacombs is going to be there forever, for life. Seems to me this is the very significant difference between the two. Now I realize I haven't said much about the ten top tort cases. In 1963 and 1964. I got sidetracked a little bit, but that is a matter perhaps for another day. A crafty device of trying to obtain another invitation back, perhaps as transparent as that.

Maybe I could take one other example, a modern case. This would be in 1963. One of the trend-making decisions. It's a kind of a case that could come up in any community. There was a young mother who took her children to an amusement park, and while they were on the merry-go-round she was killed when a large amusement device, a big elevator type thing simulating airplane rides. A big piece of it was detached and flew through the air and struck her in the head. Of course, one of the problems in the case was conceived whether it was an instant death, or whether it involved conscious pain and shock, and from a technical point of view you know that can be a very important thing. Suppose in a state like my own, Massachusetts, has a ceiling on death claims. In Massachusetts it pays to kill. It does. Some of the ladies present may be astonished to learn that early common law there was no liability for wrongful death. It was cheaper to kill them than to scratch them. That's a fact, and this barbarous rule lasted until the steam engine came along in the 1800's because the steam engine was a great equalizer. No wandering cows, troubadours, couldn't survive the accident toll by the steam engine so they had to pass a statute that was known as Lord Campbell's Act in 1846, and it simply said, Whosoever by wrongful act, neglect or default causes death and the situation is such that the deceased if he had just been

hurt instead of killed could have recovered his administrator will have a cause of action. Kind of a statutory trustee for the designated beneficiaries. You can almost imagine the train crew before the enactment of this statute. Call the engineer and the train crew down and say, Now if you have any crossing accidents today I want you to kill them all. Don't leave any survivors; kill them all.

I want to point out this one case. I just want to tell the ladies. In this very dramatic case I think many of them have read about in family magazines. The case of Lita LaVene. I know a little about it. It was a northeast flight out of La Guardia, and he landed in a swamp. There was a friend of mine on board who was killed, a former head of the Atomic Energy Commission. It was a commuters flight. They were all going into Nantucket for a little holiday. Most of them abroard were instantly killed, but this one wretched girl, she was 19 at the time, survived with a hot engine on her breast out there in the swamp. But just by good luck the chief anesthesiologist from Massachusetts general was on vacation and he got out there and crawled through the swamp and did the best he could with sedation for her, but they couldn't put her out so she lay there and screamed, and the Air Force was wonderful. They swooped in there and they had their derricks after about nine hours and they got this engine off of her. Well, they heard about it at Massachusetts General and by the time the few survivors were flown in by the Air Force they had the names of each patient outside of the operating door, and, of course, for about a week or 10 days it was nip and tuck for this girl. I talked to her doctor, Dr. Nargat, the orthopod in the case, who said this was the most seriously and grievously injured human being that he had ever experienced, and, of course, as the lawyers would know burn injuries are the most excruciating of all. Well, now, you know right off the bat human sympathy wells out for people who are victims of these terrifying accidents. In reading these Advance sheets as I do—it's part of my job, and you read some of the things that have happened—it's good we don't know about them really. So sympathy for the girl—the local Air Force makes her their mascot. The nurses stay up day and night. Dr. Nargat is there 36 hours before he leaves with exhaustion. And every place is just wonderful to her. People write in from all over the country, "Have courage. I had terrible burns, and I survived. The miracle of plastic surgery will patch you together. Hold on. Great courage." Well, life must go on, you see, and other people are getting burned and their bodies shattered, and pretty soon the nurses get tired of this and they hate to go in and change the bandages because they will stick. No one can blame them for this, sure, and then when they bring another patient into the operating room the mother says, "You're not going to put my child in this operating room. This horrible smell. You get another operating table for us." This is part of life too, see. And then her lawyer calls you up one day. He says, "I've been out in Nantucket taking depositions as part of the investigation." This is where he belonged, but today they are taking her bandages off and she insisted I be there. Would you like to come along. I could not make this engagement. It was lucky I couldn't. He went over there and he lost his lunch. And this girl knew she was badly injured, but the way they had put the bandages on she didn't know she had lost all the fingers on both hands, and she had lost most of the scalp, both ears, and terrible injuries to one leg, shriveled, and third degree burns on over 65 per cent of her body. And when they took the bandages off they took

all mirrors out of the room, but she saw her hands and wanted to die. I used to take a taxi occasionally to go over to the airport, and talk with this driver, and he would say, "Boy, do I have a case." He said, "You talk about the bride of Frankenstein." He says, "Once a week I have to take this girl over to the hospital. She's got this big white cocoon, and bandages on her hands. It ruins me for the rest of the day. He said, "The rest of the day I go to Hialeah to wacth the dogs." She lives with her mother in the apartment building where I live, too. So you know what, all friends, all supporters, and your trials and tribulations, they all melt away except your mother. Your mother is always there, and finally months and months afterward I was invited out to this girl's home. Her lawyer had worked out a settlement for her, about $365,000. See the point of this fable for our times. It pays to kill. And I drove with her lawyer up to her home, and with the settlement they were able to build a special kind of home for people who are paralyzed, you know, ramps and so on, with high hedges around there because this girl liked to swim. In her mutilated condition if she would not go down to a public swimming pool.

And I'll never forget this walk. She had kind of a sidewinding walk like a crab. She rushed up to this lawyer and threw her arms around his neck. This is what is a joy to be a lawyer and help people in trouble, all kinds of trouble, and I thought to myself her face is terribly burned, one side much worse than the other, but I said to her lawyer when she turned, I said, "Her hair is kind of beautiful, and," the only word I could think of is, "and she looks cuddley." He said, "It's a wig." This was before wigs were fashionable, and she had no ears so she had—she went in the kitchen and asked, "Would you like a drink?" Boy, this was the time for it. Yes. She got the ladder up with her two elbows and went up the ladder and got the gin and vermouth, mixed them and stirred them like this and handed it over to me. I have never seen such a spunky girl in all my life, and when we left impulsively I leaned over to kiss her good-by and instinctively she turned the horribly burned side away to the less burned, and you just turned right around the other way because there is the courage and combat of warmth that does this thing civil courage too. This girl really had it. So back to the amusement park on this grisly note, this note of optimism, too, optimism for our law.

This woman was struck, where she was killed instantly. Fortunately a priest who knew her came over and administered the last rites to her, and he would say, "Alice, if you can hear me, wink or squeeze my hand." And she would. So that this was some kind of evidence that at least there was a degree of consciousness there. I'm inclined to think the lawyer for the Home Insurance Company would probably hesitate a little bit before cross-examining the priest on the issue of credibility. So the problem in this case—this is what I'm trying to get at is how much is a good wife worth. Now there is an old theory in our law, comes down to us, even in 1960, that mothers may be killed for trifling and insubstantial sums, but there is one time in a man's life when he knows how much a good wife is worth, and that's when he has to replace her. If she is the mother of young children he then discovers that to provide round-the-clock substitute mother care is a very expensive proposition. For instance, you hire a maid and she says, "I'll do the light housework, but I won't do the dirty work or the heavy work. Find someone else to clean the toilets." So you end up with two maids as a minimum, and

then if this is a family that has asipirations for the children to rise a little higher—So a father may want schooling for his children so you may have to hire a governess, and how about the knitting and gardening, and the ironing of shirts. Now you get down to where her life is lived. I never—I asked myself when I was reading these cases and writing them up—I never once in my life saw my mother go to bed. Did any of you ever see your mother go to bed? The last one when you turned in sitting in the chair; your brother's got a big date tomorrow and there she is ironing a shirt with a little starch on the cuffs, you know, darning the socks. Never see your mother go to bed. A mother's work is like the railroad tracks, the unseen is in sight, but never is.

The young husband, he stands by the grave. He prays it's not a pit. He prays that it's a gate, and he says until sickness or sorrow or sadness must marry my body to that dust it's so much loss; stay with me, dear. There was a great judge named Wallace Pooley, whom I wanted to meet for years, and I met him the other night in Pittsburgh, and he had a case involving the death of an old wife. How much is an old wife worth? And I asked him, I said, "Judge Pooley, I heard that when you were submitting that case to the jury you sat down and made a list of all the things that Mrs. Pooley had done for you that week, and that you used two laundry lists to add them all up. Is that true?" And he said, "It is." And then I thought to myself what is the most valuable dollar you have? It's your last dollar. And what is the most valuable minute or hour you have; that's your last minute or hour. And Judge Pooley said, "That the love of a young wife or a young husband is the elixir of life itself, but," he said, "the love of an old wife or the old husband when they have gone close companions through life together and on the sunset slopes of life, the embers of life have burned from red to gray," he said, "the love of the old wife or the old husband is the very oxygen of life itself." You see, the people who really know the truth about this are not the lawyers.

And so the young husband stands by the graveside—the mother of his two children is left behind—and he says, "When I pray God for myself He hears that name of thine and sees within my eyes the tears put to it." So that's when you find out what the young wife is worth or the good wife is worth when you have to replace her, and cold hard cash in the gray dawn of tomorrow when life must go on. You consult the manager of the state unemployment office or the officer for fraternal groups whose business is the mending of broken homes, and these men will take the stand and tell you how many people you will have to hire to replace a young wife. You're going to have to hire so many people that you will be paying workmen's compensation premiums on your own little staff of employees. So the worth of the wife as the Good Book says is beyond rubies, and so in the case of ..... against the West Construction Company in 220 Fed. Supplement 367, in 1963, the judge ruled that the $90,000 set by the jury was not in his opinion excessive.

Well, this is a sprinkling, a sporadic sprinkling of some of the more notable decisions of 1963, '64. This is our beautiful common law that no one of us in this room made. It's a part of our inheritance, and as one of our great forefathers said, "We must labor to earn the things we inherit." I think

the most beautiful qualities of this common law of ours, this dynamic, living common law is the two qualities, of inheritance and innovation. The common law is always in the process of becoming, and this means that to us that work in this field as Dean Powell said, for all time. Dean Powell, the great schoolmaster of the American Bar. He said the law must be stable and yet it cannot stand still. Continuity in the past is very important. Ring the bells of the future with the ropes of the past, but also it is a very dynamic law. Common law is very beautiful, too. In other words—and the audience will be happy to know, as Lady Godiva said as she neared the end of the ride, "At least I'm nearing my clothes." Common law is not suffering from tired blood. The time for its receivership is not at hand. We have the joy to know that it's the cock crowing at high noon, and if this is so and we labor to make it so it will get you the dawn and not the dusk. (Applause.)

MR. MERRILL: Thank you very much, Mr. Lambert. We are not a bit sorry that this is the 47th state that you have been to, but on the contrary we are very happy that we have had the pleasure of your company this afternoon. I think we have spent a very fascinating but all too short an hour, and we appreciate it very much.

This meeting will be adjourned until nine o'clock tomorrow morning.

5:20 P.M.

JULY 10, 1964
9:15 A.M.

MR. MERRILL: I would now request that the canvassing committee make its report. I understand that Mr. Max Whittier has the report of the committee. Max, would you come forward, please.

MR. WHITTIER: Mr. President, Commissioners, Fellow Attorneys, and Ladies. The Canvassing Committee is made up of a committee of three, Mr. Nungester, Mr. Sid Smith, and myself. Eighty-four ballots were delivered by the Secretary. Four of these ballots were spoiled. The majority of those voting chose Mr. Vern Kidwell as the new commissioner-elect. (Applause.)

MR. MERRILL: Thank you very much, Max. This is very encouraging to me because last year we had nine ballots spoiled and it just means that the attorneys in this district can read a little better. Is the new commissioner here? Vern, would you step up, please. (Applause.) I'll ask Vern to say a few well chosen words. Vern.

MR. KIDWELL: Mr. President, Commissioners, Members of the Bar, I would like to express my appreciation for the confidence shown in me. I will do my utmost. Thank you. (Applause.)

MR. MERRILL: Thank you very much, Vern. I am very happy indeed

now to ask Herman McDevitt, the host for our next speaker, to introduce him. Herman.

MR. McDEVITT: The next speaker on our program will be John F. Boland, Jr., from Phoenix, Arizona. He's associated with the law firm of Evans, Kitchel & Jenckes. His topic will be on Labor Law. He graduated from Fordham University. For the last few years he has devoted himself almost exclusively to negotiation matters involved in labor law. I can assure you that he's a man with real honest to God guts; his partner is a campaign manager for Barry Goldwater and still will allow me to introduce him. This is living dangerously, but I would like you to see and hear a man who, with his charming wife, has captivated all of us at this convention, Jack Bolen. (Applause.)

MR. BOLEN: Thank you, Herman. Mr. President, Commissioners, Commissioner-elect, and all, it is a real genuine pleasure to be here. I hope that what I have to say will be of some value to you. At the outset I should express my deep appreciation for your invitation to address your convention. If you have any idea how difficult it is to get my wife on an airplane, you would realize how much we cherish the opportunity to visit with you. I notice that you have gone to a couple of men on your program, Frank Campbell of Phoenix, speaking on your tax program this afternoon. I would hope that this tendency to look to Arizona is carried over to the national election and that you pick the new President from the same state. No more deliberate politics. I fear, however, that as my talk unfolds no great respect for the current administration will be apparent, but I shall try to keep everything within the context of my subject and be as objective as my native bias permits.

When Alden Hull first wrote and invited me to your meetings, he suggested that your state had a primarily agrarian economy and that a most elementary talk on labor law would be in order. I know that the exposure of Idaho's Bar to labor matters in the northern counties has been extensive, however, because I have had the good fortune to know many of the lawyers from the Coeur d'Alene for many years. I know they have plenty of labor problems. However, I have taken Alden at his word and will devote a portion of my talk to a little history of how we arrived at our present posture, a portion to an analysis of the most important provisions of the Federal labor laws, and a portion to some practical approaches to, what I consider to be, fairly common labor problems.

From the time that the memory of man runneth not to the contrary, a struggle has existed between the employer and his employees. The employer on the one hand has been interested in obtaining labor at the lowest possible rates and the employee in obtaining the greatest possible return for his labor. This may over-simplify it but is the essence of the struggle and looked at solely from the standpoint of economics and without regard for the moral aspects of the problems, the stated goals of the employer and the employee were each legitimate.

Now, except for some notable exceptions such as associations of artisans during the middle ages, the struggle remained largely between the individual employer and the individual employee. The great weight of economic power

resting with the employer and the laborer having very few marbles in the game, the employee remained in an extremely subservient position over the years. Obviously the element which was missing and the element which today provides the common thread which runs through much of our labor and commercial legislation was concerted activity.

The earliest battleground was England in the early 19th Century. At the time England has become quite industrialized and was the world center of trade and commerce. This was the era of the economist Malthus who preached that unless the working man was limited to the barest subsistence, he would over-multiply providing a further drain on the economy. His tenet was to let disease and poverty take its toll. The English people and their judiciary were satisfied that the owners of industry provided the country's economic strength and that any threat to the continued vitality of industry, trade, and commerce was a threat to England's economy. As long as the recalcitrance of an employee remained his individual act, English judges were not disturbed. Such individual effort posed no threat to the nation's economy. But combination and concerted activity was something else again, and when it reared its ugly head litigation ensued. Ironically enough one of the earliest cases on the road to permitted concerted activity was not a labor case at all. In the late 19th century a new shipping line found itself faced with a combination of old shipping lines which was strangling it to death. The combination, being in a financial position to do so, was offering kick-backs to customers using the ships of the combined lines and the combined lines also refused to accept any shipments from customers dealing in any way with the new line. Bankruptcy was the quick result. The bankrupt firm sued the combination for damages and to enjoin such further conduct. Its cause of action was based on tort alleging an intentional commission of harm without justification. Undoubtedly intentional harm was inflicted and was actionable unless the case came within the recognized common law principle that such action was excusable if justified. The Court found that two property rights were in conflict and that the defendents had done nothing but pursue to the bitter end the war of competition. Self-advancement and self-protection is found not to constitute illegal motives. The plaintiff had also alleged a civil conspiracy but the Court found combination as such not illegal because if the combination had all been owned by one company it could certainly have done all of the things which the combination did. The Court held that only anti-monopoly legislation could lead it to any other conclusion. Thus, we have the Court establishing a very important principle that a combination may be used to cause serious harm through economic pressure as long as it is done for self-advancement and the pursuit of gain.

That was the Mogul case, and the Pandora's Box was opened. Labor unions were overjoyed at the principle established. Two years later in a case which dragged on for three more years, as the House of Lords wrestled with the spectre of its holding in the Mogul case, a boilermaker union prevailed in an action for damages brought by two boilermakers who belonged to another union. The defendant union had caused the discharge of the two plaintiffs by threatening to strike if they were not so discharged.

The House of Lords finally conceded that it had gotten itself in a corner

with the Mogul decision and applied the principle that, as long as no illegal act was committed, the union could exert the necessary economic pressure to advance the cause of the defendant union.

In these cases is the germ of the illegal purpose doctrine whereby, with no statutory guidelines, the Court without a jury reserves to itself the power to determine whether a particular end to be achieved is legal or illegal. Ultimately, this reserved power and the abuses which it fostered brought us where we are today.

Generally speaking, in America allowance of business combinations was deemed justifiable in a line of cases stemming from Massachusetts, and combinations of labor was deemed unjustifiable. In a line of cases arising in New York on the other hand the results were largely diametrically opposed. In any event the remedies of management against labor were deemed wholly inadequate, in the view of the employer, as long as the remedies were limited to actions at law, that is, actions for damages for torts. The real ability to resist concerted refusals to work or concerted primary or secondary boycotts was virtually non-existent. Unions as such and their leaders were notoriously judgment-proof and, in any event, by the time the final conclusion of a law case could be achieved, the damage was long since irreparably done. Often the employer's business was destroyed or the valuable customer lost. Ironically, again, when the necessary tool appeared it was by chance. In the 1880's a small railroad got into financial difficulties, and the Court appointed a receiver. The receiver's job was to protect the investment, or the investors, to try to make the railroad operate back in the black. Immediately after the appointment of the receiver the employees decided they would go on strike for higher wages. This made the receiver's job much more difficult. The difference in this case is that the receiver in his capacity as such was an officer of the Court and the receiver complained to the Court that the action of the employees in interfering with the property which had been entrusted to him by the Court was contemptuous. The Court jailed the striking leaders for contempt. The strike ended and the deed was done in hours rather than in months or years. If the Court of equity could be enlisted, here was a remedy which really worked. To place the union under injunction and to jail its leaders for contempt in the event of violation was indeed a most effective device and within 10 years the labor injunction was a widely used weapon. On a showing of a tortuous invasion of property which if not stopped would result in irreparable damage, speedy relief was obtained and the seeds of labor unrest, discontent, and of the ultimate predictable backlash were sewn. While obvious to all that damage to buildings and equipment constituted damage to property, it remained for American judges to place the right to continue to conduct one's business and the right to maintain production and profitable relationships into the category of property. This English courts had previously refused to do. Ex-parte temporary restraining orders became common, and it wasn't long before most union activities were thoroughly stymied, the lapse of time between the issuance of a temporary restraining order and the hearing on the preliminary injunction often being enough to break the strike.

Along about this time, in 1890, Congress passed the Sherman Anti-Trust Act, which in essence declared illegal every combination in restraint of trade or commerce as well as combinations to monopolize trade. Federal courts were

given jurisdiction to enforce the Act and here was still another device for restricting the concerted activity of labor unions. The courts promptly applied the law to labor unions and rightly so, because their activities fell squarely within the prohibitions of the Sherman Anti-Trust Act.

Political pressure was brought to bear on Congress and in 1914 Congress passed the Clayton Act, a portion of which was devoted to labor unions. Under Section 6 of the Act, labor unions were exempted from the coverage of the Sherman Act and were declared not to be illegal combinations or conspiracies in restraint of trade. Of much greater significance, however, to labor was Section 20 of the Clayton Act which purported to prohibit injunctions in labor disputes unless necessary to prevent irreparable injury to property or to a property right and where no adequate remedy existed at law. Samuel Gompers promptly called this section of the Clayton Act "Labor's Magna Charta" and he was just as promptly doomed to disappointment. The Clayton Act was ambiguous at best. For example, the Act spoke about cases involving employers and employees. Not employers and their employees. In the first test case a mechanics' union had sought to organize a non-union printing press company, the only company in the industry not so organized. The company was damaged as a result of the union's action and an injunction suit was brought under the Sherman Act. Parenthetically I might say the Supreme Court ultimately found that the suit could be brought under the Sherman Act because it concluded that the provision of the Clayton Act which removed labor unions from the provision of the Sherman Anti-Trust Act was not effective to relieve unions of their liability when the purposes of their activity were in fact illegal. This, however, is not the main thrust of the case. The union relied on the anti-injunctions sections of the Clayton Act. It prevailed in the lower court but the Supreme Court held that Section 20 of the Clayton Act, the so-called anti-injunction section applied only to cases where the relationship of employment existed between the company and the union members involved, that is, the people actually who were doing the striking. The pressure was being brought by outside sources. So much as I might personally sympathize with the result, and believe me I do, it seems obvious that the Supreme Court had subverted the congressional intent as set out in the Clayton Act. A fairly unbiased analysis of the Clayton Act would leave one to believe that congress intended to put its seal of approval on peaceful picketing and consumer boycotts. Certainly if not specifically spelled out in the Clayton Act such permitted activities would appear to be included in the language, "any act or thing which might lawfully be done in the absence of such dispute by any party thereto." The majority view, however, was that Congress was merely stating the law as it already existed in the judicial decisions. It refused to concede that Congress was making lawful any of organized labor's self-help techniques except as such conduct was already deemed lawful. This is to conclude that the Supreme Court had committed a sterile act. But this was the Supreme Court of another day, sitting in an atmosphere of far different ideologies than are prevalent today. This was the Supreme Court of White, Pitney, McReynolds and VanDerventer. It was that Court. It also had Holmes and Brandeis, but at that time they were relegated to the roles of dissenters. Today's Supreme Court, faced with the same legislation and factual situations, would make short work of the arguments which persuaded the majority of that Court to scuttle the labor organization.

In any event, as always seems to happen, Congress went back to work and slammed the door. This pertinacious quality of Congress to keep trying until it gets the job done is the straw at which we can still grasp in the hope that today's Congress will pass still another anti-recognition picketing statute to further clarify the Landrum-Griffin Act in order to accomplish its purpose of prohibiting blackmail picketing. Perhaps if such new legislation is accompanied by pictures, drawings, illustrations, and diagrams, the present Supreme Court might more readily get the idea that Congress truly intends and intended to outlaw stranger picketing in the Landrum-Griffin Act.

But I get ahead of myself. To get back to my chronology, Congress finally nailed the matter down in 1932 with the Norris-LaGuardia Act which was the first effective anti-labor injunction statute. The Norris-La Guardia Act went greatly beyond the bounds of the Clayton Act. For example, it recognized the right to employ organization, the right to a choice of a bargaining representative, and the right to free use of the bargaining representative in collective bargaining. It then made many specific activities non-enjoinable such as strikes, union membership, strike support, picketing, peaceable assembly, and a number of other things.

With the passage of the Norris-LaGuardia Act in 1932 labor had finally assumed the ascendancy and it needed only the favorable political climate which was about to be provided by the election of the second Roosevelt to grow into the tremendously powerful force which it is today, a political and economic force second to none.

So great and rapid was the growth of organized labor after the passage of the Norris-LaGuardia Act that the voting bloc which it represented and could control was deemed of sufficient magnitude to warrant further appeasement by Roosevelt. "Clear it with Sidney" was the word. If the Norris-LaGuardia Act let the nose of the camel into the tent, the Wagner Act of 1935 boosted it all the way inside. And he was the biggest thing inside the tent. If you know camels you know the place has never smelled the same since.

No more one-sided piece of legislation can be imagined than the Wagner Act. In my opinion no other legislation in our history has had a more profound and durable effect on life in the United States than the Wagner Act. A thousand years of combined Anglo-American tradition were swept away. The right of the employer to carry on his business and affairs solely at his will disappeared and the right of the employee to deal with his employer in the best way he could was gone. Congress had decided to throw the weight of the government against the employer. Granted that the management-labor struggle over the years has been unequal and that the scales needed some balancing, when the time came to act Congress overdid it. To borrow a phrase used recently by one of the forgotten men in the current presidential nomination race, the action of Congress was akin to lighting one's cigarette with a bomb. In retrospect, I believe that the Norris-LaGuardia Act was the single piece of legislation which labor needed and to which it was entitled, and if Congress had done nothing further, the battle would have been equal and the casualties not so heavy.

For the purpose of this talk it is sufficient to examine only a portion of

the Wagner Act, also known as the National Labor Relations Act. Its opening section contains certain findings and policies. Congress stated that interstate commerce was burdened by employer refusal to permit employees to organize and to accept the processes of collective bargaining. Congress then declared it to be the public policy of the United States to eliminate the causes of certain substantial instructions to commerce and to mitigate and eliminate those obstructions where they have occurred by (1) encouraging the practice and procedure of collective bargaining, and (2) protecting the exercise by workers of their rights as set forth in the Act.

I mention these purposes only to show you later how the latter purpose has been subverted in favor of assistance to labor unions, as such, as opposed to assistance to individual workers, as contemplated by the Act.

The Wagner Act, then, in Section 7, set forth the cornerstone of the legislation, which is a definition of the rights designed to be protected by the Act. The section is as follows:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

Having laid the cornerstone Congress then builds on it with Section 8. This section contained five subsections, each of which defined activities which were prohibited to employers. Subsection 1 prohibited employers from interfering with the exercise by employees of the rights protected in Section 7 previously quoted. Subsection 2 prohibited employers from dominating any organizational effort. Subsection 3 prohibited employers from discriminating against employees by reason of their union activities. Subsection 4 prohibited retaliatory action by employers against employees who filed charges or gave testimony in proceedings conducted under the Act, and subsection 5, of vital and far-reaching importance, prohibited employers from refusing to bargain collectively with the designated representatives chosen by the employees.

As you will note, the Wagner Act was aimed solely at employers and was designated solely to protect employees. In no place does it purport to protect and foster labor unions as such.

As originally enacted the Act created a three-man National Labor Relations Board, since expanded to five by the Taft-Hartley Act, and vested in the board two main functions. First, it has the function of providing the administrative machinery for the conduct of representation elections and with it the power to settle questions related to representation matters including the power to determine the appropriate bargaining unit. Secondly, it had the original power to prevent the five unfair labor practices listed in Section 8. I should mention that the members of the National Relations Board hold office by Presidential appointment with the advice and consent of the Senate and herein rests a congenital weakness of the legislation, at least certainly, insofar as it has the power to prevent unfair labor practices. But more about that later.

The Act permitted the National Labor Relations Board to investigate and inquire into the commission by employers of the various unfair labor prac-

tices set forth in Section 8. The remedial powers of the board were somewhat vaguely outlined in Section 10 (c) of the Act and in substance are as follows:

> "The Board shall issue and cause to be served on the employer an order requiring the employer to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act."

The very vagueness of this section, however, permits many of the abuses of power which have been perpetrated by the successive boards over the years. Anyone reading this section can quickly observe that that which will effectuate the policies of the Act depends entirely upon what a particular board perceives those policies to be. Now it is true that the Act provides for judicial review of the board's orders and it is likewise true that Congress could not spell out with precise particularity the limits of the discretionary powers of the board. In effect, Congress was delegating a portion of its legislative function to the board, hoping that the board would stay within the general guidelines set forth in the Act and relying on the Circuit and Supreme Courts to straighten the board out when it strayed from the straight and narrow.

Unfortunately, Congress, in its finite wisdom, could not foresee the ingenuity which successive boards would bring to bear on establishing unlegislated public policy or the extent to which the board and courts would submitto the application of external pressures.

The constitutionality of the Wagner Act on many grounds was promptly challenged, and within a year the Jones and Laughlin Steel case was decided by the United States Supreme Court establishing the constitutionality of the Act. The 5-to-4 opinion was written by Charles Evans Hughes and the particular case is mentioned only because Chief Justice Hughes emphasized that the Wagner Act went no further than to safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining without restraint or coercion by their employer.

The board's early emphasis in applying the Wagner Act was on the encouragement of collective bargaining at the expense of employee freedom of association and this fact, plus the inherent imbalance of the Wagner Act, limited as it was to the misconduct committed by the employers only, led Congress twelve years later, to amend the Wagner Act by the passage of the Labor-Management Relations Act of 1947, popularly known as the Taft-Hartley Act. In doing this, Congress amended Section 7, which you will remember is the section which defines the employee rights which are designed to be protected. In the Taft-Hartley Act Congress provided that in addition to the right to organize and join labor organizations, employees had the concommitant right, or equal dignity and standing, to refrain from organizing. With this most basic right Congress attempted to correct the inherent imbalance of the National Labor Relations Act by setting forth six types of union unfair labor practices. Among other things, also, the Taft-Hartley Act provided expressly for the preservation to everyone involved of the right of free speech provided that such expressions contain no threat of reprisal or force and no promise of benefit.

The public policy as set forth in the Wagner Act was left unaltered by

the Taft-Hartley Act. It was still to encourage free collective bargaining and to protect the exercise by employees of their right of full freedom of association and selection of their bargaining representative.

Another 12 years passed before Congress was goaded into action once more, and in 1959 the Labor-Management Reporting and Disclosure Act, popularly known as the Landrum-Griffin Act, was passed, amending the Wagner Act once more. Labor union abuses caused Congress, in the Landrum-Griffin Act, to add a provision to the law, among other things, delineating a so-called bill of rights for union members, a provision ostensibly outlawing blackmail recognition picketing, and hot cargo contracts and provisions for the filing of certain financial reports by union, union officers and employees, employers and labor relations consultants.

Again, the policies of the Act as set forth in the Wagner Act were left unchanged.

This, then, is the present state of the Federal Labor Law. We have the Norris-LaGuardia Act, which limits the injunctions which may be obtained in labor cases, plus the Wagner Act as later amended by the Taft-Hartley Act of 1947, and the Landrum-Griffin Act of 1959. You as lawyers know, however, that these statutes are the bare bones of the law. We would all like to think that when the harassed employer-client comes into our office with a specific problem we can just dig out the statute and provide him with the correct advice by applying the statute to the given set of facts. It's a rare case when this can be done. When stymied by the bare statute we would, however, also like to think that the board and court decisions which have been handed down administering and interpreting the statutes would largely provide us with the wherewithall to give some firm advice to our client with some reasonable assurance that the course of action he adopts as a result of our advice would be correct. Not so. I don't know of any area of the practice of law where more uncertaintly exists from day to day as to what constitutes acceptable conduct. Why is this? It is because, as I have already indicated, the law is being made by an administrative agency and the matter is so sensitive to political pressures.

Let me illustrate. While in no sense of the word could the composition of the National Labor Relations Board as it was made up under Eisenhower be called conservative, let alone pro-employer, it did have one quality and that was consistency. At the time of the late President Kennedy's election the board consisted of Leedom, Rodgers, Fanning, Jenkins and Kimball. The present chairman of the board, Frank McCulloch, was appointed by Kennedy to succeed Kimball in March of 1961 and Gerald Brown succeeded Joe Jenkins in April of 1961. Although Fanning was an Eisenhower appointee, he had written approximately 70 dissents on the Eisenhower board and he promptly became a member of the majority with the appointments of McCulloch and Brown.

I have already mentioned that in the Wagner Act the state policy of the United States was to eliminate the causes of certain obstructions to the free flow of commerce and to eliminate and mitigate these obstructions when they occur by first encouraging collective bargaining and, second, protecting workers in the exercise of the freedom of association, self-organization,

and selection of their representatives for the purpose of negotiating the terms and conditions of their employment. To reach the goal of the state policy Congress prescribed the encouragement of collective bargaining and the protection of individual workers rights. I have also said that neither the Taft-Hartley Act nor the Landrum-Griffin Act changed these policies.

Shortly after Brown was appointed to the board he delivered an address to which he stated that the National Labor Relations Board had the function of applying a public policy which he stated to be the encouragement of collective bargaining. No mention of the protection of the rights of the individual worker. He stated that the board was a policy-making tribunal and, as an administrative agency, it had an obligation to reflect the current political climate because only by doing so could it propagate the philosophy of the appointing officials who had been elected by a majority of the electorate. I submit to you that by 1961, after 26 years of board decisions setting forth detailed rules of conduct, after specific legislative amendments to the Act, and after the complete transformation of the industrial environment within which the Act operates, the present board's functions should have been largely the application of the law rather than the formulation or directional furtherance of public policy.

The guidelines for the activities of employers, employees, and unions having already been largely laid out, but these not yet being entirely satisfactory to organized labor, some device was necessary to permit departure from known rules so that change, to reflect the political climate as the new board saw it, could be obtained. Thus the majority evolved what has come to be known as the case-by-case approach. It was seen that if case-by-case analysis were substituted for known guidelines and rules, most any kind of decision could be forthcoming to suit the political requirements of the particular matter, the entire approach coming under the head of carrying the policies of the Act, which gave it a veneer of respectability along with a high degree of flexibility. Shortly thereafter, Brown, in another address at the University of Tennessee, stated: "The hallmark of labor relations is its constant state of flux. We must ever be alert to change, and the present needs of the current situation. Accommodation to change often requires creative thinking and imagination."

My observation is that this board has embarked upon this program of change and that it is indeed characterized by creative thinking and imagination and that the greatest changes which are being brought about are in the legislation itself, an area constitutionally reserved for Congress. Undoubtedly since 1935 the phenomenal growth in the strength of unions and concomitant necessity for protecting the employees from unions and various other contributing factors have dictated the need for change. This, however, has been Congress's function and it has so recognized that fact, and in 1947 and again in 1959 it amended the original Act to update the legislation to satisfy current conditions. These changes, however, or perhaps the nature of these changes, aimed as they were primarily at curbing union powers and practices do not satisfy this board's concept of change and it set about undoing many of the changes wrought by Congress and making many of its own. These changes in most cases constitute reversals of principles laid down by prior boards which have been relied upon by all parties to shape

their conduct. These changes have occurred in almost every subject area of labor relations with some of the most significant affecting an employer's duty to bargain, an employee's right to make a free choice of his representative, an employer's right to replace economic strikers, the composition of bargaining units, an employer's right to free speech, an employer's exercise of his right to manage, operate or discontinue his business, the application of the recognition picketing provisions of the Landrum-Griffin Act, secondary boycotts, and many other areas of employer and employee activities.

A common trend seems to run through the cases. The most dispassionate and objective analyst must conclude that under the heading of "Furthering the Policies of the Act" the decisions of this board are calculated to contribute to the strengthening of labor unions as such, generally at the expense of the employer and the employee who, with the general public, are the only parties who have rights specifically to be protected under the Act. The Act, as I have said before, provides no protection as such for labor unions.

Let's consider what has happened in the area of free speech. When the Wagner Act was passed it contained no guarantee of an employer's right to freedom of speech, although Congress had considered such a provision, rejecting it as unnecessary. The first board then promptly decided that an employer must remain completely neutral. It concluded that any statement by an employer would be interference with union activities because the employer's advantageous economic position would automatically cause employees to fear reprisals if the employer's wishes were ignored. In 1941 the Supreme Court in the Virginia Electric and Power case held that as long as the employer's words did not amount to coercion then his speech was constitutionally protected. The original board then evolved a number of different doctrines such as the Captive Audience Doctrine which continued to place certain limitations on an employer's freedom of speech.

Finally Congress passed the Taft-Hartley Act and it specifically preserved the right of everyone's free speech, the employer and the employee, if such expression contains no threat of reprisal or force or promise of benefit.

This did not stop the board and it evolved a serious of tortuous decisions which continued to restrict employer free speech. A swing in the opposite direction was started with the Eisenhower board, but the current board is now bent upon the removal of all vestigial remains of employer's constitutional and statutory right of free speech. For example, take the case of Dal-Tex Optical Co. decided in 1962. In that case the employer had given a number of pre-election speeches, in one of which he stated a number of legal positions, all proper. One was that he intended to test in the courts the validity of the board's action in setting aside the prior election, one was that if there was a strike he had a right to and would continue to operate, and one was that under such circumstances he had a right to and would replace the strikers. The case arose on objection, by the union, to the second election in which it had again been defeated. The board set the election aside concluding that the employer was threatening the emoplyees with economic loss and loss of jobs if they selected the union. Now in effect the board in Dal-Tex is saying that employers may not inform the employees of the drawbacks of a union. In addition to denying the employer's right of free speech, this denies to the employee his right to make a free choice, which is protected

by statute. He has a right to know he can be replaced if he goes out on strike. He has a right to know that the employer is not required to accede to the union's demands; he has a right to know that he can be replaced during an economic strike, and he has a right to know that an employer may operate through a strike if he is able to do so, and he has a right to know what it is going to cost him to be represented by the union. Only with knowledge of this type can he make a free choice. This board would deny the employee this right to make that free choice. A result calculated to strengthen unions as such, but under no circumstances protect the rights of employers and employees, the only persons designed to be protected by the Act.

Now previously announced policy of the board in this free speech area was to the effect that such statements constituted mere expressions of the employer's position. This board found that this was no longer permissible and that such speeches constituted, per se, interference, restraint and coercion. The election was set aside and the union given another run at it.

What do you advise your client who is faced with an organizational drive and who wants to do everything possible to resist the effort. He wants to know what he can say. The answer is very damn little. Theoretically he can say anything which is not coercive, but this is an expandable term and in a nutshell this board deems almost everything coercive which hinders the union's drive. On the face of it he may express opposition to unionization; he may express a preference for one union over another, and theoretically express the possible effects of unionization in the plant; may discuss wages, hours, and working conditions and explain his financial position to his employees; and explain the benefits of non-unionization and some of the detriments of unionization, but there is an all-pervading caveat. The board will look at every case on a case-by-case basis and if it finds that the statements of the employer removed the sterile laboratory conditions which it considered essential for the conduct of an election, the employer is in trouble. And the consequence is that if the company has won the election, the board will set it aside and schedule a new election. It doesn't cost the union anything to file objections to the elections and if it has a slight chance of setting the election aside it has nothing to lose by doing so.

And any discussion of freedom of speech leads us to the subject of picketing, the event which finally gets the lawyer into the situation. The client might elect to go it alone until the pickets appear and then the lawyer's telephone rings.

A basic question raised in connection with picketing is whether picketing, as such, constitutes freedom of speech protected by the First Amendment and therefore protected from state infringment by the 14th Amendment.

In 1940 in a landmark case the United States Supreme Court in Thornhill concluded that peaceful picketing was a form of communication for free discussion guaranteed protection by the First Amendment. One could spend the hour I am allotted just discussing this concept. Not only whether picketing is in fact a form of communication at all but whether or not the term peaceful picketing is not in and of itself a contradiction in terms. The mere appearance of a picket sets certain pressures in motion and true economic warfare has truly started. The best I can do is try to tell you what I view

the law to be. Now Thornhill was a direct picketing case. In 1941 A.F. of L. versus Swing came down. The Illinois court in Swing had enjoined peaceful picketing by a stranger, that is, by a union which represented none of the employees of the employer and was attempting to force recognition. The Supreme Court extended its Thornhill doctrine thereby changing the common law of many states to extend the constitutional protection of free speech to picketing by persons other than the employees. On the same day Meadowmoor Dairies came down. This was another Illinois case where peaceful picketing was interspersed with some bombing, hijacking and other forms of lawlessness and violence. The Illinois court decided on the question of whether all picketing should be enjoined; that is, the violent and the peaceful, that any picketing would carry over a momentum of fear from a past violence and the Supreme Court began to have some misgivings about the results of the sweeping Thornhill doctrine. It finally agreed with the Illinois court, saying that others would be persuaded by fear of the picket line rather than be enlightened by it. This was a considerable inroad into the Thornhill doctrine. Further inroads were made in the Ritter case in Texas where a state court decision enjoining picketing at a seconary location was upheld by the Supreme Court. Several cases followed which continued to whittle away at the Thornhill doctrine. Even though there was little left of the sweeping holding of Thornhill, the basic proposition survived, however, that picketing is a form of speech guaranteed protection by the First Amendment and further protected from state infringement by the 14th Amendment.

In addition to this constitutional right, Section 13 of the Wagner Act, which preserves the right to strike, has been interpreted to include the right to picket. Section 7 of the Wagner Act which sets forth the protected concerted activities of individuals has also been held to include the right to picket.

Now, before we start to consider what can and what cannot be done to stop picketing, consideration must first be given to a very important case in the field which was decided in 1953 and which greatly hampers an employer's efforts to resist picketing. This case was Garner vs. Teamsters. In that case the Teamsters peacefully picketed the loading platform of the plaintiff, an interstate trucking company. The union represented only four of the plaintiff's 24 employees. The employer had never objected to the others joining the union. They just didn't want to. The Teamsters were trying to coerce the employer into compelling or influencing the non-union employees to join the teamsters in violation of their right not to join the teamsters as protected by the Taft-Hartley Act. This constituted an unfair labor practice under 8 (b) 1 (a). The picketing was highly effective because drivers for connecting carriers refused to cross the picket line and 90 per cent of the plaintiff's business disappeared. The court of original jurisdiction granted an injunction, finding that the union's action violated Pennsylvania's labor relations act. Pennsylvania's Supreme Court reversed on the ground that it felt that the National Labor Relations Act as amended by the Taft-Hartley Act had pre-empted the field and that the state court's jrisdiction was ousted. The United States Supreme Court agreed. Thus we have the proposition laid down that wherever the union's activity constitutes an unfair labor practice under the Federal Act, the employer's only remedy is before the National Labor Relations Board and if it happens to be a secondary boycott or a recognition picketing case, the possible use of the injunctive proceedings

set forth in 10 D of the Act. Even these latter cases require the use of the administrative procedure of the board and from a practical standpoint provide no speedy relief.

The only real exception left after Garner was mass picketing or picketing which is accompanied by violence. Here, even though an unfair labor practice is being committed, the Supreme Court recognizes that the states still have the power to deal with such traditionally local matters as public safety and order and use of streets and highways. Thus, it is still possible to secure an injunction in such cases in state court. When this is sought to be done, of course, the provisions of the state little Norris-LaGuardia Acts or little Clayton Acts have to be considered, and any injunction to be obtained in state court will have to be tailored to or be issuable under such state anti-injunction statutes. I know Idaho had such a statute, but I am unfamiliar with its provisions.

But forcing the employer to the board for recourse is giving him a mighty poor remedy. First of all, injunctive relief is possible only in extremely limited situations. To get a cease and desist order in all other cases after filing an unfair labor practice charge can be a matter of many months and even years. Investigations, hearings and a decision consume great amounts of time while the employer is being strangled to death by mass picketing. This is particularly true in businesses where the employer's operations require that workmen of other employers or other trades cross the picket line as in the construction industry.

One of the most vicious situations is the recognition picket. Aware that the administrative snarl has the employer's hands tied, a union which is unsuccessful trying to organize the workers of an employer will regularly resort to picketing pressure. As in the Garner case, it will put a picket line on the employer's place of business to try to force him to recognize the union as the bargaining agent for the employees, well knowing that it doesn't represent them. No practice more urgently needed legislative attention and justice cried out for effective means for stopping the practice. Congress attempted to do it in 1959 with Section 8(b)(7), a portion of the Landrum-Griffin Act.

The legislative history of 8 (b) (7) makes it clear to me that Congress intended to outlaw recognition picketing-period. This is just what they were aiming at. When it finally got something acceptable enough to pass Congress a flood of litigation resulted. The end result of which it seems to me leaves us back where we were, only worse.

Here is the statute paraphrased:

> It is an unfair labor practice to picket or threaten to picket an employer where an object is to force an employer to recognize a union or the employees of an employer to select a union when such picketing has reasonable period of time not to exceed 30 days from the commencement of the picketing, provided when such a petition is filed the board shall forthwith direct an election, and provided further that nothing in the section shall prohibit picketing or other publicity for the purpose of truthfully advising the public that the employer doesn't employ union help and doesn't have a contract with a labor union.

Now, it has long been a practice of the board that it will not process a representation petition while an unfair labor practice is pending. As a result when 8 (b) (7) was added to the law, those unions which made it a practice of using this device of recognition picketing and who, by reason of Section 8 (n) (7), were then forced to file representation petitions would also file an unfair labor practice charge. It made no difference whether the charge had merit. The administrative delay in deciding whether the charge filed by the union was meritorious permitted the continuation of the devastating picketing, and the worst that could ultimately happen would be dismissal of the unmeritorious unfair labor practice charge.

You will remember that in reading the statute I read that picketing is unlawful where an object is recognition. The board promptly interpreted an object to mean the object and it held that the picketing could continue if it found that in addition to the proscribed purpose the picketing was also being conducted to inform the public that the employer employed non-union help. This case was Crown Cafeteria, and a similar result was reached in Barker Brothers. Now I submit to you that this is throwing an unfair amount of governmental weight on the side of the unions where they are permitted, in the absence of any wrongdoing on the part of the employer, to continue to picket his business and to coerce him into requiring his employees to join the union or to coerce him into signing a contract.

Why do I say that the law is in a worse state now than it was when 8 (b) (7) was passed? Simply this: Prior to the passage of 8 (b) (7) the Eisenhower Board had ruled that this recognition picketing was an unfair labor practice by the union because it felt that it was coercive and violated the rights of the individual worker not to join the union. Just like the Taft-Hartley Act said. With the passage of 8 (b) (7) the Supreme Court overruled the old Eisenhower Board and said that the limited restriction that 8 (b) (7) places on recognition picketing indicated to the court that this type of coercion was not meant to be included in 8 (b) (1) (a). That which was intended to be a curb on the coercive techniques of union turned out to be a boon for them.

Now there is just one more thing I want to talk about and I feel it is very important to anyone representing management. This is the employer's duty to bargain on management decisions and the particular case is Town and Country Manufacturing Company. Now, in this case the employer was a house trailer manufacturer who over the years had trouble with the ICC in connection with its hauling operation. It had tried a number of ways of operating to keep clear of the ICC. A union organization campaign began in 1959 as a result of one of these changes in operations. At about the same time the company called in the ICC to again examine its own operations. The employer then decided to contract out the hauling and discharge all of the drivers. Unfortunately Town and Country had been careless about statements made and actions taken in opposition to the union and had committed some clear unfair labor practices, interference with the employees' right to join the union. Some of the things the employer said were clearly wrong. There is no question in the case that the employer was guilty of unfair labor practices. The employer was charged with refusal to bargain under 8 (a) (5) by subcontracting out its hauling operation, and the discriminatory discharges

of all the employees. Now the trial examiner dismissed the 8 (a) (3)'s which was the charge that these employees were discriminately discharged, and found that the employer's motivation was to avoid further ICC violations rather than discrimination against the employees to discourage union activities. However, he did find that the employer was guilty of the refusal to bargain in subcontracting the work.

The board reversed the trial examiner, finding that the employer's pronounced hostility to the union pre-dated calling in the ICC and that the latter play was only a pretext to disguise its true motivation which was to discharge the employees for union activity and to avoid bargaining with the union. Thus the board went forward and found that the employer was also guilty of the 8 (a) (3) charges, that is the discriminatory discharges.

Now, this aspect of the decision wasn't too unpredictable in the light of the employer's improper conduct, but the board went ahead and found the employer guilty of an 8 (a) (5), that is, a refusal to bargain, on the ground that it had a statutory obligation to bargain about its decision to subcontract. Now I emphasize the word decision because this is what the board held. It was not the subcontracting which it found wrong but the company's decision to subcontract without talking to the union. It stated that because it might operate more economically through subcontracting gave it no license to violate the Act.

Now we come to the remedy which the board ordered to Town and Country. Since 8 (a) (3) violations were found, the board found that the drivers were discriminatorily laid off, it said the only effective remedy was to reinstate all of them to their jobs. It, therefore, ordered the company to resume its former trucking operation, abrogate its subcontract, offer all employees reinstatement, and pay them all back pay for their lost earnings. Here for the first time this board's newly formed status quo ante under which it said that justice can be done only by putting everything back into the situation which existed before. Now next comes this quotation from the board:

> "Of course, where that obligation," this is the oglibation to talk about the decisions to subcontract, "of course, where that obligation has been satisfied after the resumption of bargaining, the employer may lawfully subcontract the unit work."

Now you can see that in the meantime the board has successfully punished the employer, requiring him to expend a tremendous sum of money in back pay.

Now this seems like the kind of a remedial order which would be found only in a discriminatory discharge case. The board found discimination here, therefore, it would seem the order was not out of line. So far so good. But what would the board do if there had been no 8 (a) (3) aspect and there was present only the refusal to bargain on the decision. The board made the answer very clear. I quote from the decision:

> "In sum, even were we to find that respondent terminated its trucking operations for non-discriminatory reasons, we would, in the circumstances of this case, order respondent to abrogate its subcontract and bargain with the union over any future decision to subcontract its operation. In

addition we would direct reinstatement of its drivers with an appropriate back pay revenue."

We now have a proposition which all of you must keep in mind if you represent employers in any labor matters. If a management decision to change operations, to automate, or to subcontract any work is going to result in the loss of bargaining unit jobs, it appears from Town and Country that some bargaining must take place with the union before any decision is made to carry out such changes. The cost to the employer can be enormous if this is not done. If you are involved in any contract negotiations effort should be made to include in the contract a tight specific waiver of bargaining provisions under which both parties agree at the outset, when they sign their contract, for the life of the contract to waive any right to bargain on any matters where a legal duty to bargain exists.

It occurs to me that with political influence on the board so great and with the consequences of a mis-step by management being so extensive and expensive, consideration should be given to limiting the power of the National Labor Relations Board. I have concluded that of the many remedies suggested, only one would be effective and that would be to amend the National Labor Relations Act to provide that jurisdiction over the trial of unfair labor practices be listed in the United States District Court. A large measure of the uncertainty and unpredictability which has resulted from the case by case approach by this board and the tendency of this or any board to lean with the political wind would be limited. Transfer of unfair labor practices to district courts has received support from the labor law section of the American Bar Association. Such bills have been introduced in the past and in fact one was introduced last August by Congressman Landrum, who says that the board is embarked upon administrative repeal of the Landrum-Griffin Act. The present composition of Congress precludes its passage unless the board's actions become so flagrant as to stir public indigation. As far as I'm concerned we need a political change. (Applause.)

MR. MERRILL: That was a very excellent and profitable address, and we are certainly indebted to you for sharing with us your extensive experiences in this field. I do hope you are enjoying your stay with us, and we enjoy having you here, and we certainly look forward to having you back.

JULY 10, 1964

MR. MERRILL: Gentlemen, we now have what I am sure will be a special treat for the harassed trial lawyers in the audience. I will ask Sid Smith if he will come up and introduce our next speaker.

MR. SID SMITH: Mr. President, Members of the Bar and Ladies. In keeping with the commission's policy to bring to the members of the Bar something of interest and something of benefit in their daily practice we are favored to have with us Judge Doyle, a U. S. District Judge from Denver, Colorado. We are indebted to Dean Peterson for having served with him on a panel at Glacier National Park at the time of the Trial Judges Conference. Judge Doyle was born in Denver, Colorado; educated at the University of

Colorado, and attended and received his LLB. at George Washington University. After admission to the bar in Colorado he served as deputy district attorney in Denver. Was in private practice in Denver for a good many years. He became a district court judge in Denver. He has been a Justice of the Supreme Court of Colorado. He became United States District Judge for the District of Colorado in 1961. He's taken time out to be a teacher of law at Westminster College of Law and a visiting lecturer at the University of Colorado. He has also taken out time to serve three years with the army in Ethiopia, and we are pleased and privileged to have with us today Judge Doyle, and he is going to speak to us on discovery and pre-trial procedure and summary judgment as aids in the disposition of civil cases. I would like at this time to present the Honorable Judge Doyle. (Applause.)

JUDGE DOYLE: Honorable Judges and Attorneys at Law. Sid, I thought he did extremely well. As a matter of fact, I was perfectly satisfied the way he was going on and didn't feel there was any particular necessity for me to add to what he has said. He could have continued in somewhat that same vein and I would have felt more enjoyable than what I am going to do now. I was interested in the remarks of the last speaker. He is trying to confer more jurisdiction on federal courts and I would say to him, "Shoemaker, stick to your lab." We have all the business we need and a little bit more at this time, and we have no particular desire to take on more emergency work especially in labor cases involving applications for temporary restraining orders brought in on Friday afternoon between the hours of four and five, and invariably they have to be heard and heard in some depth. You just can't decide those off the top of your head so I would be very pleased if he would just leave that matter alone, and I can sympathize with some of his viewpoints. I gather from what he has said that he is opposed to picketing somewhat. I merely want to add that there are worse ways to make a living than the practice of labor law, and if it weren't for picketing I say to him he might be representing insurance companies or doing something else equally interesting. But he did do a masterful and very excellent job I would say in covering a tremendously broad field in a short time. This is not an easy task, as I have found out.

I didn't select the subject matter. Dean Peterson, my good friend, thought that this might be of interest here now. This is not an area that has any human interest in substantive matters, and yet no gathering of lawyers is quite complete unless some time is devoted to the problem of trial practice. They are upon us all the time every day in the week, and thus I guess we just have to reconcile ourselves here and now to the fact that there are neither sex nor psychiatry which can be woven into this material, and thus if I get too bad I give any person here permission to get up and walk out and I'll know that it's impersonal. Yet, no bar meeting is ever complete without devoting at least some time pre-trial and the closely related subject of discovery. Summary judgment is also related but it has had much less attention through the years, undoubtedly because the courts have not embraced it fully. Especially in the state courts has there been great reluctance to use this most effective method. Indeed, it is correctly described as a weapon because it is not only capable of inflicting serious injury, but is sometimes lethal in nature.

Because of the belief that it is necessary to discuss and consider pre-trial

and discovery whenever lawyers get together, I must not speak at all disparagingly of these pre-trial techniques. It is noted here at the threshold that everything is not happiness and light in this area. The federal rules have been in force now for 25 years and yet they are still known as the new rules.

The rules have been adopted substantially in the vast majority of the states and yet the bar has not fully accepted them. But new is inaccurate. Long before the adoption of the federal rules the philosophy of the rules has been advocated. Discovery has been recognized in the old Federal Equity rules, and the pre-trial in one form or another has, according to Nims in his text on the subject, had recognition since the days of the development of the common law in England.

The modern philosophical basis for most procedural reform is found in the now famous speech of Dean Roscoe Pound given at the American Bar Association convention at St. Paul in the year 1905. The title of this important statement of principles is: "The Sources of Popular Dissatisfaction With the Administration of Justice." It is published in several journals but was recently republished in the Judicature Journal. Here Dean Pound pointed out the basic difficulty to be the refusal of judges to take a positive approach in running their courts. When a judge conceives of himself as a mere referee, the lawyers take over the running of the courts and do so in their own interests. The clients' interests do not always coincide with the public interest. Pound urged in the inswndwatndwatndwndwatnawndwatnwatndwantwwd Pound urged judges to take initiative and to exercise leadership in the interests of a speedy and just disposition of cases. He advocated abolition of the old surprise methods whereby cases are won or lost on the basis of the skill or lack of it of the lawyers involved. In a system in which technique is the determinant, the cause of substantial justice is bound to suffer and possibly fail altogether. Although the Pound warnings were sounded almost sixty years ago, the bar, and particularly the trial bar, has never fully accepted his thesis. This is not surprising since the idea has a sort of socialistic flavor and there is no more rugged an individualist than a trial lawyer.

While the trial bar has not embraced the methods in question, there has been surprisingly little resistance. Perhaps one reason for this is that the rules have not been put to full use in the state courts. However, now the trial judges in state courts are discovering their value, and so nowadays you do hear some howls. Most of the noise is being made by the older trial lawyers who knew the old system of trial by battle or ambush in all of its glory. From this group who are devoted to the old sporting theory of justice you are apt to hear that the art of advocacy is being destroyed. They lament the fact that the federal judges are examining the jurors on voir dire, and are making lawyers divulge evidence which robs the case of surprise and drama. I can't say that I blame them, but I must also observe that their outcries are not going to have much effect. It is unlikely that the trend which produced the current approach to trials will be reversed.

So far my remarks have been prefatory and I have used a substantial amount of my time, so I had better move into the subject matter of my talk. One last word. Flexibility is essential. A rigid legalistic approach can ruin the entire spirit.

The Discovery Rules

The design of Rules 26 to 37 is such that an ingenious or an enterprising lawyer can through use of them succeed in exposing all of his opponent's evidence. The only limitations are relevancy and privilege and it is not even necessary to show that the evidence is competent or in itself relevant. Or is it relevant to the subject matter of the action. If it leads to relevant evidence it is sufficient. The deposition on oral examination needs no comment. A wide range of subject matter is permissible, limited only by the power of the court to protect the party or witness from embarrasssment or oppression.

Rule 30, pertaining to oral depositions, and Rule 33, to interrogatories to parties, are simple enough and little comment is here indicated. The problems arise in connection with production of documents and requests for admissions.

Rather than discuss the rules, I shall take up a few particular problems under them.

Consider the request for production of witness statements. First of all, good practice requires or at least suggests the filing of an affidavit by the lawyer or the party in order to satisfy the good cause requirement. How much is needed? Where the matter sought is an attorney's work products, privilege attaches to it and the ruleman versus Taylor, 329 U. S. 495, comes into play. This rule is stringent and the showing must be substantial. Such a case was Diamond versus Mohawk Rubber Company, 33 Fed. Rules Decisions 264. There the attorney for defendant took a statement from a former employee of the defendant. In doing so he called in a stenographer who recorded the questions and answers. It appeared that the witness was hostile to plaintiff and would not submit to interview. Under these circumstances I ruled that good cause existed for production of the statement; that to refuse discovery would subject plaintiff to deposing a hostile witness without prior notice as to the nature of his testimoy. This, then, was held to be a showing of good cause within the stringent limits of Hickman versus Taylor. The Diamond case points out that merely because the statement was taken by the lawyer it does not follow that it was work product. It must appear that an attorney's technique was employed in its preparation.

Distinguish the case in which an investigator has taken witness' statements. Rule 34 still demands a showing of good cause, but I submit that good cause as here used, means a great deal less than it does in the Diamond or Hickman cases.

This very matter the question of production of witness' statements taken by a non-attorney was before me in Johnson versus Ford, it will be in federal rules decision. There an investigator for the insurer took a number of witness' statements immediately after the happening. There was a lapse of time until the case was filed in court. Plaintiff obtained the names of witnesses and proceeded to interview them. He discovered, however, that they had forgotten the details and on the theory that he needed to know what they had said immediately after the fall—off a horse. He demanded production. This in my judgment made out a case of good cause. The fact that the witnesses were unable to remember what they said to the investigator at the time. Well, I held that this is sufficient. Indeed, many cases go further, holding that only

relevance need be shown where the items demanded were prepared by an investigator. Good cause continues, however, to be a formal requirement; at least in federal courts.

The problem of attorney-client privilege presents still another question. I now refer to communications between attorney and client, or vice versa. A specific example of this came before me in October, 1963. United States versus Anderson, 34 F.R.D. 518. This was an action by the Small Business Administration to enforce officer guarantees following a corporate failure. The company has gone through Chapter X reorganization. The plan of reorganization was a liquidation. Small Business Administration had brought in the security and it was contended that the individual secondary parties had been discharged. The defendant wished to uncover the intra-bureau communications. Some of the documents were work products subject to discovery upon a showing of good cause; others, however, were subject to attorney-client privilege, being conclusions and opinions communicated by attorneys to agency officials. As to these latter it would seem almost impossible to make a showing of good cause sufficient to overcome the strong policy factors favoring the protection inviolate of attorney-client communications. It is pointed out in the Anderson case, however, that painstaking examination of the documents in camera is essential. Mere assertion of the privilege fails to fill the bill.

One additional, specific an highly controversial disovery problem is that of the existence of and policy limits of insurance. Obviously, this is not competent evidence and so the question is reduced to whether it is relevant to the subject matter of the suit. There is a split of authority on this. However, the Colorado Supreme Court, in an opinion authored by me while a member of that Court, ruled it to be subject to discovery. The rationale was that it brought to the fore the identity of the real party in interest and led to the opening of new sources of information. The argument on the other was that it is fundamentally abhorrent to delve into ability to pay. It is especially abhorrent to insurance companies. The decision referred to is Lucas versus District Court, 345P. 2nd 1065.

In concluding the discussion of discovery it is to be added that it constitutes one of the most notable aspects of the modern procedure, is an inextricable part of pre-trial, and is the very antithesis of the individualistic sporting theory of justice as it existed prior to 1938. Like all human institutions, however, it is subject to abuse and it is up to the trial judge to protect litigants from oppression and embarrassment.

The Pre-Trial

The pre-trial may well prove to be the most significant development in improved judicial administration of this century. In the past decade it has gained almost universal acceptance.

The pre-trial differs between courts according to the philosophy of the judge. Thus, it can be a mere ritual or it can be highly meaningful. In order to serve its mission the lawyers should have ample notice and should meet beforehand to prepare for it. Discovery should be complete and the pre-trial should serve as the culmination of trial preparation. It should provide an

occasion for formulating the issues in the case, marking the exhibits, listing witnesses and narrowing and eliminating the irrelevant issues.

In order for the pre-trial to be successful it is essential that the judge take a positive approach in obtaining stimulations and in formulating issues. If he does his job properly the case will be at last reduced to its bare essentials and indeed it will be often reduced to an issue of law which can be set down for argument and disposition.

The pre-trial order should be full and complete and when completed the order is a blueprint for the trial which supersedes the pleadings. It should govern the conduct of the trial and should be modified only to prevent manifest injustice.

What Does It Accomplish?

1. It is often regarded as a docket control measure and indeed it will serve this purpose. It unquestionably speeds up settlement. The mere sitting of pre-trial conference will produce some settlements. The actual pre-trial brings about some settlement and indeed the judge can exercise some influence in this area.

2. More important than a docket control measure is its function as an aid to fair and just trial. By eliminating the sporting theory and by searching for truth and justice it provides a method for reaching the real merits of the case. By thus bringing about the disposition of cases according to their true merits the pre-trial serves the public interest and the clients' interest.

3. It helps both court and counsel to understand the case and thus makes for a more orderly, smoother functioning trial. Often the lawyers do not formulate theories or muster proof until just before the trial. The pre-trial eliminates this last minute rush and eliminates also the three ring circus aspect at the trial. By eliminating costly delays during the trial the litigants, witnesses and jurors are not subjected to cooling heels while mysterious doings are being conducted outside their presence.

4. It tends to prevent courthouse steps settlements with the loss of trial time which invariably ensues.

To many lawyers and to many judges as well, the pre-trial is a drag and they wish it would go away. Such a development is most unlikely. I predict that, like the forward pass, it is here to stay.

I have taken too much time and I have not even talked about summary judgment.

Closely related to the other methods and techniques for simplifying the issues of a case is the summary judgment. This is the culmination of the discovery and pre-trial. If all genuine issues of fact are at last eliminated the summary judgment procedure is a perfect method for bringing the issue or issues of law into focus and for thus avoiding a trial. Many members of the bar are not fully aware of the kick, so to speak, which is inherent in this procedure.

In the past it was enough to deny an allegation such as the averment of execution of a document and an issue of fact existed. This is no longer

true. Rule 56 (c) requires that positive facts be set forth in response to assertions of fact contained in affidavits or depositions. If the party fails to come up with positive factual matter the rule provides that his response must set for specific facts showing that there is a genuine issue of fact. If he fails to so summary judgment can be rendered against him. Prior to the amendment of this rule there was a division in the circuits. This amendment has now settled the matter in favor of the ruling which permitted recognition of sham issues.

It can be readily seen that this is a drastic but mose effective technique in the hands of a professional who knows how to use it. It can quickly and effectively force the emergence of the merits of the case.

The trial bar has more regard for this procedure than it has for the other methods. However, the courts have been reluctant to put this to full use. This is understandable. Courts are apprehensive that the real merits might not be presented. When, however, the true shape of the case is revealed to a judge, he should not hesitate to grant this motion. Once a determinative ruling can be made there should not be hesitation.

More and more the effective pre-trial will tend to reduce to one or more legal questions which can be well determined by summary judgment.

My little talk is completed now, and my only statement is that I'm going to take on all comers now in the limited time we have left—we have only two minutes. Being sympathetic now and realize that—it is difficult to apologize—cover a field as broad and extensive as this is to do any kind of a workmanlike job in the short time, and I don't feel that I have done too well, frankly, but I have tried to hit some highlights and perhaps to inspire some viewpoint and philosophy on your part whereby these rules will become active and meaningful, and I think that they will serve not only your clients but the public as well. Now they may prove to be the answer to this 20th century supermarket approach to justice that we have had to adopt. I know the situation is not happy. I was born too late. I would have done great things back in the 90's, I'm sure. I think my constitution is geared for that kind of living. It was quiet; it was simple; it was attractive in every possible way. Unhappily I was born in 1911 and came to the bar in '38 following the profession so I've had to, as you have, meet the difficult problems that have come in the post-war era and with the tremendous population explosion, the development of the West, and so on. And the old adversary system has not worked out. This is not a diabolical scheme to make lawyers unhappy. This is an imperfect method to deal with our problem. If you can think of it in that manner why perhaps your sympathies will be a little bit more in the direction of, as I say, imperfect method of helping our difficult social problem of the law.

It is delightful to be here, and I will be here for a little longer, too. I'm not going to leave here right away. I am most grateful to Dean Peterson and you folks for having me here, and you've been gracious, too. So I do thank you. (Applause.)

MR. MERRILL: Judge, you really put some life into somewhat of a musty subject, and I am sure that all of us will walk out feeling it was

extremely worth our while to be here. We appreciate your taking the time from your very busy schedule to be with us. We do hope you enjoy the remainder of your stay. Thank you very much.

12:10 P.M.

JULY 10, 1964

1:30 P.M.

MR. MERRILL: Ladies and Gentlemen, we have a very radical departure from ordinary annual meeting procedure in that we are extremely fortunate to be able to take advantage of a group of experts that rarely, if ever, assemble in the State of Idaho. So instead of the usual half a day of fun and frolic and swimming and so forth we present to you the foremost members of the Internal Revenue Service and tax practitioners in the western part of the United States. These gentlemen compose the Western Regional Bar Association Revenue Service Liaison Committee. They are having a meeting here at Sun Valley, and have kindly consented to remain an extra day in order to help us. I personally and on behalf of the commissioners of the Idaho State Bar would like to thank Marv Anderson of Boise who is the Idaho member on this committee for the great help in establishing the program. I would like to call your attention to the fact that after the presentations are made you will have an opporunity for a question and answer period. I mention it now because I hope you will be formulating your questions as they might arise and jot them down so maybe you can put some of these gentlemen through the paces when they are all through this afternoon. They tell me they will welcome any appropriate question, or any inappropriate question. I would then like very much to introduce to you the chairman of this committee or more properly, the president, from Phoenix, Arizona, Mr. Frank Campbell. Frank. (Applause.)

MR. CAMPBELL: Thank you very much, Wes. Ladies and Gentlemen of the Idaho Bar, it is a great pleasure for us to be here, and I think I speak for everybody on the committee when I say that I wish we could stay longer if we didn't have to work so hard. We put in a full day yesterday, and unfortunately some men had to go back today.

As Wes indicated we also plan to change the sequence in which some of the speakers will perform. As Wes stated that I am president. Frankly, I'm not. I am chairman of the committee. It is an understandable error I suppose, since I'm from Arizona. (Laughter.) I would, however, like to introduce the speakers at this time, and then when we do get to the program we won't indulge in the formality again. First of all, we are very privileged to have as a guest at the committee, Mr. Vernon Acree, the assistant commissioner of internal revenue, inspection service, from Washington, D.C., and better known as Mike. (Applause.) Second, another guest of the committee, the Associate Chief Counsel, from Washington, D.C., in charge of litigation, Mr. Rudy Hertzog. (Applause.) The rest of the people on the platform—I guess I'm surrounded by service peronnnel going down on my right, first the Regional Commissioner of Internal Revenue from San Francisco, Mr. Harold Hawkins. (Applause.) Next the Re-

gional Counsel of Internal Revenue. He heads the largest law firm west of Chicago. Melvin Sears. (Applause,) Next, the Executive Assistant to Regional Commissioner, Audit, from San Francisco, Mrs. Ernie Langbein. (Applause.) The last man on my right, G. B. (Buck) Willmarth, Assistant Regional Commissioner, Internal Revenue Service, San Francisco, the Appellate Division. (Applause.)

On my left, Mr. Aaron Resnik. He's the Assistant Regional Counsel from San Francisco. (Applause.) And a man who I am sure you all know, the District Director of Internal Revenue from Boise, Cal Wright. (Applause.) In the audience we have one more internal revenue man also an assistant regional counsel, Mr. Joe Reese from San Francisco. (Applause.) Next from Tacoma, Washington, Charley Thomas, who is a practitioner the same as you and I. (Applause.) From Salt Lake City, Mr. Jay Holdsworth. (Applause.) From my old home town from Missoula, Montana, Sherman Lohn. (Applause.) From San Jose, California, John Hopkins. (Applause.) The representative of the American Bar Asosciation on our committee from Los Angeles, Dick Forrester. (Applause.)

The other members of the committee--one didn't get here, Clark Spiegel from San Francisco. Three had to go home early, one is Dan Frost of Los Angeles, second one is Jimmy Tratis from Portland, and the third, Dick Long of Honolulu.

I presume that you all remember what the makeup of the liaison committee is and what purpose and function it is supposed to serve. So for that reason I have taken it upon myself to alter the program to first call on Mel Sears to explain to you exactly what the purposes of this committee are.

MR. SEARS: Mr. Merrill, and other guests, and ladies and gentlemen: In the ten minutes the amount of information I can give you is rather limited, but what I am going to do is try and tell you how this bar liaison committee began, what its aims and purposes are, and aspirations, what we have done and what we have not done to date, and what you can do to make it more effective and more helpful both to the revenue service and the bar of the various states.

Now the beginning of this committe came about five years ago when Harold Hawkins, the regional commissioner and I discussed what the formation of these committees should be. We felt the need of channels of information from us to the tax representatives, C.P.A.'s and lawyers and in turn draw from them the suggestions, comments and criticism which we need in order to operate our shop. The decisions we reached at that point were a multiple group. In the first place we would have two committees on the regional level, one for C.P.A.'s and one for lawyers because the type of problem that was to be faced was entirely different depending on whether it was the C.P.A. or whether it was a lawyer. We also felt that we should permit and continue the liaison groups with the district directors at each district director's office since they were dealing at a more or less local level, whereas what we wanted to do was deal at a regional level. So the result was that someone had to sparkplug the origination of this liaison committee, and there had to be some catalyst provided for drawing together the bar associations of all the states of the region. I undertook to do that, and originally this amounted to

inviting an attorney in San Francisco and an attorney in Seattle to consult as to how this committee should be formed and what its purposes should be. Mr. Val Brooks of San Francisco and Mr. LaSeur of Seattle were the two originally contacted. And out of those discussions came the conclusion that this should be a Bar Association committee. The revenue service should be available to it, but that we should not hold office, we should not be in control of the committee, we should not choose the membership of the committee, and that the Bar Association should individually by states select those whom they wish to represent their group of legal practitioners.

We also reached a series of other conclusions that have been followed. One is that this should be a channel for communications at the highest level of the region. Mr. Hal Hawkins and two of his prime assistants, and I as regional counsel, and two of my prime assistants are available to this committee for discussion at each of these meetings.

We also decided there would be some restrictions on what type of subject could be taken up in these committee meetings. We did want to discuss the specific cases for the obvious reason that this would provide unfair advantage to someone, which we wanted to avoid like the plague. We would not discuss criminal cases for the sensitivity of the matter involved would be such that by the slightest error in judgment of what could be discussed we might do someone or some group irreparable injury, and we did not want to get into an area which would usurp the the authority of the commissioners, liaison group, or what he calls an advisory group, which meets nationally with the commissioners quarterly.

Now with those restrictions we did not try to limit the type of subject which could be involved or the depth of the consideration. We did limit the membership to one man from each state with the exception of California, two are participating, one from the San Francisco area, one from the Los Angeles area. The logic of this arises from the fact that there are two different directors in California, and the schedule between the northern and southern sections of California is more than just a humorous division; there is quite serious economic division between northern and southern California. So with that exception there is one member from the bar from each state. Our representation has been left to the bar of the state, and in some instances it is either the head or the appointee of the head of the tax section of the state bar. In other instances it may be the head or the appointee of the head of the continuing education section, but the revenue service exercises no influence whatever over how these inividuals can be chosen. They are your representatives. It is your committee. We are available to you to set up this channel of communication, but we do not dictate how your representative are chosen, nor what the subject matter should be, but I can tell you some of these meeting generate into haymakers from the floor. It is a very closely knit organization. We talk very freely to each other. I think there have been tremendous values come out of this.

The beginning was intended to stimulate interest among the general practitioners. We feel that the specialists in the tax field has quite adequate knowledge as to where he should go for knowledge, to whom he should speak, what the sources of written material are, but we feel that the general practitioner is more inclined to continue a practice which originated in the 20's

of letting this business go by default because it was not apparently at that time a major legal problem. Well, it has become a major legal problem, one in which we hope all of you will interest yourselves. We also want the bar representatives chosen by the state bars to be truly representative of the state bars. The turn-over in the committee is a disturbing factor in some ways, in that the matters which are discussed in one year's activity may appear to be new matters to members coming to the committee for the firse time in other years, but we have arranged for a continuity there by permitting continuing membership to past chairman of the committee, and through this there has been a continuity established that has proven so far to be adequate without increasing the members of the committee to the point where it is unwieldable.

Now what have we done to date? I want to mention just a few. We have been operating for four years. Have had meetings twice a year. A number of them in San Francisco. We met in Seattle. We met in Honolulu, Los Angeles and Phoenix. Now we are meeting here in Sun Valley, the Idaho area. The coordination with the state bar was initiated last year in Honolulu, where Dick M. Fong, the representative from Honolulu, aranged the first of these coordinated meetings. The reception was so overwhelmingly favorable that we have adopted it as a principle. The availability of the committee and its memb bership to the state bar at such times as they have their meetings, preferably if we can coordinate their meetings with ours so that they may know what we do, how we do it, what principles we follow, how we can be of service to them. One other thing we did, for instance, you may recall that the tax court changed Rule 28 to provide for certain pre-trial procedure. I don't claim total credit for the committee for accomplishing this, but one of the persuasive factors I am sure in the tax court's mind was the fact that this commitee is representing the entire bar from the 10 western states memorialized a resolution to the tax court requesting adoption of some rule providing for pretrial procedure. At the request of the Oregon bar a pilot project was initiated designed to meet the needs of a small taxpayer who could not travel to Portland for appellate division conference. Out of the discussions had in this committee schedules were set up by Bud Willmarth of the Appellate Division designed to provide a circuit riding proposition so the appellate division technical adviser could meet these taxpayers at their home place at a minimum cost to them. We have coordinated these state bar meetings.

We have a participation with the American Bar Association, which I am very happy to state, and I am sure I am not in error, the American Bar Association considers the formation and the membership and the type of operation of the western region here as being a model for the rest of the country. We have accomplished a tremendous amount of good work through the committee, and the American Bar Association has the highest praise for this type of an activity. We have been able to synopsize and have published the results of our meetings. The communications that come from the national office through the committee reached the bar associations by publication of synopses into your state bar journals.

So I think for the short life we have had we have had some rather outstanding landmarks of success, but we still have a number of things that have not been done. One of these is that I feel these meetings do not mirror the views of the state bar general membership. This is because I think there is too

shallow a communication between your representatives and the membership generally, and in turn a feedback from the membership to your representative who in turn can bring it to the committee. In some states we've had a considerable cooperative effort from the bar group and in publishing the results of our meetings and communicating the activities we have, the problems we've discussed, and the solutions we have reached, and in others it has been virtually impossible. Now in these in which it has been difficult largely has been those in which there has been a small or non-existent tax group in the bar. So we are paying particular attention in trying to interest general practitioners in the tax side of the legal practice, and, of course, the question of feedback from the bar is corollary to what I have been saying. If we don't have that interest we don't have the communication, then we don't get feed back from the bar through your representative which permits us to mirror your views to the national office or answer your questions.

Now lastly I will talk about what you can do. And I think foremost in this is don't run from tax problems. They are reasonably lucrative fields. The fact that a client of yours receives a frank envelope with Treasury Department in the corner should not send you in a hurry to the nearest tax expert or C.P.A. We are really very easy to deal with. In the kit that was delivered to you today you will find a chart of the district director's office and the names of the people whom you can contact so that if you will bring your problems to us, to the district director, to the field office of the district director, to my office, and to the regional counsel's office. We are, of course, interested in the Treasury Department, but we are your government; we are not litigants in the sense that that you would be litigants to someone whose car hit yours at an intersections, and you were jockeying for position trying to surprise each other and you hold back facts. We are your government. We are not trying to win cases while cases. We are trying to win the position which the government should sustain in that particular set of facts, and if you will be open and above board with us you will find very few of your cases going to trial, and most willing approach to disposition of doubtful issues on our behalf.

And lastly I think I would ask you to support your liaison representative in both phases of his work. Both in distributing the results of our meetings and in getting suggestions to him as to areas for discussion and improvement operation. We are going to embark upon a fairly new approach to this, of the service operatinon. We are going to embark upon a fairly new approach to this and that we are going to try and choose of the service areas for discussion rather than set up an agenda with some 50 items on it. We are going to try and choose perhaps half a dozen areas which we think will will be most fruitful. We are going to try and get those to your representative and ask him to reproduce them and get them to the membership of the state bar, and ask you to feed back to him your comments on those areas so when he comes to our meeting he will come armed with your views and not have one of these sterile discussions where we sit down with an agenda and we talk in a vacuum about a series of items on a printed document which may or may not have your attention and comments. So if you would give attention to the issue that may come to you from the liaison representative and take the time to consider the problems that he is raising in that communication and the feedback to him what your views are on those areas I think our succeeding meeting will be a much more fruitful one.

So there you are, the beginning, the past accompliments, and what we hope to do. Obviously the first two are history. The last is what we are trying to accomplish, and what we want you to do for us. So I want to thank you all on behalf of our committee. I want to thank Mr. Merrill. I want to thank Myron Anderson for the arrangements he has made, and particularly the weatherman who has been most kind to us. Thank you very much. (Applause.)

MR. CAMPBELL: Thank you, Mel. I can't but affirm what Mr. Sears has said in that the internal revenue service people who although not members of the committee lend themselves or make themselves available to these discussions are very receptive to any formal complaint you might have, and very desirous of knowing what your complaints are, and they appreciate constructive criticism.

We turn next to what we think is the logical sequence to go through the organization of the internal revenue service and procedure of the various steps through which a tax case might proceed. Starting off Harold Hawkins, the regional commissioner of internal revenue from San Francisco, will discuss the general organization of internal revenue service.

MR. HAWKINS: Thank you, Frank, and ladies and gentlemen. I am billed to speak on the general oranization of the internal revenue service. I can't think of anything more dull and uninteresting to most of you and for me to stand up here and draw an orgazination chart of the service. I don't think we are interested in that.

I think on the organization it may suffice it to say that you know, of course, that the commissioner and his staff in Washington, the policy making staff developed broad programs. We do have eight regions in the field. Ours, the western region, is located, quartered in San Francisco, is comprised of 10 western states, including Hawaii and Alaska. We have the job of tailoring these broad programs to meet the needs of these areas. I have about seven assistant regional commissioners, one for each program area. Four of these concern themselves with the programs that are carried out. The work is done in the district offices in our region. We do have 11 districts, one of which is the District of Idaho. These are the people who do the work. They carry on the work of the service, and this is where most of our people are located. In the Boise district you are undoubtedly more familiar with the audit operations there. If you do have clients who are behind in their bills you meet these people. If you have refunds coming you are also interested in contacting these people. We have our intelligence operation. I hope you don't meet these people too often, because they are primarily interested in fraud cases, and the administration division which is the house cleaning and service area that keep our shop going. In the regional office we are not only interested in these programs but through others, the appellate operations which have been regionalized to give a more independent, completely independent consideration of protested cases outside of the district office, and also the alcohol and back tax work.

I do want to emphasize that in addition to these operations that I have mentioned we do have in the field the regional counsel's office of which Mel Sears, of course, gets the western region. The regional counsel does not report to me. I do not report to the regional counsel. We do operate

independently. Mel reports to the chief counsel in Washington. We do work very closely together because he is our attorney and keeps us out of trouble, and he tries cases and does assist us in many ways. We also have the regional inspector's office. Mr. Acree is here from the top. He represents the top area of the inspection service in Washington. We do have a regional inspector in San Francisco. They are the people who check our procedures and make sure that we are running a tight job and also that our people themselves keep their noses clean and things of that kind. You will hear more from these people, but I just wanted to emphasize two areas, the inspection service and the counsel service do not report through the regional commissioner but do report direct to their counterparts in Washington. The thing that we are working on now as you have read, I know, that may be of more interest to most people, is our data processing system. In addition to our eleven districts we do have our regional service center in Ogden, Utah, servicing this region. When all of this system is put into effect we will have eight such centers which produce information on tape they ship to a central computer center in West Virginia, where those tapes are meshed and we will have information on every taxpayer in the country, we hope. In order to prevent this image of eucalyptus from getting too far we hope that the data processing system will bring about some procedure, some thinking, some swiftly handled operations that we have never been able to do before that will convince every taxpayer that he is paying no more than his proper tax but that a neighbor is paying his proper tax, too, which after all is so necessary. I might say this is one of our principal endeavors these days is to make sure that we do run this kind of a shop and that the taxpayers generally are very sure that they are not only paying but each of you are helping pay the proper part of the taxes, too, so that you are not paying his share.

It is extremely nice to be here in Idaho and in Sun Valley. We have enjoyed ourselves and we hope that at some future date we can come back and renew our friendship with you people. Thank you so much. (Applause.)

MR. CAMPBELL: Thank you, Harold. Each of you received, I trust, a copy of the businessman's kit, to which Mel referred initially. These kits were prepared and made available to distribution at this time by the district director of internal revenue in Boise, Mr. Cal. Wright, who will now explain some measure of simplicity, the utility which that kit might serve. Cal. (Applause.)

MR. CAL. WRIGHT: We do appreciate the opportunity of being here today. My remarks are going to be very brief. As has been mentioned, we in our district office have gone to considerable effort to prepare these little kits for you, and actually when you go through them they pretty well speak for themselves. I am sure you will find them both interesting and informative. In the interest of saving time this afternoon I enclosed my own personal remarks to you in writing in a letter in that kit and along with a brief chart of our Boise office particularly for the use of you attorneys as to who to contact according to the subject matter. Now we have here this afternoon a mighty full program of able speakers, and they have come a long way to be with us, an so, Mr. Chairman, I choose at this time to yield the remainder of my time to those that follow me. Thank you. (Applause.)

MR. CAMPBELL: Thank you, Cal. We come now to a series of discussions; generally are geared to the processing of income tax returns through the various branches of the internal revenue service organization. The first group to whom the taxpayer is representative I suppose are the members of the Audit Division. Representing the regional director's office from San Francisco Mr. Ernest L. Langbein, the executive assistant to the regional commissioner audit, who will discuss the auditing and informal conference procedure. Ernie.

MR. LANGBEIN: I'm playing it kind of loose up here looking at the agenda. I thought possibly I could expand the type of material, but I look at it now and I finally thank you for your kind attention, but I would like to give you advance information on the appeal level at the Audit Division. We are about to change our informal conference procedure. For those of you who are familiar with the pre-1952 appeal procedure in the audit division you will remember that we had a conference staff. That was kind of a formal appeal procedure which included the completion of the revenue agent's report and then if the taxpayer or the practitioner decided to take it to appeal within the Audit Division he had to prepare a protest. Shortly after the reorganization we eliminated the conference staff which took away the formalities of the appeal procedure within the Audit Division. Actually, the group supervisors were encouraged to hold informal conferences and these intended to be merely informal meetings between the group supervisor and the agent and the attendant or prectitioner or taxpayer.

There are certain faults with this that both the practitioner and the internal revenue service wanted to correct. One so far as the practitioner was concerned was that he felt that a group supervisor could not give an unbiased consideration to the case, and so far as the group supervisor is concerned he felt he could not conduct the supervisor responsibilities with any degree of satisfaction. So we had a compromise in 1954 and created a conference coordinator. There was a series of improvements, and just recently in 1962 the conference coordinator had a complete staff to take over the informal conference work load. Under the commissioners the manpower utilization program they made a study of the—one of the studies they made was in the informal conference procedure, and they came up with certain recommendations. The Audit Division has recently taken these recommendations with an in-service task force that had come throughout the country and come up with further recommendations to the commissioner. These have now been reviewed by the advisory committee of the commissioner, and he has approved them and they will be in effect by October first. I'm sure you will receive some publicity as to how these are—the details of how these are going to be productive, but I would like to give you some information which I think would be of particular interest to this group. One recommendation is that that the agent will write up a complete report at the conclusion of his examination. This report will be handled in the same manner as in each case; that is, it will move from the agent through the supervisor and then to the review staff. There it will be given a technical review which includes a review of the adequacy of the explanation of items, including citations when necessary. The taxpayer will then be furnished with a copy of the agent's report along with an appropriate cover letter of transmittal. If you are familiar with our procedures today you are receiving only a Form 2808 which

gives very minute details the issues at hand. We have here an exposure before you come into an informal conference how the agent stands on his case. In cases involving a deficiency over assessment or claim of less than one thousand in any one tax year the taxpayer will be issued an invitation letter offering him a conference upon request within 15 days. The letter will also inform him that he may file a statement of objections to the proposed adjustment and request a hearing before the appellate division within 30 days.

If a conference is held and an agreement cannot be reached the taxpayer will be advised in writing by the conferee that he will be given 15 days in which to submit a written statement of objections to the issues still unagreed and to request a hearing before the appellate division. In other words, there is no written mandatory written statement of objections in a case under one thousand dollars unless you are going to the appellate division. In larger cases the taxpayer will be issued a 30 day invitation letter offering him a conference upon the filing of a statement of objections to the agent's proposed findings. This letter will also provide a taxpayer with the opportunity to go directly to the appellate division upon the filing of the above statement. The taxpayer is held—if a conference is held and an agreement is not reached the taxpayer will be advised by the conferee that the case filed may be referred to the appellate division upon request. In order that the written statement of objections submitted for the district conference may be used in transmitting the case to appellate such statement will be submitted under oah for penalty of perjury with outline of instructions that will be enclosed with invitation letter. One other category of cases is the large complex case over $50,000 in any one tax year. Where there is little or no chance of closing at the district level the conference coordinator will be given discretion as to the issuance of conference invitation letter. In such a case a regular 30-day letter will be issued providing a written statement of objections and offering a hearing at the appellate division upon request. It is recognized that in some instances taxpayers or their representatives will insist on district conference. If one is requested a hearing will be granted. One aspect that I am sure you're interested in is that—however, in pattern type cases one change is being made with respect to cases involving a tax change under one thousand dollars. Once a determination in this type of case is made in the appellate division then the district will be able to make comparable dispositions of other cases turning on the same issue. This would assure that the same justice is dispensed to all taxpayers and at the same time avoid unnecessary tranfers of cases from audit to appellate.

I think some sidelights that you might be interested in are the revenue agent's report will have a complete review before it goes to informal conference procedure. After it is passed through review it will not return. The conferee has complete discretion as to the correctness of the determination. Now these are all cases in the field Audit Division. Our audit conference procedure will not change. I think in summary as far as the taxpayer is concerned the only noticeable change will be that he will receive a revenue agent's report rather than a Form 2808 following the examination which should contain a very much more detailed explanation than he has usually received heretofore. And secondly, if the tax change is in excess of $1,000 for any one year a written statement of objections will be necessary. Except in some unusual circumstances the examining agent will not be present at the

conference. So I think from these you can see that our over-all objective is to improve the prospects of an early and less costly closing at the Audit Division level. (Applause.)

MR. CAMPBELL: Thank you, Ernie. As indicated in Mr. Langbein's comments in the event you are unable to settle your case at the local director's level through the auditor you are then afforded an opportunity to present your views to the next highest administrative level within the internal revenue service and to the appellate division.

Mr. G. B. (Bud) Willmarth, the assistant regional commissioner of the internal revenue service of the appellate division will next discuss the procedures within that division. Mr. Willmarth.

MR. WILLMARTH: Members of the Idaho Bar. My brief absence from the meeting was not to run out on the speakers we've had, but due to the fact that I had either misplaced or lost my reading glasses without which I can't see things immediately in front of me. So you will be saved whatever notes I had prepared from the meeting. The word "appellate" should be an understandable word to lawyers, and I think perhaps if you think of the appellate division in a general way in which to think of appellate courts you will get a fairly good picture of the administrative function of the appellate division. In contrast the audit division which Mr. Langbein has just been speaking about. The judicial districts and the district director may be thought of as the points of origin in tax cases for litigation. The appellate division, you can call it courts, is a place to which appeals may be made in order to settle disputes. The appellate division of the internal revenue service has no original case development function. Its only function is to hear appeals by taxpayers from disputes they might have with the audit division of the internal revenue service. There is no direct relationship between the appellate division and the district director's office except through the office of the regional commissioner.

The appellate division is the smallest division of the internal revenue service. We have five offices which cover 11 states. There is no appellate office in the state of Idaho and there are none in several of the other states. There is an appellate office in Utah. When a taxpayer in Idaho appeals to the appellate division his case will be heard by the appellate branch office out of Portland. Now in order to forestall attorneys or taxpayers having to go to Portland we send hearing officers who are called technical advisors to Boise, to Pocatello, to Idaho Falls, I believe, and over into Twin Falls. Whenever a sufficient volume of work is needed at any of those points. At the present time we are discussing the feasibility of having one man come over once a month to Boise, where the largest volume of work in Idaho originates so that attorneys or taxpayers who want to appeal their cases to the appellate division will know that a particular week of the month will be a week set aside in which they can have conferences with the appellate division. The purpose of the appellate division should be clear to you. I'm sure it's understandable that all these feats that arise between the audit division and the taxpayer cannot be heard by the tax court or by the federal courts. The appellate division is the administrative agency for the taxpayer mainly. What we like to call an independent hearing by a professional conferee who might have a fresh look at a case but who will apply

the same law. The principal distinction between the settlement of authority of the conference section, which Mr. Langbein was just telling you about, and the appellate division is the fact that the appellate division can take 30 days in consideration of settlement of cases.

In an audit case once the facts are thoroughly established the revenue agent must apply the law to those facts. You might be interested to know that approximately 14 out of 15 cases involving disputes between taxpayers and the internal revenue service are settled at the appellate level which makes it possible for the tax courts with 16 judges, not including our judges, to operate as effectively as it does. It has been a great pleasure to me to make my first visit to Sun Valley. The weather is delightful as it has been and I leave with the feeling that I want to return as soon as possible. (Applause.)

MR. CAMPBELL: Thank you, Bud. If you then find after your experience with the appellate division that the service personnel were unreasonable as is usual you have available to you several arternatives. One of them is to refuse to pay the tax (laughter). There are, however, a couple of routes you might choose. They are of particular interest to Aaron, who will discuss these alternatives. Mr. Aaron Resnik, who obviously can't be very objective, the assistant regional counsel from San Francisco, will discuss "Choosing the Forum."

MR. AARON RESNIK: Mr. Chairman, Mr. Merrill, members of the Bar of Idaho. We are indeed gratified at the opportunity to be with you today. My wife was a member of the bar of the District of Columbia, and, of course, being much smarter than I, recognized that in this beautiful setting and this beautiful climate you would not be interested in a long speech from me. So that on the matter of the topic of "Choosing a Forum" she thought it could be summarized in about 60 seconds. You have had 15 cases before the appellate division, we settled 14, and out of the 15 one posed the problem. The client is in your office. You know the court is available. You know the form you can follow. Probably the prinicipal question you have to ask yourself is which is forum and which is agin him. (Laughter.) Unlike most civil litigation in which the government is not a party in a tax controversy you actually have a choice of three distinct courses that can be followed. You only elect at your peril. You have a pay now, sue later forum, or you have the sue now, pay later forum. If your taxpayer does not want to pay the deficiency as represented by the 90 day letter which has been issued under the authority of the commission then, of course, there is only one avenue available to you and that is the tax court of the United States. If, however, you are fortunate enough in having a wealthy client and can either pay or not if he chooses then he may pay the tax and you have abailable to you two other alternatives, a suit in the district court in the district in which the return is filed or in the court of claims, but here again under a fairly recent Supreme Court case the total tax must be paid. It cannot be a partial payment and thereby revoke the jurisdiction of these pay now, sue later courts. You must pay the total tax. Really what are the facts that you ought to be considering in the determination of the forum that you will select. Clearly if your taxpayer cannot afford to pay the decision is made for you. Then you must within 90 days of the date of the mailing of the statutory notice file a petition into the tax court. If he can pay then, of course, you have the

choice of the other two. The factors that you will be considering are, apart from paying, is this the kind of issue which you will want a jury trial. If it is then, of course, there is only one court available to you and that will be your district court. Neither the tax court nor the court of claims permit jury trials.

What about the rules of procedure. Do they make any difference to you? Really they should not because in three forums basically the rules are substantially simple. The court of claims and the district court follow the federal rules of procedure fairly general. The court of claims has a few variations including the use of trial commissioner. The tax court has promulgated its own rules of practice which generally are very brief and nontechnical, and in the absence of a tax court rule you gentlemen can assume that the tax court follows the federal rules. What may be of more significance to you than these highly technical points is, who are your adversaries and what are the potentialities of settlement of the case even after it becomes docketed, and here there are significant differences. With respect to the court of claims and the federal district court which are part of the federal judiciary the government is represented by an attorney of the department of justice. In the tax court which for our purposes is still regarded as part of the executive branch of the government, the commissioner of internal revenue is represented by attorneys of the chief counsel of the internal revenue service, are actually attorneys on the staff of the regional counsel's office. We in San Francisco, in the San Francisco region serve Idaho, and the tax court has established Boise as the place of hearing for tax cases in Idaho. This really has some significance to you I believe. In many instances you will find that where the United States is represented by the department of justice there is not that ability to meet intimately with your adversary from time to time in the trial development or the potentialities of exploring settlement. In the tax court our attorneys are available to you after the case is docketed in the Boise area to discuss with you the stipulation of facts, the further investigation jointly with Mr. Willmarth's staff of the potentialities of settlement. In the 12 year period from 1947 through 1958 it was found that of all the cases docketed in these three courts 74 per cent of those docketed in the tax court were settled and less than 50 per cent into the other two courts. So that from that point of view there is some significance to the choice of a forum and the choice of who your adversary will be and what opportunities are available to you to discuss with a brother lawyer the problems incident to your case.

There is one factor that does prove troublesome to private practitioners in the choice of forum. As you know your district court is bound by the decisions of the circuit court in which the district sits. Appeal from the district court goes to the circuit court. Similarly an appeal from the tax court goes to the circuit court. However, the tax court can regard itself as a national court and it does not regard itself bound by any decisions of any particular circuit court, and it wouldn't and doesn't consider itself bound, for example, in an Idaho case, by the precedent of the ninth circuit. They may be precedented by the second and fifth as the ground to follow and it will so that you must give some consideration as to what will happen to you at the trial level by virtue of the fact that the tax court regards itself and is a national court whereas your district court is bound by the precedent

of the circuit court. Clearly in the court of claims there being no appeal but merely a right to apply to the supreme court on writ. You in a sense avoid or lose that opportunity of intermediate interval. I can go on at some length and point out to you other differences. I think, however, fundamentally the major point is, can your taxpayer afford to pay the deficiency or not. If he can't, then, of course, your choice is determined for you. If he can, then you must weigh the other factors that appear. In basic tax law the rule is substance over forum. In procedure may well be stated the forum over substance. Thank you very much. (Applause.)

MR. CAMPBELL: Thank you, Aaron. If I might add one point. He mentioned the fact that you had to size up your adversary. He mentioned that 74 per cent of the cases in the tax court were settled and only 50 per cent of those tried in the district court and were under the control of the justice department. He did not mention the percentage of cases the government won in the tax court in comparison to the number of cases won in district court, and this is an important consideration frankly. The representatives in the regional counsel's office by virtue of the way the cases are handled are generally much better prepared than are the cases tried in district courts by the representative of the department of justice, and only arrives on the scene the morning of the trial. It is no reflection on his ability. It is only a practical matter, he can't be as well prepared as these fellows are. Consequently, I suggest to you that don't be swayed by the fact that 74 per cent of the cases are settled over there. Aaron mentioned the fact that the tax court was the logical court to go to. To discuss the litigation policies of the internal revenue service relating particularly to the tax court as within the area of the operation of the regional counsel—or, the chief counsel's office, and we are very honored today to have as our guest and your guest the associate chief counsel of the internal revenue service from Washington, Mr. Rudy Hertzog. (Applause.)

MR. HERTZOG: Mr. Chairman, Mr. Merrill, and members of the Idaho State Bar, ladies and gentlemen. It is a great pleasure for me to be here in this delightful Sun Valley. It is very appropriately named. It's my first visit here as well as to the state of Idaho, and I think it's probably the only state other than Alaska that I haven't visited previously. I don't know why I waited so long to come to Idaho, but I am glad I eventually did, as my wife will tell you.

I am going to talk to you today on litigation policies of the service. It's an area I've been connected with for quite a number of years, and also going to first discuss with you the settlement of tax disputes after they get into litigation. From time to time articles appear in the press regarding he settlement of tax disputes which are misleading and give the erroneous impression especially in the headlines that certain prominent or notorious taxpayers are allowed to settle their cases at a big discount, paying less than the amount of taxes due and owing and, therefore, less than the amounts paid by the average citizen. Typical of these articles were those which appeared several months ago in newspapers throughout the country with respect to the settlement of a number of cases on the west coast involving movie stars and others in the show business. Many of the headlines read, "Show business figures settle tax rows at discount," and show business figures "Settle tax claims at 35c per dollar." The implications were that because of the promi-

nence of the individuals involved the service permitted them to settle their cases by paying less than the amount of taxes which they owed, thereby showing favoritism over other taxpayers. The only basis for these conclusions was that the amount of the settlement as disclosed by tax court decisions were in some instances considerably less than the amount determined by the commissioners to be due before court action was instituted. The implications of these articles are unfounded and entirely erroneous. When a case is settled by the government for an amount less than the amount originally determined to be due this merely means that the amount set up in the first instance was over-stated, and that further developments indicate that a readjustment of the tax liability has been made. The amount settled for is the amount re-determined to be due. The services does not allow discounts to any taxpayer in the settlement of a case, no matter who the taxpayer may be. When a tax case is settled this does not mean that the government is relieving the taxpayer of the payment of part of the taxes due and owing, but merely that an agreement has been reached between the government and the taxpayer as to the amount actually due. It means that any doubt existing regarding the tax liability has been resolved and that a tax court trial and court decision is unnecessary to fix the amount.

I would like to put the settlement of tax disputes between the service and the taxpayers in proper perspective. During the fiscal year 1963, 71 per cent of almost one hundred and six billion dollars in revenue collected from corporations and individual income taxes came from corporate or individual income taxes. In this same year 72.5 million income tax returns were filed, and 3.8 million were examined resulting in over 2.1 million of recommended additional tax and penalties. It is quite obvious from these figures that our system of taxation depends primarily upon each taxpayer promptly determining his own tax liability under our self-assessment system. All but a very small portion of the returns examined each year are settled to the satisfaction of both the government and the taxpayer without litigation. This factor is essential if our tax system is to continue to supply the revenues necessary to the operation of the government.

The great majority of the tax paying public are basically honest and make a sincere effort to report and pay the full amount of taxes due and owing to the government, but, of course, it must be recognized that perhaps some are honest and file proper returns only because of the consequences which might result if they don't do so. The fact that nothing induces voluntary honesty in some people more effectively than fear of penalty is clearly indicated by a letter received by one of our district directors during the last filing period when the writer stated, "I have always paid my income tax in the past because I was afraid of going to jail if I didn't. Now I read in the papers that this is a matter of self-assessment. If it is voluntary I don't want any part of it so you can have your forms back." (Laughter.)

When a revenue agent examines the tax return and makes an investigation with respect to it he makes every effort to determine the correct net tax liability and computes the taxes as accurately as possible. He then tries to reach an agreement with the taxpayer as to his findings and conclusions. When a taxpayer is not in agreement with the findings of the examining officer an informal conference may be had with the conferee in the district director's office. If an agreement is not reached at the district level and the taxpayer

is still dissatisfied with the conclusions reached he may ask that the case be considered by the appellate division in the office of the regional commissioner. At this step the appellate conferee has authority to reach a settlement, to take into consideration the strength and weakness of the case from the government's standpoint as well as that from the taxpayer. In other words, in attempting to reach a settlement at the appellate division it considers litigation hazards. If an agreement is not reached at this time a Notice of Deficiency is issued in which the commission determines the tax liability upon the basis of the facts and law of the case as developed by the examining officer and in administrative conferences.

In many of the disputed cases which arise and which get into court the taxpayer has failed to take advantage of the administrative procedures for the settlement of tax disputes, or has failed and refused to submit to the service facts in his possession which may enable a correct determination before the case gets into court. In other cases there is an honest difference of opinion between the service and the taxpayer as to conclusions to be drawn from certain facts and the proper determination of the internal revenue laws and regulations as applied to the particular case. Upon receipt of the statutory Notice of Deficiency if a taxpayer is still dissatisfied with the determination of tax liability he has a choice as pointed out of either petitioning the tax court without payment or paying the additional tax found to be due after filing a claim for refund may sue to recover in the United States District Court or the Court of Claims.

Even after a petition is filed in a tax court or in another court further opportunity for settlement conferences is afforded. It is the policy of the service that every reasonable effort to dispose of disputed cases upon a basis which is fair and just both to the taxpayer and the government considering all the facts and circumstances involved. Settlements are effected in approximately 80 per cent of all cases taken to the tax court. I think perhaps my figures are a little higher than Aaron's throughout the country, and they vary from year to year, of course, but trials are really only necessary in 20 per cent or less of the cases taken in the tax court. Perhaps a larger percentage in the district court. Frequently the additional taxes asserted by the commissioner are in excess of the amounts later determined to be due and owing. On occasion the amount due cannot be accurately determined within the time allowed by the statute of limitations for such determination, and the amount set up is at times greatly in excess of the correct tax liability. Nevertheless the standard on which cases are settled is the correct tax liability as nearly as it can be ascertained without regard to who the taxpayer is and whether he is someone of prominence or just an average citizen.

The largely over-stated assertions of additional taxes which occur in some instances are unfortunate but cannot always be avoided. Many times the taxpayer fails and refuses to cooperate or furnish any information to assist the service in checking the items on the return as to ascertain the correct tax liability. Under such circumstances it is necessary to resort to other means of verification which are time-consuming and often result in inaccuracies which are not cleared up until a later time and after it becomes necessary to assert an additional tax. Also very often in the absence of any dispute as to the tax there is real doubt about the proper conclusion to be drawn from the facts or as to the interpretation of the applicable law and

regulations which would have to be resolved by the courts unless the parties are willing to agree and thereby able to agree upon a settlement. There are also times when the books and records are lost or destroyed or do not adequately reflect the tax necessary to arrive at the correct tax liability. On other occasions changes are made to the applicable law and decisions are rendered by the courts which change credence interpretations of the law and the regulations which apply. There are also occasions when the year in which an item becomes taxable income is in dispute and it is necessary in order to stay the running of the statute of limitations to assert a tax for two different years on the same income in order to protect the interests of the government. Congress has placed upon the commissioners the duty and obligation to enforce the internal revenue laws. In fulfilling this obligation each taxpayer whether large or small or whether known or unknown to the general public must and is treated fairly, and his tax liability is determined in accordance with the facts and the applicable law relating to his income tax returns. The amount settled for is the amount determined to be due and owing, considering all the facts and circumstances and is no more or less than the service would reasonably expect the court to find if the case were litigated to a final conclusion. It is the policy of the service to dispose of disputed tax cases by agreement with the taxpayer whenever possible. However, quite frequently and for many good and valid reasons the parties are unable to agree as to the correct tax liability and the courts are necessarily called upon to get the answer.

Now as to policy of litigation when we get that far and are unable to come to an agreement with the taxpayer. Litigation is important to the administration of the tax laws, but its importance is not measured by the relatively small part of the more than one hundred billion dollars received yearly by the government. It is important because of the precedent value decisions rendered have with respect to other cases and the effct that a position taken by the service in litigation has on the shape and development of laws. It is easy in handling a particular case which is not settled to focus solely on the money at issue and to ignore or under-estimate the broader effect of the cases. We do not consider it our function to merely win cases and collect the tax determined to be due in that particular case. It is the broad effect of the decision which might be rendered which governs our litigation attitude. The detailed tax code and the regulations promulgated under it do not provide all the answers. Many questions arise for the first time in litigation. The position taken by the service when a case gets to court must represent the interpretation it feels is proper in the overall administration of the tax laws and in accord with the congressional intent whether the case is won or lost. This position should be the best and most reasonable interpretation and the one which makes the maximum to a sound, wise tax system not only immediately but over the long run.

Our responsibility to adopt the proper position in litigation cannot be shifted to the courts. In discharging our responsibility as lawyers and commissioners every effort is made to coordinate with all parts of the service to insure that the position taken in a particular court action on matters where the case is pending to conform to the policy of the service as expressed in regulations, general counsel memorandums, rulings, acquiescences and non-acquiescence in tax court cases and technical information releases which

are issued from time to time. The greatest care is exercised to see that we do not ask the court to adopt a position inconsistent with an established service position, and we attempt to reflect the sane, larcenous of attitude in court that is used in performing the ruling or interpret function of the service. There may be a tendency on the part of the lawyer trying a case to urge whatever arguments will support the government and win the case, but the mere fact that a case is in litigation does not justify taking a position which would not be taken had the question been presented for ruling. It is a truism that it is not always in the best interests of the service and the government to establish a particular position. A position which may be favorable to the government from a revenue standpoint in one case may be unfavorable in another case, and a position successfully taken today against one taxpayer may tomorrow be used by other taxpayers to their advantage. The commissioners' interest and the interest of all taxpayers must be considered in this broad context when a position is advocated in litigation. We believe and hope that the successful implementation and the following of these goals which were recently adopted by our chief counsel, Sheldon S. Cowen, will inspire increased public confidence in our tax system and the internal revenue service, and will eliminate the necessity of repudiating cases after they are won as has sometimes happened in the past. We feel that this is the proper course to take, and that it will materially aid the commissioners in the proper and efficient administration of the tax laws to the betterment of both the government and the taxpayer.

Now if I may have your indulgence for just another minute or two—I think we are going to take a break after that—I would like to present to you the Gettysburg Address on Form 1040 and is presented without any irreverence to Abe Lincoln.

"Two score and 11 years ago our fathers brought forth upon this nation a new tax conceived in desperation and dedicated to the proposition that all men are fair game. Now we are engaged in a great mass of calculations testing whether that taxpayer or any taxpayer so confused and impoverished can long endure. We are met on Form 1040. We have come to dedicate a large portion of our income to a final resting place with those men who here spend their lives that they may spend our money. It is altogether anguished and tortured that we should do this, but in the legal sense we cannot evade, we cannot cheat, we cannot under-estimate this tax. The collectors clever and sly who computed here have gone far beyond our power to add or subtract. Our creditors will little note nor long remember what we pay here, but the internal revenue service can never forget what we report here. It is rather for us to be dedicated to the greatest task remaining before us that from the vanished dollars we pay increased devotion to the few remains that we hereby resolve that next year will not find us in a higher income tax bracket."

Thank you very much. (Applause.)

MR. CAMPBELL: Thank you very much, Rudy. We appreciate your taking your time to be present with us at our meeting and stay over today to participate in this discussion.

It is my understanding that a coffee break is in order at this time.

(3:07 P.M., short coffee break.)

MR. CAMPBELL: Now we would like to get the second half of this program under way. As you can see from the people on the platform we wore out the first set of performers and now we have the second and we hope we don't do the same with you. We completed pretty well the handling of tax cases through the administrative and the court levels. We turn now to another branch of the internal revenue service, specifically that of the inspection service which handles the internal audit, and security within the entire internal revenue service organization, around 60,000 employees. We are particularly fortunate in having as our guest and yours today the assistant commissioner of internal revenue, in charge of the inspection from Washington, D.C., Vernon Acree, who will talk about the Integrity Program within the internal revenue service; Mr. Acree. (Applause.)

MR. ACREE: Mr. Chairman, Members of the Idaho Bar, their Ladies. I feel that after initially having been scheduled to speak first and moved to this point I'm kicking off a late late show. I hope it will prove as interesting to you as the first half session did.

I would like for a moment before I get into the function and mission of the inspection service to give you some notion beyond that which you have heard previously of our internal organization. It is as you may not really understand and realize the largest financial institution in the world. We have 60,000 employees assigned to 982 offices throughout the United States and with some overseas posts. Millions of tax returns, information documents, flow annually into the revenue service facilities. Last year the greatest amount of revenue ever produced by any country ever was collected by your internal revenue service, in an amount exceeding one hundred and five billion dollars. The word "billion" as you notice does roll rather easily off the tongue of a professional bureaucrat, but stop for a moment and take a measure. If you started spending $1,000 a day from the day Christ was born you still today would not yet have spent one billion dollars. As a matter of fact, you would be well up into the year 2000 before you would have accomplished this feat. This would be a challenge even to my wife. (Laughter.) Due to the enormity of the internal revenue service operations, and the largest financial organization in the world, it follows that we need have a watch dog type of organization within the revenue service. The general organization, as you know, was decentralized in 1952. At that time in view of the decentralization of our activities and the unfortunate scandal period which the internal revenue service was beset with for that period—during that period of time, an independent inspection force was created for the purpose of keeping the activities and functions of the revenue service under constant scrutiny of the bureau and to insure that the internal revenue service was being conducted without fear, favor or impropriety. As I said, we serve in the watch dog roll, and it is a difficult roll as you can imagine to pursue in an organization as large as ours. To accomplish this mission, serving as investigators we have our organization divided into two functions, internal audit division and internal security division.

We have a regional inspector assigned to each of the internal revenue regions reporting directly to the security section in Washington. In a sense we are completely independent of the organizational framework of the revenue service that handle the tax issues and report directly and exclusively only to the Commissioner of Internal Revenue.

The work of our internal audit division could generally be compared to that of the bank examiner or an independent auditor brought into a commercial establishment. We go into each of the operating activities of the revenue service nationally and on an annual basis. We audit ledgers, evidence, appellate, counsel functions, are all tested and looked at by our internal auditors from standpoint of determining that the affairs of the revenue service are being conducted in a fashion that the areas of responsibility have prescribed. Most of our time is spent on the physical activities of our service, testing the compliance on the part of our collection people insofar as the proper crediting of taxpayers' accounts are concerned, as to the proper depositing of revenue collected into the banks that the revenue service utilizes in this area. This force is comprised nationally of approximately 250 men, many of whom are drawn from the audit division. All of whom have extensive accounting backgrounds. All of whom are well trained, oriented in the job of compliance review, fiscal auditing that it is necessary that they be particularly adept in accounting.

The other division in our organization from the security division has a similarly comprehensive program. It commences internally with a background check inquiry concerning the individuals that are working for the revenue service who come into the service for the first time. We make a character background check on them to identify and eliminate any who come on our rolls whose standing or stature in the home community may be subject to some question because of some dubious activity on their part. A verification is made of the claimed education attainments, checks with the local police and credit records. We obtain from them financial statements which is later utilized to determine if a complaint is received by the auditing agents who check their financial status to assure that no money is coming to them other than that which they are properly entitled. The tax audit is made of their returns of the preceding three fiscal years, and they are required, of course, to file and their filing record is checked each year to make sure that they are not delinquent in any tax on the certain sound assumption that we must have of our own people beyond any question as to their own personal tax affairs.

Our division also makes such housekeeping investigations of the service as are necessary. We have 800 automobiles which the service operates. We have any number of our personnel utilizing the automobiles in connection with government business. Unfortunately we have several hundred accidents each year with bodily injuries or death, and we make a full inquiry into all of these accidents. We also check into any so-called discrimination in hiring. However, I suspect the major area of responsibility which we have is the inquiry of obvious misconduct of a serious nature on the part of our own personnel. Each one on the force is re-examined as to property, collusion, procurement of government funds, improper relationships with taxpayers or practitioners. We also check into matters of alleged abuse of taxpayers, harrassment by our personnel of taxpayers, in that we regard such a charge against one of our personnel in the similar serious vein as we do the other areas of misconduct of which I speak. The investigation force serves as the investigative arm of the office of the director of practice. We make background checks on individuals seeking employment to practice before the Treasury Department with approximately 70,000 enrolled practitioners. We have the responsibility, too, of investigating charge of improper or unethical conduct on

the part of the enrolled practitioners, reporting the results of our inquiries to the director of practice for his review and such action as he feels may be necessary in the circumstances. We have, too, the responsibility of investigating the attempted bribery of our personnel by outsiders, taxpayers or practitioners. As a matter of fact, in the last two years we have had 160 instances of attempted bribery of our personnel and our agents reported to the inspection organization and investigated by us. About one-third were criminally prosecuted and we have had a 100 per cent prosecution record in this regard. These bribes to our employees have ranged from $20 to $25,000 by practitioners in some instances, taxpayers, other misguided people under the mistaken belief they could find another way to flee from the proper assessment in payment of their taxes.

Another area that we are constantly alert to is the extortion of money from taxpayers by other taxpayers or by practitioners under the guise of asking the revenue personnel that something improper might be done. There is a very high frequency of this type of activity. As a matter of fact, in Washington this morning a Certified Public Accountant extorted $8,500 from a State of Massachusetts official under the guise of passing it on to revenue personnel making the examination of the state official's tax returns. This problem is constantly with us. I don't intend to get into too much details strictly for the sake of time. This little brief insight into our total program, the integrity, ethics area is vigorously pursued on the basic premise that public confidence in the internal revenue service operations must be sustained and strengthened. This confidence I'm sure you will agree goes to the very heart of the self-assessment feature which is a foundation of our entire tax system. It is based on the good faith of the American people and their continued willingness to report income and deductions accurately. This good faith is depended upon and the public's general confidence that the tax laws are operated fairly and impartially and that their neighbors are paying their proper share of the taxes due. As notably responsible citizens of the community and our country we in the service ask your help, understanding and assistance in perpetuating as one of the American philosophies for taxation. Thank you very much. (Applause.)

MR. CAMPBELL: Thank you very much, Vern. The balance of the program deals primarily with what could be classified as substantive matters pertaining to the tax laws, and generally speaking reflects the topics that were requested by your bar committee to be discussed in capitalized form by the members of this committee, I would like to call upon Joe Greaves, the assistant regional counsel from San Francisco, whose particular area of operation involves the federal liens with which lawyers frequently have great problems. Joe Greaves.

MR. GREAVES: Members of the Bar, ladies and gentlemen. You heard a great deal of the talk this morning of the sort of togetherness between the practitioners and the internal revenue service to arrive at the correct tax. This is a sort of a "we" approach. Well, when it comes to collection it is just a little bit different, and occasionally I will have a practitioner call me and tell me he has a tax assessment, and then he says, "We have a problem." To this I would like to tell him this story about the Lone Ranger and his faithful Indian guide Tonto. It seems they were out riding one day and they were headed east, and from the east came 10,000 Indians, to which the Lone

Ranger said, "Quick, Tonto, we must ride west." They ride west; 10,000 Indians from the west. "Quick, Tonto, we must ride north." They ride north; from the north come 10,000 Indians. "Quick, Tonto, we must ride south." They ride south and 10,000 more Indians all hostile. Finally he looks at Tonto. He says, "Tonto, we're in trouble." To which Tonto says, "What do you mean we, White Man?" This is sort of the approach in collection, and I think rightly so, and I hope you will understand because in the tax structure you are given every opportunity. There are the elaborate administrative procedure, the income tax, the state tax, withholding tax, all those taxes. There are various administrative and judicial means by which you can determine your correct tax. After that correct and just tax has been determined, however, the byword is pay, and you must bear in mind, too, that the United States Government is not like a general business in the sense that our creditors are not voluntary. We do not discriminate; we will take anybody. So our creditors are all involuntary and it is at their choosing, not our choosing, that they are on our roll.

Now how does the federal tax lien come into existence? Well, it's very simple; all you have to do is not pay your taxes. After the correct tax has been determined an assessment is made in the local director's office, and the taxpayer is sent a 10 day notice in which he is asked to pay his taxes within that period. If he does not pay the taxes within the 10 days the United States acquires a lien on his property. This lien is for a period of six years. Then it can be extended by agreement or it can be reduced to judgment in court and then it lasts forever. This lien is on all property whether it be real, personal, tangible, intangible, and it will even cover exempt property which is exempt under state laws. There is a very narrow exemption within the federal code of tools of trade and household goods of about $500 worth, but state exemption is not valid against the federal tax lien. It includes also any after-acquired property which he may acquire during the time that lien is in existence. The only way to get it off is to pay that tax.

Now this particular lien also is valid against other creditors, notwithstanding at this point in time it is not even known to the general public. It is merely an assessment within the director's office. This lien is valid against all other types of creditors with the exception of four protective classes, namely, your mortgagees, your pledgees, your purchasers and judgment creditors. Now the United States to protect itself against these four classes of creditors it may file a notice of federal tax lien in the appropriate county recorders. In the case of real property this would be the site of the property. In the case of personal property it would be the domicile of the taxpayer. After this notice of tax lien is filed the lien is valid against all property as against all substitute creditors.

Some of the large areas of litigation which we have had over the years in connection with this federal tax lien is in the area involving competing creditors, and as I say, the lien is a very powerful lien. It even as a secret lien as it sometimes is referred to without notice of lien it would be valid as against an attachment or against a mechanic's lien, against a garnishment, against landlord's lien, against any of those liens, those type of statutory liens, until they are actually reduced to judgment, and there again they must be reduced to judgment prior to the time of the notice of federal tax lien is filed. And if all else fails in this we have in case of corporations what we

affectionately refer to as the "100 per cent penalty." It is very often believed that one may get into a corporation and have himself the limited liability. Well as the old song goes it ain't necessarily so when it comes to federal tax liens. In the case of withholding taxes or any withheld taxes in that category, excise taxes, if these are not paid by the corporation the responsible officer of that corporation may find himself personally liable for the full amount of those taxes which he willfully failed to withhold and pay over. Now the term "willful" is used in the statute, Section 6672. However, the term "willful" is not the criminal willfulness which we are also acquainted with, but it's what I like to refer to sometimes as the Allied Warren Test; if he was there and he should have withheld the taxes and he knew that there were going to be taxes. This is the extent of the willfulness which is necessary under that particular statute. After these taxes, of course, are assessed against the individual then there would be the normal tax lien against his property just as in the case of the original assessment on the others, and if all of these fail then you will perhaps try to figure out something else to assure that all taxpayers pay their just and fair tax. Thank you. (Applause.)

MR. CAMPBELL: The next speaker is the representative of the American Bar Association on the Liaison Committee, Dick Forrester from Los Angeles. His topic will be Personal Holding Company Problems. Dick.

MR. FORRESTER: Thank you. I would like to add my deep thanks on the part of myself and my wife for the wonderful five days we were up here in your gorgeous country.

This talk is obviously confined to a few comments on the 1964 amendments to the Personal Holding Company Provisions. I was asked to speak a few months ago to a group like this on the 1964 Act and got toward the end and I says, "Does anyone want to hear about the personal holding company provisions?" And not a hand went up. In spite of this lack of enthusism, I agreed to spend ten minutes on the subject at this meeting because I think many more clients of ours are affected by the changes in the 1964 Act than many of us realize.

As far back as 1934 Congress imposed an income tax at penalty rates on corporations designed to drop passive types of income into the corporate pocketbook instead of into the pockets of the shareholders. However, as is generally the case, taxpayers and their advisors have been finding ways to minimize the effect of the tax.

Under prior law, if a closely held corporation which would otherwise be a personal holding company receive more than 20 per cent of its gross income from an active trade or business, the personal holding company rates of 75 per cent and 85 per cent could be avoided as to dividends, royalties, and interest types of income, even though they constituted up to 79 per cent of the total.

Under prior law, personal holding company treatment could also be avoided if 50 per cent or more of the gross income was from rentals. This meant that up to 49 per cent of the income could be dividends, interest, royalties, etc., and the corporation would escape personal holding company treatment.

The provisions of the new law are far too complicated to cover in a few minutes, but let me illustrate the two most significant changes.

Mr. X in order to avoid high personal income tax rates, put securities into a corporation in 1960. The dividends and interest totaled $80,000 a year. If Mr. X had the corporation run a grocery store or manufacturing business with gross annual income of $20,000 or more, then the confiscatory personal holding company rates were avoided. The gross income was determined by the difference between sales and cost of sales. It would be immaterial whether or not any profit was made on the merchandising or manufacturing part of the business.

Under the new law, the general result is to increase the operating income requirement from 20 per cent to 40 per cent of gross income. The definition of gross income has been modified so as to make it more difficult to use a high gross profit margin type of business for the mere purpose of avoiding personal holding company treatment.

As a second example, let us assume that Dr. A wanted to drop $50,000 of dividends, interest, royalty payments, etc., into a corporation so that they would be taxed at corporate rates lower than those applicable if this income was received on top of his earned income. He could accomplish this under prior law if he was able to get $50,000 of gross rental income into the corporation. Again it would have been immaterial whether or not there was any taxable income left from the rent after deduction of interest on loans on the property, depreciation on the property, property taxes, or ground rentals.

The new law plugs this loophole by providing that the 50 per cent rental test can be met only if the rental income amounts to 50 per cent or more after deduction for depreciation, property taxes, interest, and rents paid.

A second plug has been inserted. Even in a case in which the 50 per cent rental income test can be met, if other types of passive income such as dividends, interest, etc., amount to more than 10 per cent of the gross income of the corporation and are not distributed to the stockholders, then the corporations will be treated as a personal holding company.

As is applicable in many tax problem situations Congress has afforded an answer—Commit suicide.

Recognizing that the new law will create a hardship on certain corporations that under prior law were not personal holding companies, relief provisions are afforded to those companies which are liquidated prior to January 1, 1966. Such corporations are now being referred to as "would have been" corporations. They must show that in either 1962 or 1963, while they were not personal holding companies under prior law, they would have been personal holding companies for at least one of these years under the new law. The general purpose of the escape route is to eliminate from capital gain treatment the appreciation of assets of such a personal holding company over and above the accumlated earnings and profits. The accumulated earnings and profits will still be taxed at capital gain rates. Although a "would have been" corporation must file a personal holding company return and pay the tax for such part of 1964 and 1965 as it is in business, if liquidation is

completed prior to January 1, 1966, it will be entitled to a refund. Thank you very much. (Applause.)

MR. CAMPBELL: Thank you, Dick. Another area to which there has been devoted considerable attention and consideration of the most recent revenue acts is that involving the use of more than one corporation to conduct your business activities with a view toward obtaining favorable tax relief. John Hopkins, the representative of the Northern California Bar Association and a member of our committee will discuss the subject of multiple corporations.

MR. HOPKINS: I want to express my appreciation also for the wonderful time my wife and I have had in Sun Valley and for the pleasant company of both the Idaho Bar and members of this committee. However, I do have to confess that this subject of Multiple Corporations makes me somewhat uncomfortable with such distinguished members of the Internal Revenue Service present because as in many areas of tax planning the area of Multiple Corporations is one where taxpayers have become dissatisfied with what they feel is sending all their money to Washington and having some of it trickle back to them to live on, and have done something about it and consciously have set about a program to reduce their tax to a minimum, and, therefore, I am speaking as an attorney before my advocates stating what I feel the law to be, and I am sure that we will have many areas of disagreement.

Basically the area of multiple corporations is one where people have turned to using several corporate entities to reduce their tax down to a point where the tax gets low corporate rates, and primarily 30 per cent. Any taxpayer will, if he's in a high bracket, benefit from incorporating if he is not professionally prohibited from incorporating by putting a ceiling on the amount of tax—by putting a ceiling on the tax bracket that his income will be taxed at.—The corporate rates have been 30 per cent on the first 25,000, and 52 per cent on everything above that, but they are currently being reduced in two steps to where it's 22 per cent on the first 25,000 and 30 per cent—28 per during 1964 on anything above 25,000—excuse me—50 per cent above 25,000 in 1964 and 48 per cent thereafter. The fact that the first 25,000 is taxed at a much lower rate presents a great incentive to taxpayers to duplicate this advantage by forming several corporations and dividing their income into several components. The government is not unaware of this nor was congress, and congress has at times taken direct action to limit taxpayers in their quest for the low corporate rates. However, congress has not been nearly as effective as the internal revenue service has in solving this problem. The internal revenue service got off to a rather slow start in this area and had some bad cases from their standpoint, not from the taxpayers' standpoint, but they didn't give up, and starting about 1957 or '60, I don't recall, they had a case called Coastal Oil Storage, in which the government successfully argued that the predecessor to Section 269 of the code could be used to disallow the surtax exemption. That's this exemption that enables the first 25,000 to be taxed at 30 per cent, but they could use this section to disallow that surtax exemption.

Now Section 269 was originally promulgated, at least in my impression, to stop the trafficking in lost corporations, but the government successfully argued that acquiring control—as Section 269 says says—includes form-

ing new corporations and so, therefore, if a person forms a new corporation for the primary purpose of obtaining a surtax exemption it can be disallowed under Section 269. Then in the James Realty Case they took on a real estate developer, and these are the people that seem to have created a bad law for the taxpayers in the multiple corporation area. They took out a real estate developer who had literally hundreds of corporations. Some were building corporations; some were land owning corporations; some were selling, and the government successfully argued that Section 269 will allow them to disallow all surtax exemptions of these corporations. A branch of Section 269 which the James Realty Case was given some backing on, they moved into the sham corporation argument claiming that when you had formed hundreds of these corporations all of which were literally paper corporations because they didn't have independent facilities, or independent employees or independent offices that they could say that all of the income of all these corporate entities actually belonged to one corporation and that the rest of them were disregarded and sham corporations. And in the Alden Homes Case and Shaw Construction the government successfully argued this and the taxpayer lost all his surtax exemptions, but meanwhile there was a section adopted by congress, Section 1551, which attempted to face this problem directly rather than by the interpretation of the statute which wasn't designed to do this in the first place. In that statute they were very limited and they only prohibited corporations who transfer property to new corporations or to form corporations from obtaining a new surtax exemption, that is, the slow 30 per cent rate. This section in its limited form was barely effective from the government's standpoint because it didn't cover the problems they were after. So they relied primarily upon Section 269 until these recent Section 61 cases or sham corporations cases. Well, congress then stepped back into the picture and left me and I presume some of the practitioners hopelessly confused as to what the present state of the law is.

What congress did was expressly in their committee reports say that we are going to reduce the corporate rates now and the first $25,000 of income to 22 per cent. Now this is going to create greater incentive for taxpayers to create multiple corporations so we will give them a choice; they can have that first $25,000 taxes at 22 per cent if they want to be satisfied with one surtax exemption. This is for groups of corporations where there is one person or one corporation owns 80 per cent of the stock, and it is not just new corporations, it is existing ones no matter when they were formed. If they had common ownership of one person owning 80 per cent of the stock then this rule comes into play. If they want to be satisfied with one surtax exemption then that one corporation can be taxed—the first $25,000 can be taxed at 22 per cent or the corporations can agree how that surtax exemption is to be divided up amongst them. If, however, they are not satisfied with just the one then they can have surtax exemptions provided the other rules don't disallow them as sham corporations such as Section 269 and Section 1551 don't disallow the surtax exemption. Then they can have all the surtax exemptions provided they pay a 6 per cent penalty on the first $25,000 income on each corporation. Well, from a tax client standpoint they are still better off by paying the 6 per cent penalty if they have sufficient income from each corporation to pay the penalty, to let them pay the penalty and go forward. At the same time, however, Congress amended Section 1551 which heretofore applied to corporations transferring property to new corporations

to include corporations transfer property directly or indirectly to new corporations or individuals transferring property to new corpooratins if they have already owned a corporation. Well, apparently, Congress' attitude is that it is all right for a taxpayer to have one corporation and he doesn't have to show a business purpose to have that one corporation, but if he is going to have more than one corporation he's going to have to come up with a business purpose. And in stating this in the committee report they indicated that cashing corporation is exempt from Section 1551, and it's exempt even though the taxpayer did it solely for tax advantages; that is, forming new corporations with cash. There is no mention made in the report that Section 269 has been interpreted in other cases to disallow the surtax exemption even on a cash corporation so there is some indications that Congress doesn't agree with what the courts have said Section 269 is.

Well, what are the business purposes would substantiate forming multiple corporations? There are a number of cases which taxpayers have won. Most of which have been in non-real estate development areas, and they have said, summarizing it, that if there is a valid business purpose such as geographical division, gas stations, one say in Boise and one in Pocatello and one in Twin Falls you could have separate corporations for each of those; that's a valid business purpose. Limited liability, but is it not a valid business purpose for several corporations to keep risky businesses out of secured profitable businesses provided that the individual shareholders aren't personally guaranteeing every obligation of all the corporations, and functional separations if there is a real reason for dividing the functions. Now actually there hasn't been many functional separations that I'm aware of outside of the real estate development field that the government has won on the grounds that this is either sham or Section 269 applied until just recently and here a tax attorney advised a business to transfer their partnership into four separate corporations each to perform a separate function of the—well, formerly conducted by one partnership, and the tax court applied Section 269 again that there was no valid business purpose for dividing it into four separate corporations and, therefore, were only going to allow one surtax exemption and that one we are going to allocate to the corporation that they have elected sub-chapter S on it so it's not going to do them any good at all. But that is a fairly significant case. Most tax attorneys that I'm familiar with felt it was fairly secure if he didn't go off the deep end by taking one business and dividing it into four separate divisions and four separate corporations provided it is sound business purposes in lining it up. The tax court didn't agree there was any business purpose.

Both the new tax law, the six per cent penalty and the new amendment to Section 1551 have created extreme complications in the area of multiple corporations. A complication that I couldn't hope to go into in 10 minutes both because of the time limit allowed and I confess that I haven't enough knowledge of the area to make any sense out of it. There will be, I'm sure, a number of cases continuing under the old law defining this area because as I've indicated before it is an area of taxpayers have consciously sought to reduce their taxes and in some cases have gone to the extreme and it's going to be an area in which the rules are going to have to be hammered out by litigation between taxpayers and the internal revenue service. Thank you (Applause.)

MR. CAMPBELL: Thank you, John. The next subject involves the recapture of depreciation division. It was fairly recently enacted. On that subject is Mr. Sherman Lohn, a member of the committee representing the Montana State Bar.

MR. LOHN: Ladies and Gentlemen, I was going to comment that both the previous speakers on this substitute portion of the tax law have talked of means of saving tax money that has now been lost for taxpayers. Here is another one that is in the same category. Ever since the enactment of the so-called serious rates of income tax field there has been a built in mechanism whereby it was very simple for the taxpayer in business to charge the cost of property acquired depreciation against ordinary income, and then if he could obtain a favorable sale recapture that depreciation at capital gain rates. We all recognize any time you can in effect convert ordinary income into capital gains you have accomplished something. In 1954 there were enacted the rapid methods of depreciation. This meant that in the event there was a disposal of a depreciable asset within normal lifetime for that matter even at the end of that lifetime you had a much greater chance of recapturing a part of the depreciation. Well, Congress has been looking at this for some time, and in 1962, Section 1245 of the Internal Revenue Code was enacted, and it's a very stringent law. It said in effect on any sale or any other disposition of depreciable personal property at a price over the basis this will result in ordinary income to the extent of the profit or to the extent of the depreciation taken, and it applies only to depreciation taken after December 31, 1962. In other words, the first year it was in effect was in 1963 and in the returns of your taxpayers on the disposal of depreciable personal property you may have had some ordinary income situations. Well, this was then followed by the enactment of Section 1250. This law in effect states that in any sale or dispostion of depreciable real property any gain over straight line depreciation which pointed a new term called "excess depreciation," any gain over straight line depreciation will be taxed as ordinary income. I think we can best look at what the '64 law did by comparing it with the '62 law. The '62 law respecting personal property generally applies to a sale at any time no matter when the sale is made if you made a gain, taxable as ordinary income. The 1964 law, real property, applies only to sales that are made within 10 years of the acquisition of the particular asset. 1962 law, personal property, applies to all depreciation regardless of method. In the 1964 law on the real property after the first year it applies only to the amount of depreciation that is in excess of the depreciation that would have been allowed on the straight line basis. Incidentally, any sales in the first year you better discard 100 per cent rate of depreciation that might be taken. In an example of real estate portion. You have real estate improvement costs of a thousand dollars, depreciation of $100, basis $900. The straight line depreciation for this one year period would have been on a 20 year basis, we'll say, five per cent, $50. You sell for a thousand dollars, and that is actually your cost then you have $50 ordinary income, $50 capital gains. Comparing the same recap provisions again under the 1962 code one hundred per cent of the gain over basis up to the amount of depreciation taken is reported as ordinary income. Under the '64 code after a 21 month holding of the assets then there is a diminishing percentage that is reportable as ordinary income It actually goes down one per cent per month after the 21 months, three years 84 per cent is reported, five years 60 per cent; say

9 years and 2 months you have 10 per cent of the excess depreciation that will be reportable as ordinary income. In other words, the real estate provision is not quite as desperate as is the personal property provision, but it is certainly something that can step up and bite you if you don't know the consequences in advance.

Now neither of these acts apply to all sales or other dispositions of property. They do apply—in fact, this cuts right across the code—they do apply in many transactions that we understood were not taxable previously and they will be taxable now. Some of the exceptions, and I think you have heard at least one example given before, or solution to the tax problem was death. Same thing here. In death they give you a new basis. They aren't going to tax you as ordinary income on any recovery of a depreciable depreciation taken. Another exception is gift. However, in gifts, just as done before, the transferee takes over the same basis of a depreciable asset. He also takes over the same basis of income potential. So when he disposes of this depreciable asset he may be amazed to find out he has an ordinary income even though it might be an asset that in his hands is not depreciable at all.

There are also certain corporate transactions that escape this tax. Liquidating a subsidiary by the parents, certain transfers, controlling corporations, certain transfers in reorganization. Other escapes, lifetime exchanges, involuntary conversions where there is a replacement, provided, however, that in the lifetime exchanges you wind up with again what we term, or the real estate portion of it, 1250 property. It has to be the same type of property used in the same manner. It, of course, is obvious that one big solution to the real estate portion of this would be to acquire the asset, depreciate it for eight years, then make tremendous improvements on it, adopt a rapid depreciation system, sell one a month past the 10 years, not taxable; your recapture is not taxable. Well, of course, even Congress anticipated that, let alone the revenue service, and they put in a special provision having to do with improvements; major improvements are made they will be put on a separate basis and we are going to have some beautiful allocation problems involved in that.

There is one thing here in giving this presentation I over-simplified most of it, but this is a problem that applies to every practicing attorney. Many of us look at the collapsible corporation and think that, thank goodness I don't have to face that problem of multiple corporations, I don't have to face that. Here is one you will have to face because every one of us handles in our business every year sales of farms, ranches, businesses and so on. We also recognize the tax consequences often will control a sale. They even control whether a sale will be made. Now the tax consequences are not as simple as they used to be. Some of the standard rules in the past the seller representing the seller, beware of covenants not competing might result in the ordinary income. Otherwise we won't have many worries as a seller, we are going to get the capital gains treatment. No longer. The buyer, his problems allocate price as much as possible to depreciable assets, especially the personal property that we can depreciate fast. Get a covenant now to compete and maybe we can deduct that over the terms and beware of good will, not depreciable. New rules now, seller, ordinary income results from both sales of personal property and with some limitations to real property. Solution: Allocate all he can to unimproved realty. Next to improved realty

a third to personal property. What about the buyer? Don't forget the buyer now. Oh, no. None of those rules that apply to seller do I want to apply to the buyer. We have a conflict right away. But I think it will be several years before this portion of the law reaches major consequences because one portion is effective in '63, the other portion in '64. If you are adequately representing your clients you are going to have to tell them of the tax consequences of your particular sale.

Incidentally, just on the 1963 rule of depreciation of personal property I have already had one sale fail because the price had been determined on what the taxpayer thought his tax consequences were. When they turned out to be decidedly different the sale did fail. I think you are going to have to review each sale like the new rules. Eventually sales are going to be very hard to come by—to complete because of the tax consequences. I'm not attempting here to argue with the justification of the enactment of Congress. It is a distinct change, a great change. One writer from California says that this is rather ironical, they should pass this law the same year, the beginning of it, they talk about investment credit, and say let's give all the businesses to make new expenditures and help the economy and so on. He says it's the government reaching out shaking hands with you and when you are not looking then hitting you with a left cross. So that's some impressions. My purpose is merely to say, the ordinary tax practitioner should know the consequences and advise his client. I will add mine and my wife's sincere thanks for having us here. Thanks a lot. (Applause.)

MR. CAMPBELL: The next item on the agenda involves income averaging. Discussing that topic, Jay Holdsworth, a member of our committee representing the Utah State Bar. Jay.

MR. HOLDSWORTH: Mr. Chairman, Ladies and Gentlemen. We have in the provisions income averaging a very good example of the ingenuity of the legislative vassar in trying to solve what it conceives to be a problem. Let's talk about what the problem really is. The problem goes so deep as the continental concept of your income tax system which is that the person who earns more income should pay more tax and not only a total more but more of each dollar of extra dollars income earned, and we refer to it loosely as the increasing bracket, increasing surtax bracket. What really happens is that a person that makes more money has to pay a greater part of the dollar in tax, and that would be fine if you had your whole lifetime within which to make an accounting on what you earned, but the King of Siam cannot wait that long for his money and the government must have money periodically. So they have chosen each calendar year as the time when we have that accounting. So when I take the practical reasons every year we have to say how much we earned and pay tax on it. That's fine if your income was relatively constant, but it becomes a real problem if your income is low for a few years and all of a sudden gets a boost for a year or so.

When you have that problem of tax rising you have much more income tax paid into the total than you would have if the income were averaged over the period during which the taxpayer had been working or which he owned the property which produced the income. So Congress attacked the problem, and this is the solution they came upon with the internal revenue provision. Now once again so we understand it, let's look at what the prior rules were. Well, there weren't any prior rules permitting averaging of income. Many of

you, I hope all of you, had the joy of having one year of a real big fee for which you worked over 36 months and had the privilege of going back and spreading that fee over the prior years and when you did that what you did was put part of the income back in the prior years return and then used the rate of the prior years. When Congress came along with this new provision in '64 it concluded not to use the income tax rates or the income tax situation of the prior year, but to use the current year.

Now this is what it did—I'll have to come over to the blackboard. I think you can hear me— Let's assume that this represents the tax rate, and this represents the income, and the way the rate structure functions, as you know, is you have no taxes for awhile and then you kind of jump up in rate and the rate goes up. Well, what they did in this particular Act was say, in a particular year if you have an abnormal amount of income, we'll take this rate here or this rate and we'll have it apply to more income, not just the amount that is ordinarily applied to you, but apply to a broader amount of income. That's in effect what they've done. They have taken this year's rate had it apply to more income and that broadened that out. Now in doing that—then they started the same rate structure over here where you have an area there where you don't have those rates applying and you don't in effect lose any money. Now the problem was to determine just where in that rate structure you meshed the gears. That is, if you had a lot of income one year how do you figure where you come in the rate structure. Because it might be at this point or might be at that point, might be in the middle. I take a case arbitrarily, Congress said, that what we'll do we'll compute what the average income was for the prior four years, and that average we will then add as one of the starting points to determine where in the rate structure we mesh gears, but Congress didn't want to get into that rate so they said they would take the average income for these years, add a third of it again and we'll kick up the rate a little bit and that's where we will mesh the gears. So what they in effect do is take the income for the prior four years and add it which is the sum of it and divide by four. You add a third of that on gains so you multiply by 133⅓ per cent and that much you cannot average; that becomes the place where you mesh into the rate structure. If the income of your current year exceeds that by $3,000 then you may average. In other words then you may broaden that note. You determine what the rate was by taking 133⅓ per cent of the last four years average, and if you get more than $3,000 you can broaden that rate structure and it will apply to all of the excess above 133⅓ per cent of the average base years. Now this is a real break. This will affect everybody. The reason it will affect everybody is because seventy-two and a half million tax payers before they file a return for '64 are going to have to look at each of the prior four years and find out whether they can add, and that's a lot of work. It is very important. It may not mean a lot of dollars, but it may mean so many dollars that Uncle Sam will repeal it. Now the way you do it is you determine how much of the current year's income exceeds 133⅓ per cent of the average base and then you add one-fifth of that on to your current year's tax structure wherever it is. Then you in effect compute the tax on that one-fifth, multiply by five. So you're getting the lowest rate. Now this isn't limited to lawyers; it applies to everybody. If you just happen to have a good year than your prior four years before you're in.

Now if you do some thinking, those of you out here in the cow counties

like I am, and the cattlemen are keeping their calves. But there is going to come a time when they are going to have to sell those calves and the price goes up. Let's assume they keep all their calves and keep all their stock the whole year and don't realize any income and the fifth year they sell them all and really have a lot of income and brings the price up where it belongs. You can think of all sorts of possibilities, I'm sure. Well, this is too good when it applies to everybody. You can think of some loopholes on that all over the place so they plugged all the loopholes, at least all they coud see. They eliminated capital gains. Capital gains has a flat national rate anyway, so you cannot average capital gains. Then somebody began to worry about the poor taxpayer who has worked hard for $3,000 a year and all of a sudden he receive a huge inheritance and the income on that inheritance is $20,000 by a year. Well, they had to write that out. So that was written out. Well, then somebody thought about gifts. Well, that's been written out. Income for gifts, income from inheritance you may not add. Then they began to worry about a student who was going to college and had no income and was supported by his parents and all of a sudden he is married and he got a job, a $50,000 a year job, and he wanted to run that back over his four years in college—can't do that; it won't work. You people in Idaho have a peculiar problem being a community property state. As you know, half of what is his is hers. You won't like this but under the averaging provisions during the base years half of what is his is his and the other half is his for the purpose of determining the base period. It is going to be a dream for tax lawyers, but I'm sure it's going to be a nightmare for anybody that prepares returns. Just think what you have to do. You have to have all the prior four years before you, everybody's return because you don't know whether these provisions apply or not. Thank you. (Applause.)

MR. CAMPBELL: Thank you, Jay. I took it upon myself earlier in the program to change the sequence and propose to do so again, not because I want to be last. So next we will have Charley Thomas discussing Dealer versus Investors in Real Estate Transactions.

MR. THOMAS: I've had the good fortune of dealing with the revenue service all the way from Salt Lake to the commissioner. For two years I've had the good fortune of serving on the advisory group of the commissioner of internal revenue. I tried to tell these fellows how to run their shop. The effectiveness of my advice can best be illustrated by a story. A fellow had a tomcat that came in from a night's conquest making so much noise that it annoyed his neighbors. He wanted good neighbor relations so he agreed to have the cat fixed up. A week or so later the cat was still disturbing the neighbors and the neighbor said, "I thought you had the cat fixed up?" He said, "I did, but now he goes out in an advisory capacity." (Laughter.) I think we can all agree that in this country we have an ideal tax administration. When D. Ladem was commissioner of internal revenue—I never looked to check his story, but he claimed that Plato about 400 B.C. made the statement that the ideal tax administration keeps the taxpayers surly but not rebellius. (Laughter.) On dealer versus investor the statutory definition is, property held for sale of customers in the ordinary course trade of business. If it is not property held for sale of the customers in the ordinary course of trade of business then you are an investor. If it is such property then you are a dealer, and the significance is that you are a dealer it's ordinary income, and

if it's an investory you pay capital gains. You get benefit of capital gains. It has been stated that the securing of capital gains rather than ordinary income is rapidly becoming America's second favorite indoor sport. (Laughter.) It has also been admitted that it will never offer any serious competition for first. (Laughter.) But if you are able to practice your second favorite sport successfully it may give you the wherewithal to enjoy your first in more exotic surroundings. (Laughter.) The courts have favored several factors that enable them to determine whether you are a dealer or an investor. They vary with the different courts, but primarily they can be summarized under four factors. One: Sales activity. Did you employ agents? Did you engage in an extensive advertising campaign, or did you just sit passively? If you have a case with a revenue agent you will find that he will sometimes go back 30 years in city directories to find if you are listed as a real estate dealer, or if you are in a joint venture with someone else well, he will search the city directories to see if this other fellow is not listed as being in the real estate business. If he exhausts his attempts in this regard and can find no sales activity whatoever his report will solemnly state that the taxpayer engaged in no sales activity because he found this unnecessary because he was in a seller's market. (Laughter.)

Second: Is improvement and developing of the property such as subdividing. The more you improve the more vulnerable you are. If there is no improvement at all why then the revenue agent's report will cite that the taxpayer found it unnecessary. (Laughter.)

The third factor is the purpose for which the property was acquired. If you acquired the property for sale that's against you, but it is inflated, but if it is unimproved property abviously it produces no income and you will find the revenue agent using the remark, the property produces no income so obviously he held it for sale. The courts won't buy that. They will consider that as one factor, but they point out that the statute doesn't use the word "acquire;" it uses the word "sell."

The fourth factor is the frequency and continuity of sales. The more sales, the more vulnerable. The longer your holding period on property the better off you are, and the shorter the holding period the more vulnerable. You use the money from the sale of real estate to buy more real estate they say you are replenishing your stock so it would be best to use the money from the sale of real estate to buy stocks or bonds or something else. Also your percentage of your real estate profits compared to your other income is a factor. There are two leading cases in the Ninth Circuit—well, you can find many cases. You can find cases to support you no matter how poor your case is and no matter how good your case is, you can find cases that will be against you. There are literally thousands of them. There is no rhyme or reason for them, but Austin versus Commissioners, the Ninth Circuit, and Hoover versus Commission, a Tax Court decision—they are not two of the latest ones. I like to cite those two because the taxpayers won both of them, and I like to see the faces of the tax court wince. However, the facts are never identical, and the government has a much simpler approach to this. Instead of going into all these factors they would simplify it in this manner: If it's a gain you're a dealer. If it's a loss you're an investor. (Laughter.) The government hasn't always followed precedence because they can find a precedence in some other area, but I'll never forget the tax

attorney who cited to a revenue agent a U.S. Supreme Court decision on tax law which is generally considered to be fairly good authority, and the revenue agent said, "Well, the commissioner hasn't decided whether he's going to follow it." (Laughter.)

You can summarize the activity in this regard. The more the profit is caused by your activity whether it's advertising or development the worse off you are. The more your profit is caused by external factors such as inflation or the community growing up around the better off you are. Now that doesn't mean that you won't be challenged on a lot of these cases even if you have done nothing. Now in this area there are some pitfalls. The first pitfall, of course, is the internal revenue service; that's a continuing pitfall (laughter). In that regard I might mention that a few years ago the internal revenue service changed its name from Bureau of Internal Revenue to Internal Revenue Service. That was a very desirable change because they are not primarily interested in revenue, they are primarily interested in giving service. In fact, this organization services many people (laughter). I had a professor in law school who said, he said, "A word in one setting doesn't necessarily mean the same thing." Confine that to the internal revenue if you will look at your local paper many times you will find that the district director is advertising that he is seizing someone's property for failure to pay tax. In that same classified section in that same newspaper you may find an ad "Bull for Service." (Laughter.) Now there may be very little similarity between the use of the word service in those two categories, the internal revenue service seizing a man's property and the other, but I suppose if one searched hard enough he could find a word that would describe what happens to the recipients of both adjeactives (laughter.)

There are some suggestions—the installment sale. If you're in with a dealer in a joint venture, using the rule of guilt by association, his activity will have to be attributed to yours. There have been a couple of recent cases where the facts are pretty strong for the taxpayer where they refuse to attribute the joint venture activity, or the other fellow's activity, to the person who has not been a dealer. It was once said that a person is a dealer or not as he deals, and if he doesn't deal for a whole year it's past reason to say that he is not a dealer. However, as you know, the internal revenue service doesn't need to use reason because the commissioner's determination is presumed correct. The burden in civil cases, with few exceptions, is on you to show otherwise.

Now I don't want to give you the impression I don't like dealing with these distinguished gentlemen of the internal revenue service. I will make two observations, one is that if you change and took all the present 60,000 employees of the internal revenue and put them on the other side of the fence and you picked C.P.A.'s and tax attorneys on the other side, transferred them into running the internal revenue, things wouldn't be much different from what they are now. Also tax lawyers thrive in taxpayers' troubles, and the internal revenue service will always be causing the taxpayers trouble. (Applause.)

MR. CAMPBELL: Thank you, Charley. I am supposed to talk on Investment Credit. It is getting near the bewitching hour. I'll try to talk about

two minutes. First of all, as was pointed out that the provisions pertaining to investment credit were adopted in 1962. It represented an entirely new concept in income tax law. It has been inferred that political reasons might have inspired it. Investment credit is an incentive device which is designed to encourage the acquisition of machines and equipment for productive facilities of many types by reducing the effective cost of machinery and equipment by way of reduction in income tax. A direct reduction in income tax by the purchaser of the facility. Investment credit permits the purchaser, the minute the purchase is made, if the property is properly qualified, a reduction of seven per cent of the cost of the property as a direct reduction in income tax which would otherwise be made. It is a mandatory provision under the internal revenue law that the credit be taken in the year the purchase is made. There are only certain types of assets that qualify. Generally speaking, they are tangible personal property; machinery and equipment, yes. Buildings, no. Livestock, no. Nor is property predominantly used outside of the United States eligible for that. Improvements that might be connected with the operation of a hotel or motel is distinguished from an apartment house that would qualify. Used property if it otherwise meets the requirements set forth is eligible for a credit only up to a total of $50,000 purchase in the year in which the used property is acquired.

As indicated previously the basic investment credit amounts to seven per cent of the cost of the eligible property acquired during the year; that is to say, if a purchaser acquired $100,000 worth of eligible property he would be entitled to deduct $7,000 from the tax otherwise payable for that year. There is, however, a further limitation on this, and that is that the property so acquired must have a useful life of eight years or more or the investment credit is reduced. If the property has a useful life of 4 to 6 years the investment credit is reduced two-thirds, and if it has a useful life of six to eight years it is reduced one third. If a usable item is less than four years, such as an automobile, then no credit is allowed. In the house investment credit plan, as I previously indicated, the income tax liability itself is reduced by the amount of credit up to $25,000. If your tax liability is $50,000 and you have a credit of $50,000 generated by the acquisition of the property you would be able to reduce your tax by $25,000 plus one-quarter of the liability over that figure; that is to say, your $50,000 credit would be used $25,000 on the basic $6,250 against the remaining tax liability so that the total credit for that year would be $31,250 and you would still have left $18,750. Provision is made for the application of this excess credit in much the same manner as in the case of operating losses and carry it back a few years and use it up there and carry it over for five years so that unless you run into very unusual circumstances some point credit should be available. The law as originally enacted provided that if the credit were available and it was taken and declared by law the basis of the property acquired would have to be reduced initially by a like amount; that is to say, if you acquired a $100,000.00 piece of eligible property you would have $7,000 credit. The basis of the property would then be reduced $93,000 for depreciation purposes. In 1964 it was enacted that now wipes out the requirement, that you now get full investment credit and have no adjustment to make for the depreciation. In much the same manner with respect to recapture of depreciation a specific provision is made in the event property is sold prior to the term that is normally used for life and in essence a portion of the credit will be

withdrawn at that point by the government, and you would have been able to use that money up to that point.

I think that generally covers the subject very briefly but I think all of you should be aware of the fact that this is a tremendous benefit. We will be happy to try to answer any questions that you have. (No response.) I would like to thank our guests, Mr. Acree, Mr. Hertzog, and members of the Liaison Committee, representatives of the Internal Revenue Service who have participated in our program, and Mr. Myron Anderson, who is the representative from the State of Idaho who made all the arrangements for our being here, and Mr. Alden Hull in the preparations of the format of the program, and lastly the members of the Idaho State Bar. We have all enjoyed ourselves tremendously here and feel honored to have been asked to participate in your program. I would at this time like to turn the meeting back to Wes Merrill. Thank you very much. (Applause.)

MR. MERRILL: Thank you very much, Frank. I think you gentlemen from the Liaison Committee have put the frosting on our program for us and we are very thankful and very pleased that you were able to be here with us. I am also happy to see a group of accountants that have joined us this afternoon. We are pleased to have you. Presentation was very effective, and I only have one suggestion that is perhaps obvious. If any of us general practitioners run into trouble the best thing we can do is get better acquainted with the last six speakers. The question and answer period will start promptly at 6:30 in the Redwood Room of the Lodge. Our next general session at 9:00 o'clock in the morning. Until then I will see you at the question and answer period. Thank you. (Applause.)

5:15 P.M.
JULY 10, 1964

JULY 11, 1964
9 A.M.

MR. MERRILL: Gentlemen, we will call to order the business session of the Idaho State Bar.

The first thing we have on our program this morning would be the committee reports, and I would like to have the Judicial Conference Report by, I understand, Justice McFadden. Would you come up to the stand, please, Sir.

JUSTICE McFADDEN: President Merrill. We met at Trail Creek Cabin Wednesday at nine o'clock. Attending the judicial conference were four members of the Supreme Court, and unfortunately Justice Taylor could not be present by reason of a death requiring his presence in California. We had all the district judges except four present at this conference. One of the district judges was out by reason of illness, one by reason of a death, and one of the district judges was attending a school in Denver, Colorado. We started this in the morning and continued all that day and also continued the next morning. We started the program last year with the district judges that I think it is going to bear great fruits. They are organizing what we

call a District Judges Association. The first day papers were presented by Judge Hyatt, Justice McQuade, and other members of the judiciary. Those are rather technical and interested the judges primarily. The highlight of the report—of the conference was a report given by George Bell and Tom Miller on lower court reforms. A copy of this report was given to you gentlemen. We are fortunate in having with us several of the legislators. As you gentlemen realize a year ago at the Legislative Session the Liaison Committee between the legislature and the courts was established. Members of the Judiciary Committee of the House and of the Senate were appointed by the heads of those bodies to meet with the court. The sole function of that committee was to exchange information back and forth. Legislation which we felt was necessary in the court system was presented to this Liaison Committee, and the Liaison Committee would then take it to the appropriate committees in the legislature. I might say that this group was a very devoted group and results were excellent. We had several members of that committee discuss the problems of the judiciary with the judges in the session.

Present was Representative Green and Representative Larry Mills. We also had a session scheduled for Senator Murphy and Senator Dee. Unfortunately Senator Murphy could not be present. Senator Dee presented his matter. It was of great interest in one minute area which I think will be of interest to the Bar. The program on that was to have a court rule adopted to protect lawyer-legislators during the time that they are in the legislature so that they will be excused or relief can be granted from these time elements which arise with practicing attorneys. Further study was going along on that, and we hope to be able to get some sort of a rule to solve that problem by the time of the next regular session of the legislature. Certainly the judiciary were pleased with the results of the conference, and they have asked that I express to the members of the bar and to the commission their appreciation for the hospitality and for the assistance they rendered in making this conference such a success. Thank you, President Merrill. (Applause.)

MR. MERRILL: Thank you very much, Judge McFadden. The judge has requested that he be allowed to be excused, and that has been granted. Thank you.

The next is the President's Report which has actually been encompassed in the last column of the Advocate, written by myself, and I will dispense with the President's Report on that basis. I would like, however, to repeat just a portion of one paragraph in my report. I would like to state that I have been very pleased and gratified by the response that I have received when I requested attorneys to perform tasks to the bar association even though those tasks have been unpleasant, but necessary. My special thanks to Jim Lynch, our secretary, and to his efficient assistant, Olive Scherer. I am very grateful to both of them. With the portion of the report the balance, of course, will be published in the proceedings of this day. (The president's report is set out here verbatim.)

PRESIDENT'S REPORT

During the past year I have enjoyed associations with many attorneys from every part of the State and this opportunity to meet and become friends with so many is one of the great rewards that I have found as President of

the State Bar. I have had the opportunity of a large number of speaking engagements and personal appearances both throughout the State of Idaho and in many of the surrounding States. As I write this column, I have participated on the program of the Montana Bar Association and the Utah State Bar as their special guest. I attended the Ninth Circuit Judicial Conference before returning to Idaho for our own annual meeting. The number of times that your President has been called upon by the American Bar Association and the Bar Associations of other States, is a recognition, not of the present incumbent, but of the growing stature and vigor of the Idaho State Bar. I feel we are taking giant steps, through the individual attorney, the various District Bar Associations and the State organization, in molding a strong, vigorous organization that can, and does, represent the attorneys of the State of Idaho, and responds to their needs.

I have had many opportunities during the preparation of my monthly column in the last year, to report on the activities of our Bar, and so feel that a detailed report for the year is not necessary, but a mention of a few highlights will not be amiss.

For the first time the Bar Association has an office to call its own. Early in July of 1963 we established a separate office and we feel that this has greatly enlarged the usefulness of the Bar Office and has encouraged its use. It became necessary to seek these separate quarters because of the change in the office of the Secretary. At the beginning of my term James B. Lynch took over the duties as Executive Secretary of the State Bar. He succeeded Tom Miller who has been acting as Secretary for four years. Jim has been a very devoted Secretary and has done an outstanding job. I would like to take this opportunity to thank him personally for the tremendous help he has been to me. The State Bar is most fortunate to have such a Secretary, as he is worthy in every respect to join the list of distinguished Bar Secretaries that have advanced the work of the attorneys in the State of Idaho.

The past year has seen the cumulation of many years' work in the two Continuing Legal Education Institutes. The fine work of Professor Brockelbank in his "Community Property Law of Idaho," afforded an excellent subject for the Institute, one in Moscow in November, 1963, and one in Boise in January of 1964. It took many years to bring this work into being, and the fact that it was published by the Idaho State Bar Association and the Idaho State Bar Foundation, Inc., and all publication rights are held by these Institutions, is a great credit to the Continuing Legal Education program in Idaho. I feel that we have had an outstanding year in this field, and I would like to extend to Bob Huntley, Chairman, and his Committee, and to the College of Law, my special thanks for their hard work and assistance. This area is one of prime responsibility as far as the organized Bar is concerned and I am most pleased with the results of this past year's efforts.

In line with the mandate of the attorneys through their annual meeting, the State Bar has now a functioning General Counsel system. John L. Child of Meridian has been functioning as General Counsel of the Idaho State Bar on a part-time basis for many months and has turned in a very outstanding job. In addition to John, we have recently appointed Mr. Thomas Whyte of Idaho Falls to function as General Counsel in that area. These gentlemen conduct the necessary investigation on disciplinary matters and in the field

of unauthorized practice of law, and, upon the request of the Commission, file the necessary actions. This activity is justifying the faith evidenced in it by the members of the State Bar and it will certainly be to the advantage of the Bar to have it carried on and expanded in the future.

The proposed Uniform District Court rules were presented to the Supreme Court during the current year with a resolution of the Board of Commissioners that they be accepted. The Supreme Court has conducted extensive investigation work and revision concerning these rules, and have consulted with the various District Judges concerning their practicality. It is the intent of the State Bar to push this to a satisfactory conclusion.

I feel that one of the most significant steps taken by the Commissioners during the current year has been the institution of the Committee on the Reform of the Courts. The Commissioners have appointed George Bell, Professor of Law, College of Law, and Thomas A. Miller, Attorney, Boise, Idaho, in liaison with Justice Joseph McFadden as a Committee to present a comprehensive plan for the lower courts of the State of Idaho. These gentlemen have done extensive research and are in the process of formulating a plan together with statutory changes that would be required to put it into effect.

I would like to thank Dean Peterson of the College of Law for his assistance in the many Bar Programs and problems. The relationship between the Bar Association and the Law School has been one of extreme cooperation and helpfulness. This has been very beneficial to the Bar and I feel also of benefit to the Law School. The Bar Association was able to assist the Law School in launching its Idaho Law Review as a regular bound publication.

This year has been the first full year of operation under the benefits of the new license fee schedule. As a result, the Bar Association has been able to institute and make use of its General Counsel program, greatly expediting the handling of disciplinary matters and unauthorized practice of the law complaints, launching the Reform of Courts Committee, allowing various Committee meetings to further the work of the Bar in the unauthorized practice of the law field, and the continuing legal education field. All of this, we feel, benefited the individual attorneys in the State of Idaho.

We have continued the recently established policy of having Commission meetings around the State, in order to explain the functions and the work of the State Bar Association and to acquaint the individual attorneys with the problems of the Bar as a whole. We have continued the policy of active cooperation with the surrounding State Bar Associations and the American Bar Association. This has been of considerable benefit in helping us solve the problems that we are faced with.

The Commission has continued frequent meetings with the Supreme Court all to the end that there is a more cordial relationship and mutual understanding between the two groups. Discussions of the Rules for Admission to the practice of the law, bar examinations, Reforms of the Lower Courts system, Continuing Legal Education and Uniform District Court Rules have been on the agenda of these various meetings.

It is with considerable hesitancy that I make any recommendations for the future course of the Bar Commission but, as an almost Past-President,

perhaps I do have that prerogative. I urge that continued emphasis be placed upon the Reform of Courts Committee and that this project be pushed to an early and successful conclusion. It further appears to me that it is important to secure the early approval of the uniform District Court Rules so that they may be put into effect to the aid and benefit of all practicing attorneys in the State. After this is accomplished, a complete revision of the rules governing appellate procedure, district courts, the Bar Association and the Bar Commissioners, the Canons of Ethics, and the fee schedule should be immediately accomplished and the results published in a loose leaf desk book type of publication for the aid and assistance of the attorneys. All of these things I know have already been firmly fixed on the list of items to be accomplished by Alden Hull, the new President.

I would like to requote the words used by Marc Ware in his report of the President in June of 1962, because they are so appropriate at this time: "Among the objectives of the Commission is the important one of keeping our profession on a high level on which fidelity to the client, respect for the courts, and a sense of public responsibilty are so combined as to make our profession of greatest possible service and significance to the people of our State. We must not lose sight of the fact that the Bar is one of the instrumentalities by which justice and the rule of law is established and maintained among men."

Space will not permit me to list individually each of the Committees and their memberships who have performed so satisfactorily in carrying out their assigned duties. I would like to state that I have been very pleased and gratified at the response that I have received when I have requested attorneys to perform tasks for the Bar Association, even though those tasks have been unpleasant but necessary. My thanks to Jim Lynch again and to his efficient assistant, Olive Sherer. I am certainly grateful to you both.

I feel very fortunate indeed to be able to turn over this office of President to Alden Hull. I am sure that he, Ed Benoit, the present Commissioners from the Western District, and Vern Kidwell from the Eastern District will serve the Bar Association with energy, success and great enthusiasm. I am sure they will serve the Bar well.

Our next report will be the report of the secretary, Mr. Jim Lynch. Mr. Lynch.

MR. LYNCH: Mr. Merrill, Members of the Idaho State Bar. This is my first report, and I might say initially only that I enjoyed very much working with all the members of the Bar this year, and I look forward to the same kind of relationship in the coming year. The following is the secretary's report:

SECRETARY'S REPORT

The following report is made to the members of the Idaho State Bar for the purpose of reporting statistics pertaining to the financial condition of the Idaho State Bar, membership, Bar examination results, disciplinary matters, and other aspects of the work of the Board of Commissioners of the Idaho State Bar and their employees and committees. The following report covers the period from June 1st, 1963, to June 1st, 1964.

FINANCIAL REPORT

BAR COMMISSION FUND: The account books maintained in the Secretary's books, which are regularly audited by the State Auditor, reflect the following receipts, expenditures and balance in the Bar Commission Fund, a dedicated fund subject to State appropriation and control:

EXPENDITURES June 1st, 1963, to June 1st, 1964	
Personal Services	$ 8,947.37
Travel Expenses	7,494.64
Other Miscellaneous Expenses	7,004.29
Capital Outlay	901.43
Transfer, Social Security	305.98
Transfer, General Fund	783.18
TOTAL	$25,436.89

RECEIPTS, BALANCE	
Balance on hand June 1st, 1963	$22,116.32
Receipts, June 1st, 1963, to June 1, 1964	30,692.70
TOTAL	$52,809.02
Less Expenses	25,436.89
BALANCE, June 1, 1964	$27,312.13

Personal Services covers salaries of a part-time secretary, a full-time stenographer, bar examination monitor and occasional clerical help. This item also includes fees paid to individual attorneys acting as General Counsel by appointment of the Commissioners.

Travel expense includes all costs of transportation, meals and lodging for out-of-town travel of the Commissioners, the Secretary, and other persons engaged in Bar activities, including Bar Committees and the General Counsel and other attorneys required to travel in connection with discipline investigation and prosecutions. It also covers a portion of the travel expense of the Idaho State Bar Delegate attending meetings of the House of Delegates of the American Bar Association.

Other Miscellaneous Expense includes the cost of printing the Proceedings of the Annual Meeting, that portion of the cost of printing and distributing the **Advocate**, which is attributable to disseminating official Bar information, the cost of preparing and mailing notices and other materials to Idaho lawyers, office expense such as rent, telephone, postage, stationery and other supplies, and other miscellaneous Bar expense.

The Social Security Transfers represent the State Bar's payment as the employer of the above-mentioned personnel.

The General Fund Transfers refer to charges against the Bar Commission Fund by the State Auditor's office for bookkeeping and auditing services rendered to the Bar.

TRUST FUND: This is a special fund not controlled by the State for the reason that the receipts are collected from sources unrelated to official funds.

The status of that fund is as follows:

Cash on deposit, The Idaho First National Bank, Boise, as of July 1st, 1964	$1,731.16
Adjustments for sums presently due	448.15
ADJUSTED TOTAL	$2,179.31

The July 1st, 1964, balance of $2,179.31 compares with a reported June 1st, 1963, balance of $1,545.43. At the time of making this report, it was possible to report the Trust Fund balance as of July 1st, but the General Fund records pertaining to June of 1964, were not yet available.

MEMBERSHIP

BY DIVISIONS: The membership of the Idaho State Bar at this time as compared with a year ago is:

Division	1963	1964	Change
Northern Division	129	126	2.3% decrease
Western Division	327	328	.31% increase
Eastern Division	148	150	1.4% increase
Out of State	13	15	15.4% increase
Military	2	1	50 % decrease
TOTAL	619	620	

Attorneys admitted and currently licensed in Idaho and who are not under disbarment or suspension, and all Idaho Supreme Court Justices and District Court Judges and U. S. District Judges for the District of Idaho, are members of the Idaho State Bar, I.C., 3-405. The Judges are included in these figures.

BY LOCAL BAR ASSOCIATIONS:

	1963	1964	Change
Shoshone County	16	17	6.25% increase
Clearwater	66	65	1.5% decrease
Third	189	190	.53% increase
Fourth & Eleventh	82	82	None
Fifth	59	59	None
Sixth	19	18	5.3% decrease
Seventh	56	56	None
Eighth	47	44	6.4% decrease
Ninth	42	47	11.9% increase
Twelfth	19	16	15.8% decrease
Thirteenth	9	10	11.11% increase
Out of State	13	15	15.38% increase
Military	2	1	50 % decrease
TOTALS	619	620	

Rule 185 (e) provides that at the Annual Meeting each local bar association shall be entitled to the number of votes represented by its total membership, and that was the members of any local bar association present at such annual meeting shall cast the entire vote of the members of such local bar association.

DEATHS OF ATTORNEYS

Since the last Secretary's Report we have learned of the following attorneys' deaths:

Name	Place of Birth	Date of Death	Admitted to Bar
Solon B. Clark	Portland, Oregon	Sept. 5, 1963	9/17/12
Ralph K. Breshears	Boise, Idaho	Sept. 12, 1963	6/1/21
Kenneth K. Branson	Coeur d'Alene, Idaho	Sept. 24, 1963	9/1/32
Proctor K. Perkins	Los Angeles, Calif.	Oct. 13, 1963	3/21/13
John H. Norris	Weiser, Idaho	Oct. 24, 1963	5/9/10
Judge Charles F. Reddoch	Boise, Idaho	Nov. 6, 1963	3/10/09
Edwin U. Driscoll	Los Angeles, Calif.	Dec. 31, 1963	1/31/38
Judge Charles E. Winstead,	Boise, Idaho	Jan. 9, 1964	10/23/09
L. Vernon Daniel	Payette, Idaho	April 14, 1964	10/5/48
J. L. Eberle	Boise, Idaho	April 15, 1964	11/12/15
Robert W. Hudelson	Gooding, Idaho	May 12, 1964	12/10/26
Judge E. V. Boughton	Sandpoint, Idaho	May 24, 1964	10/1/07

BAR EXAMINATIONS

Two Bar examinations were given since the last Annual Meeting, one in September, 1963, and the other in April, 1964, both in Boise. Twenty-six applicants wrote the September, 1963, Bar examination, and of these 23 passed and 3 failed. There were no petitions for review filed in the Supreme Court.

There were nine applicants who wrote the April, 1964, Bar examination, and of these 5 passed and 4 failed. There were no petitions for review filed in the Supreme Court.

At the time of the last Secretary's report, two petitions for review were pending before the Supreme Court for review of failing grades received in the April, 1963, Bar examination. Both petitioners were subsequently admitted on order of the Supreme Court.

DISCIPLINE MATTERS

On June 21st, 1963, there were 24 disciplinary matters listed on the agenda for the Commissioners meeting held in Boise on that day.

Four of these matters were then pending as formal complaints, C-269, C-271, C-273 and C-274. One matter was pending for payment of costs, which were collected. Jed Owens was suspended for three months by the Supreme Court, upon his filing a Motion for Voluntary Suspension. The Commissioners have recommended to the Supreme Court that his Petition for Reinstatement be granted. Mark B. Clark was reprimanded for engaging in unprofessional conduct by the Supreme Court, after a formal hearing and after agreeing by stipulation for the entry of a recommendatory order by the Commissioners, recommending that he be reprimanded. William E. Swope was suspended by the Supreme Court for six months and has not petitioned for reinstatement.

Fifteen complaints pending on June 21st, 1963, were dismissed after investigation disclosed that formal hearings were not warranted.

Formal complaints, C-275, and C-276, were also filed in two of the then

pending cases and later dismissed prior to a formal hearing. The attorneys involved in these cases were informally reprimanded by the Commissioners of the Idaho State Bar.

Formal complaints, C-278 and C-279, were filed in two cases then pending and these matters are still not disposed of.

A formal complaint, C-277, in one of the pending matters, was later filed and as a result, Dwight K. Bickel was reprimanded by the Supreme Court for engaging in unprofessional conduct after a formal hearing and after moving for the entry of a Recommendatory Order by the Commissioners recommending a reprimand.

Since June 21, 1963, 34 written complaints have been filed with the Secretary's office, some of which were verified. These complaints have either been investigated and disposed of, or are currently pending on the agenda as more particularly described below: A formal complaint, C-280, was filed in only one case which arose after June 1st, 1963.

On May 22nd, 1964, the Commissioners met in Boise and an examination of the agenda for that meeting reveals that there were 19 disciplinary matters listed for consideration at that meeting. Twelve of these cases were dismissed or disposed of at that meeting, after investigation indicated a formal hearing was not warranted. Of the other seven pending cases, five are being investigated, and the investigations are not complete at the present time. The other two pending matters are both formal complaints, C-278 and C-279, mentioned above, and have been pending since prior to June of 1963. One is scheduled for hearing and the other is awaiting final determination upon submission of additional proof by the accused attorney.

John Child of Meridian was appointed by the Commissioners to act as a part-time General Counsel in the Western Division area, and has investigated and prosecuted all but one discipline case arising in that area since his appointment. Thomas C. Whyte of Idaho Falls has been appointed to act as part-time General Counsel in the Eastern Division area, and the Commissioners are looking for someone who would be willing to serve in the Northern Division area in the future, when needed, thus eliminating the additional time and expense connected with travel to another area to investigate a minor case. These gentlemen have also been assigned certain unauthorized practice of law cases for investigation and possible prosecution in the Courts.

The Commissioners have also appointed a Committee on Discipline to hear almost all of the cases reaching the formal hearing stage, thus eliminating the necessity of the Commissioners both initially reviewing the evidence to determine if a formal complaint should be filed, and then judging the case when the evidence is introduced at the formal hearing itself. The six members of this committee, only three of whom sit on each case are:

Gilbert St. Clair—Idaho Falls.
Glenn Coughlan—Boise.
Marc Ware—Lewiston.
Milton Zener—Pocatello.
Tim Robertson—Twin Falls.

Robert Brown—Kellogg.
Thank you. (Applause.)

MR. MERRILL: Thank you very much, Jim. This is a very comprehensive report. I would like to remind the members of the Bar that the records and the reports of the Bar Association are open to your inspection at the Bar office in Boise at any time that you might desire to look at them. While not on the formal report I would like the record of these proceedings to show that at the end of the banquet last evening the Bar Association awarded 50-year certificates to Mr. John Jackson of Boise, Laurel Elam of Boise, Ben W. Davis of Pocatello and Alfred C. Cordon of Pocatello.

The next committee report will be the Prosecuting Attorney's Section, if we have a member of that section available.

(No response.)

The next one will be Continuing Legal Education Committee. Bob.

MR. HUNTLEY: Thank you, Wes. Commissioners, member of the Bar.

The Committee on Continuing Legal Education for the past year has consisted of Charles R. Donaldson of Boise, Robert Alexanderson of Caldwell, Professor Herbert Berman of the University of Idaho Law School and myself.

The committee conducted an Institute in Moscow on November 1 and 2, 1963, on the subject of "The Community Property Law of Idaho." The speakers and the topics discussed by them were as follows:

"Torts and the Community"—Sherman Bellwood, Rupert.

"The Community and Business Enterprises"—Prof. Harry Cross, Seattle.

Accounting and Tracing, Allocation of Income and Expenses Between Community and Separate Property"—Prof. William J. Brockelbank, Moscow.

"Contracts Between Husband and Wife"—Robert E. Bakes, Boise.

"Conflicts Problems Involving the Community"—William S. Holden, Idaho Falls.

The same topics and speakers were presented in an Institute at Boise on January 17 and 18, 1964. There were 116 registered at the Fall Institute and 92 registered at the Spring Institute. Professor Brockelbank's book "The Community Property Law of Idaho" served as the foundation for the Institute programs. The book is a significant contribution to the literature of Idaho Law and the committee extends its special thanks and appreciation to Dr. Brockelbank for this work.

The Fall Institue this year will be conducted in Moscow on October 23rd and 24th. The Institute topic will be an adaptation of the University of Michigan "Road Show on Cross-Examination." A football contest between the University of Idaho and Washington State University will be featured on Saturday afternoon. (This institute was moved to Boise because of lack of accommodations for attorneys in Moscow.)

I would depart from the regular report for the moment to advise the Bar that the committee feels that this is going to be a very outstanding

institute. This team is being brought in at a cost in excess of $3,000 from Michigan. The general format of the program involves a typical traffic accident case involving personal injuries and change of personalities. Witnesses are placed on the stand and have direct examination, and then three experts from the Midwest on cross-examination each in turn, in the absence of the other two, conduct cross-examination of the witnesses, and then after each of the three have conducted their cross-examination there is a panel consisting of some of the staff and some Idaho people who will lead a general discussion on techniques presented by the three cross-examiners. This institute has been conducted nine different times back east and this is the first time it has come west. They have attendance ranging around 2,000 lawyers at the last several institutes, so I think it will be a very worthwhile project. Thank you very much. (Applause.)

MR. MERRILL: Thank you very much, Bob. I would like to say that this is one of the hardest working committees of the State Bar, and their job this year has been excellent and most outstanding.

In looking around I notice a couple of members of the Prosecuting Attorneys' Section. Do any of them feel qualified to make a report on their activities?

(No response.)

Seeing no hands, we'll proceed. The next committee report I would like to call on is the Advisory Fee Schedule chairmaned by Gene Thomas. If Gene is not here I will ask the Secretary to read the written report as submitted.

MR. LYNCH: Mr. Thomas has written the letter which I will quote here:

"Covering our recent discussion, please be advised that the Fee Schedule Committee does not have a report this year" . . . He goes on further and says:

"May it suffice as our report, therefore, that:

The Fee Schedule Committee of the Idaho State Bar reports no recommendations for revision at this time. It continues to recommend action by a select committee on the subject of commercial collections, with ultimate revision of the Fee Schedule in that area. It also continues, as in the past years, to recommend that the Bar take necessary action leading to the preparing, distributing and compiling of the Fee Schedule to go with rules and other such standard materials in loose leaf binder form practical and consistent with their day-to-day use by practicing attorneys.

Respectfully submitted,
EUGENE G. THOMAS Chairman
Advisory Fee Schedule Committee."

MR. MERRILL: Thank you, Jim. I might state that the suggestions contained in that report have been noted by the Commissioners for appropriate action.

The next committee report that I will call for is the Commercial and Collection Practice Committee, Jack Voshell, Chairman. Is Jack here?

MEMBER OF AUDIENCE: Mr. Chairman, Jack is not here but asked that I deliver this report to the President.

MR. MERRILL: I will ask the Secretary to read the report of this committee:

COMMERCIAL AND COLLECTION PRACTICE

MR. LYNCH: "Report of the Commercial and Collection Practice Committee.

The Commercial and Collection Practice Committee by this report would like to call attention to some of the problems that are singularly identified with the collection field of the practice of law.

Some of the problems considered by the committee include:

1. It appears that a simple fee schedule for the Commercial and Collection Practice is inadequate because collection cases are so unique and varied.
2. Many attorneys are at a loss to know what is a fair fee in many of the broad variety of collections that come to them.
3. To some degree the Commercial and Collection field of practice has been undeservably deprecated by the Bar, which in turn has resulted in poor public relations with business and commerce in general.
4. Through education and by circulation or dissemination of available aids to the individual attorneys, a source of good will and substantial additional earnings could be discovered.
5. Many attorneys, particularly attorneys newly admitted to practice in their eagerness to garner business, have cut fees because often those who prefer this type of business encourage it.

The Committee recommends that preparation of a Commercial and Collection Practice Handbook which would contain the best available guides such as Commercial Law League Rules and Rates, contingent fee guides, forwarding and referral fee practices, and useful references. Such a handbook need not be fancy, but to make it available to the entire Bar membership, a special appropriation to cover costs would probably be necessary.

The Committee further recommends that the Bar Association, through its continuing Legal Education program, conduct a special seminar devoted to the commercial and collection practice, or, if this type of program is too ambitious, we would hope that in the future one or more of our convention speakers might be selected to give special attention to this field of the law practice.

The only tangible product of the committee consists of the resolutions drafted by one of our committee members, Mr. Frank E. Chalfant, Jr., which have been submitted for consideration, including the proposed amendment of Paragraph 8 of the Advisory Fee Schedule providing that minimum fees for appearances in various courts, or minimum hourly rates may be charged, as elsewhere provided in the fee schedule; and also providing that minimum fees of the Commercial Law League of America may be charged for making initial demands and related matters. The other resolution submitted provides for sending a copy of the Advisory Fee Schedule of the Idaho State Bar to each of the law lists with the request that such law lists in their subsequent

publications show that "Bar rates prevail" after the name of each Idaho attorney listed.

Special thanks and commendation are due Mr. Chalfant and Mr. Daniel O'Connell, the other members of the committee for their work and interest in the objectives for which this committee exists, and we join in asking that the committee be continued.

Respectfully submitted,
COMMERCIAL AND COLLECTION PRACTICE COMMITTEE
JACK G. VOSHELL
Chairman"

MR. LYNCH: I might mention that the resolutions referred to here were not presented to the Resolutions Committee, and Mr. Chalfant may or may not want to present that resolution from the floor.

MR. MERRILL: The next report I would ask for is from the Insurance Committee, Dale Clemons.

MR. CLEMONS: Gentlemen, I have prepared a report from the Insurance Committee of the State Bar. This committee consists of Willis Moffatt, Al Kiser and myself. We have been functioning as a committee for about three or four years. Mr. Eberle was original chairman, and due to his injury a year ago last December, could not serve and at that time I assumed the chairmanship.

As you are aware, the Mutual of Omaha now has our State Bar insurance program, There are three main categories of insurance being written. There is the major medical, the life insurance and disability (loss of time). When I reported to you last year, I gave you figures as of June 5, 1963, furnished to me by Mutual of Omaha. There were then 267 major medical policies in force, 187 life policies in force and 117 disability policies in force.

This year I have requested further information with respect to our insurance program from Mutual of Omaha and under letter dated April 29, 1964, Mr. Ray Kuhn, the District Manager of Mutual of Omaha in Boise, advised me there were 236 major medical policies, 132 life policies and 119 disability policies in force.

A little arithmetic will point out to you that since last year there has been a loss in major medical policies of 31, 55 loss of life policies and a gain of 2 in disability polices.

I understand that Mutual of Omaha has used 453 members of the State Bar for the purpose of arriving at the 51 per cent necessary to make any type of these insurances available on a non-selective basis. In other words, it would take 231 enrollees in each program to put over that particular program. The major medical program, of course, went over the early days of our agreement with Mutual of Omaha. We have never reached the favored position of 51 per cent with the life or the disability programs and, in fact, we are losing ground on the life program, as well as approaching a dangerous point on our major medical.

If you will recall, many years back Continental Casualty wrote insurance for the Bar and I still think there are several of those policies in effect. Now we have Mutual of Omaha with policies in force on major medical, life and disability, as I have previously indicated to you.

Your committee is not at all pleased with the progress of the insurance program for the Idaho State Bar. We feel that rather than gain, we have lost ground in the past year. This is due either to lack of interest on the part of attorneys or the failure to have the program properly submitted to them. The program has not accomplished, except for major medical, any of the objectives that we had in mind at the time we entered into this new program. I appreciate that Mutual of Omaha has put in considerable effort in this matter, but notwithstanding such efforts, our objectives are still in the future.

It is the feeling of your committee that for any other insurance company to undertake the insurance program for the State Bar, it must, of necessity, be in a position to have the sanction of the State Bar to protect existing policyholders from loss for policies written by other companies under the auspices of the Bar. Any new company writing under the auspices of the State Bar should be put in a position to underwrite the existing policies and must give some reasonable assurance that the program can be put over to pick up our uninsurable members. If this cannot be accomplished, then we do not feel the Bar should continue to sponsor this insurance program. Perhaps some formal action should be indicated by the Association at this time because we hardly believe it proper that the matter be left in its present condition with two of our main programs; that is, life insurance and disability insurance, still remaining on a selective basis. In other words, to put it bluntly, if we cannot get these programs on a non-selective basis in order to help and assist our uninsurables, then we had better stay out of the insurance plan completely.

Often a little new blood on these committees is helpful and your present members have now served for several years. I do not mean to indicate that we are unwilling to continue, but we do not feel that we have accomplished what should have been accomplished. I know from reports from other states that state bar programs have been successful and I would like to see it a success in Idaho. Whether it be your present committee or a new committee, if you are to have a State Bar Program, it is suggested that you extend to this committee full authority to negotiate for you and on behalf of the Bar an altered, modified or completely new program with the view to making our uninsurables protected under the State Bar insurance.

My report which I will hand in needs some little modification now in view of the figures I have received a few minutes ago, and with your permission I will change those figures and then submit my report. (Applause.)

MR. MERRILL: Thank you very much, Dale. I can assure you that the statement for the commission that they will consider your report very carefully and the recommendations that you have made.

I think perhaps it would be only proper—Mr. John Squires of Mutual of Omaha is with us here this morning and if he has anything to say I think we should give him the chance. John, do you have anything?

MR. SQUIRES: Thank you very much, Wes. I can only set in motion as far as Mr. Clemons' report is concerned as we promised when we began this program our objective was to qualify your association non-selectively, not on only one part of the program but all three parts because the major objective is to gain coverage for those people who cannot qualify because of their health. I will find out—this is our objective and we earnestly solicit your cooperation in keeping it. I think we become pests calling on you. I suppose we probably called on every lawyer in Idaho two or three times; we will continue to be pests because we want to get this objective accomplished if we possibly can. I will point out one thing, however, that is, that the major medical program which did go non-selective to give you some idea of the benefits that will come under this plan at this time, now has 43 uninsurable risks covered of the some 290 participants in the program. On these uninsurable risks the benefits today have exceeded $38,000. So in this sense at least the objective has been accomplished and these people have gained coverage through a source they coud not get under any other circumstances. I might also point out that yours is the only professional association in Idaho which has any type of non-selective program in effect. This is a compliment to you and indirectly a compliment to the sales efforts of my sales associates. Customarily at this time I would present a gavel to Wes as outgoing president of the Association, and thanks to the efficiency of our postal department the gavel is some place between here and Pocatello. So, Wes, as soon as I am able to find it, I will present it to you perhaps a little more informall,y, but I do want to take this opportunity to congratulate you on your term in office and I extend my very best wishes from my company. One other thing we do have here though is some coffee. Whenever you are ready for that we will be outside. Thank you very much. (Applause.)

MR. MERRILL: Thank you very much, John. You can be assured I will birddog you until I get the gavel. We do appreciate your being with us this morning, and since we all are working toward the same goal I am sure it can be worked out satisfactorily so that the attorneys can get the best possible benefits from this program.

The next committee I would like to have the report from will be the attorneys and Life Underwriters Liaison Committee, Mr. Dave Doane. I don't believe Dave is here so I will ask the Secretary to read his report.

MR. LYNCH: This report is in the form of a letter addressed to me:

"Dear Jim:

In compliance with your request that a report be submitted from the Life Underwriters Liaison Committee, I submit herewith a report which consists primarily of an initial contact made by me, as chairman of this committee, with Oral Andrews, immediate past president of the Life Underwriters Association of Idaho. I have not had the opportunity to call a meeting of the committee since we were appointed, or given a definite assignment, in May, and have not really had the opportunity to meet. However, I am sure that Mark Ware and Lamont Jones would go along with the report that I am making, since it is purely preliminary and setting up an area within which the Life Underwriters and the members of the Bar may work together, to their mutual advantage.

In talking with Mr. Andrews, we concluded that it would be of mutual

advantage to the two professions if the following points were made the objectives of joint conferences between the two associations:

1. Define the unauthorized practice of law and make arrangements to communicate the same to as many life underwriters in the State as possible.

2. Promote mutual understanding between the two professions of the respective background training and the operating procedure and resulting problems involved in each of the respective professions.

3. Work toward the establiishment of effective liaison between the two associations to handle specific complaints or to sponsor programs designed for a more effective service to the public.

Initially, Mr. Andrews has pointed out that legal services and advice should always be rendered by one who is trained in the law and duly licensed to practice. Laws to this effect have been enacted throughout the country. Oftentimes, however, the layman has been confused as to what constitutes the "practice of law" within the meaning of the unauthorized practice of law rules of various states. It has come to our attention that in 1946 representatives of the National Association of Life Underwriters and of the National Bar Association set up the National Conference of Lawyers and Life Underwriters, the declared purpoose of which is to promote cooperation between Life Underwriters and attorneys, and to eliminate as far as possible misunderstandings and causes for complaint, by either against the other in relation to any practices which do not appear to be in the public interest. The Conference published a national statement of principles and cooperation between Life Underwriters and lawyers which was adopted in 1948 by both associations. This being the case, I heartily recommend to the commissioners of the Idaho State Bar that our committee be permitted to pursue an assignment recently given it, with respect to coordinating with the Life Underwriters Association of Idaho and the unauthorized practice of law committee of the Idaho State Bar, in order to bring about a state dissemination of the principles which have been adopted in the past by the two national associations and of any other principles which the two state associations may deem proper and feasible.

Finally, in closing this report, I wish to say that in making the contact with the life underwriters, it was my personal observation that they seem sincere and eager to cooperate and work with the legal profession.

Respectfully submitted,
DAVID DOANE, Chairman
Life Underwriters Liaison Committee"

MR. MERRILL: The next will be the Committee on Communist Tactics and Strategy, Z. Reed Millar.

MR. MILLAR: The committee of which I am chairman is represented by members throughout the entire State, Blaine Anderson in Blackfoot, John Hepworth in Buhl, Peter Wilson in Bonners Ferry, and myself in Boise, and we make this report:

At the request of Mr. James B. Lynch, Secretary of the Bar Association, we submit herewith a report of the activities of your Committee on Commu-

nists Tactics and Strategy, and as chairman of that committee I report as follows:

1. This committee has never met in session, but communication has been carried on between the members of the committee by mail.

2. The committee has received communications from the American Bar Association and made one contribution for publication in the Advocate.

Communication has been had with the American Bar Association Committee on Education Against Communism and has received communications from them, including the reports of the American Bar Association Committee. The Committee has received the publications used currently by the State Board of Education and has reviewed in detail these communications.

3. This committee has offered its services to the Idaho State Board of Education in an effort to cooperate in the preparation, use and dissemination of information and instruction pertinent to the subject, but has never been invited to sit in or participate in any of the activities of the State Board of Education with reference any of these matters, or otherwise.

4. This committee, at the last session of the legislature, through communication with the Chairman of the State Affairs Committee of both the Senate and the House offered its services to the legislature in any and all matters pertaining to the subject matter, and presented to the legislature copies of the Florida statute requiring the course in the educational program of that state, teaching the value of the American System over Communism. No reply or acknowledgment was ever made by any member of the legislature as to this offer.

5. We have been advised that there was previously prepared, under a committee of the American Bar Association, a brochure for the training of in-service teachers. The acceptance and use of this brochure was objected to by many substantial members of the American Bar Association, and it was immediately withdrawn as being in effect a watered-down, compromised apology. There is now in process of preparation another brochure which will be acceptable to the Association for this specific purpose. It is interesting to note that on the committees selected by the American Bar Association there are certain educators whose ideas, while claiming to be anti-communistic, are purely socialistic, in that they fail to recognize the inalienable rights of man and his Divine origin and heritage, and cling to, and insist upon the notion that secular humanism is a conceivable alternative. They do not recognize the necessity for a Principal Creator greater than man. This appears to your committee to be the basic crux of the division of thinking in America. That is, whether or not:

1. Man is of nature of Divine origin with certain inalienable rights by government, whose individualism, right to ownership of property and the right to freedom of choice must be made the Lode Star of all governmental activity, as against:

2. The thought that man has no inalienable rights, that his individual rights are now and always have been subservient to the planned social needs of the powers in government, depending on who is in power, and that under this type of law, freedom of the individual must give way to

the so-called good of the whole as interpreted by the government in force.

It is the thinking of your committee, as reflected in the communications with one another, that these principles expose the real threat in America, and that no force or group has more at stake in the preservation of the basic fundamental theories of the founding fathers expressed under Item 1 above, than lawyers of this nation whose interests are:

1. In the preservation of individual enterprise, the rights of property, and the freedom of choice; and

2. In such preservation maintain the right of lawyers to exist as a profession without curtailment, direction or guidance or domination by any forces of government.

This report is made in the hope that every lawyer in the State of Idaho will be alert to every move, every infiltration and every design of any man, group of men, organization or force, so that in detection we may lead out in thwarting its accomplishments; that every School Board, every school teacher, every influence designed to direct and train the thinking of the youth of this State, be moulded and directed toward pointing out the great benefits and advantages of the American system of freedom and liberty, over any other system, which might be introduced or encouraged anywhere and any place.

Respectfully submitted,
Your Committee.

MR. MERRILL: Thank you very much. As I am sure most of you realize the bulk of our committees are handicapped by the fact that they do not have the funds available for meetings, but we are pleased with the result that we do obtain from the voluntary work of these men. I might say we are trying to develop a program where some of these committees can meet.

The next committee report will be the report of the Special Committee on Summary Probate Proceedings, and I will ask Jim Lynch to read that.

MR. LYNCH: The report: Recommendation Regarding Summary Probate Procedure.

Dear Mr. Lynch:

Pursuant to the request of the Commissioners of the Idaho State Bar, I have made a study of the possibilities of making the procedure outlined in I. C. Section 14-114 applicable to the situation where the husband dies, as well as to the situation as it exists now, in which the wife passes away.

This problem, unexpectedly is an extremely involved one, primarly for the reason that, as you know, the contractual capacities and liabilities of a wife in Idaho, particularly insofar as community property acquired during the marital status is concerned, is somewhat vague and conjectural.

Therefore, following the suggestion made by Commissioner Wesley F. Merrill, and based upon some study made of this problem, I would make the following recommendation:

Because of the rights of creditors, the cases indicate that for the legislature to make I. C., Section 14-114, applicable to a surviving wife, as well as to a surviving husband, would violate the requirements of due process of law in that it would possibly tend to deprive the creditors of property without due process of law. The present I. C., Section 14-114 is actually a proceeding to determine heirship, rather than one to guarantee that all creditors are protected and satisfied. This is apparent for the reason that, as we all know, the husband is personally liable for the obligations of the community anyway, and; therefore, the distribution of the property of the community to him upon the death of his wife could have no adverse effect upon the creditors. This is obviously not so in the situation where the husband would pass away leaving surviving his wife. The question, then, of course, would arise as to whether the wife was liable for the debts of the community, which apparently she is not at the present time, and with the property having been transferred to her as her sole and separate property, the creditors would be left without any redress for the satisfaction of the obligation.

It was felt by some that some notice provision should be put in I.C., Section 14-114, particularly in the case where the husband passes away leaving a surviving wife. This would seem to cure the defect, except that due process, under the case law, seems to require a substantial notice period, and; therefore, you actually wind up with a "long form" probate or regular probate.

It is my recommendation that a thorough study be made of this problem with the possible suggestion that a statute be enacted whereby in the event property would be transferred to a surviving wife under I.C., 14-114, as would be amended, then, and in that event, the wife would become personally liable for the debts of her deceased husband, and the creditors would also have redress, in order to satisfy their claim against the property received by the wife from the husband pursuant to I.C. 14-114. If this were done, it would probably be necessary for the creditors of the community to submit some kind of a document during the probate under I.C. 14-114 in order to establish that an indebtedness existed. Consequently, as you can see, you would actually be ending up, for all practical purposes, with a "long form" probate.

It is apparent, therefore, why I am suggesting that a more exhaustive study be made of the question, as suggested above, and in closing it is felt that a very basic and fundamental change would have to be made in regard to the law respecting a wife's liability for the debts of the community, as well as her contractual capacities.

Sincerely yours,
WILL S. DEFENBACH"

(Applause)

MR. MERRILL: The next report is the special committee on the removal of attorneys who are mentally incompetent under the chairmanship of Sherm Bellwood, and I will ask Jim Lynch to read that also.

Report of Special Committee

on

Removal of Bar Members Who Are Mentally Incompetent

Idaho State Bar, Annual Meeting, 1964

MR. LYNCH: Sooner or later every disciplinary authority will be faced with the problem of members of the bar who become mentally incompetent. Anticipating the problem, the Board of Commissioners appointed a committee of three members of the bar to study the problem and make recommendations.

Under the rules then in effect discipline apparently could be applied only to misconduct; there is no clear or specific provision for suspension in cases where a member of the bar (1) has been adjudged insane, mentally incompetent, or mentally ill, or (2) is involuntarily committed to an institution for the mentally ill, or (3) is voluntarily admitted to an institution for the mentally ill, or (4) has failed to maintain such special mental fitness as would have entitled the member to admission to the bar in the first instance, or (5) has committed any act or omission either related or unrelated to the practice of law or administration of justice indicating mental unfitness to continue the performance of his duties. Additionally, what about the member who is apparently or obviously mentally ill at the time of a disciplinary hearing, or who pleads the defense of mental illness when charged with misconduct?

In an attempt to meet the problem and complete the assignment, the committee proposed a set of rules numbered RULE 177—a number appropriate to the current numbering of rules now in effect. It is to be noted that the proposed rule refers to "a member of the Idaho State Bar" rather than to "attorney." This apparent broadening of scope was designed to include attorneys and judges; this on the grounds that so far as the committee could determine, mental illness is unconcerned with titles or positions.

A copy of the proposed RULE 177 is attached to this report.

Your committee realizes the application of the proposed rule will not be easy. However, its adoption will prepare the Idaho State Bar to consider the problems, and to discharge its responsibility to the public and to the profession to solve these problems in a rational manner.

Your committee is informed that the Board of Commissioners formally adopted the proposed RULE 177 on May 23rd, 1964, and that the same was forwarded to the Supreme Court with the recommendation that the rule be approved.

Respectfully submitted,
MARY SCHMITT, Gooding
JOHN H. DALY, Twin Falls,
SHERMAN J. BELLWOOD, Rupert,
Chairman.

RULE 177

RULE 177. (a) A member of the Idaho State Bar (1) who has been adjudged insane, mentally incompetent, or mentally ill, or (2) who is involuntarily committed to an institution for the mentally ill, or (3) who is voluntarily admitted to an institution for the mentally ill, or (4) who has failed to maintain such special mental fitness as would have entitled the member to admission to the Idaho State Bar in the first instance, or (5) who has commited any act or omission either related or unrelated to the practice of law or administration of justice indicating mental unfitness to continue the performance of his duties as a member of the Idaho State Bar, shall be suspended until reinstatement by the Supreme Court.

(b) When a member is adjudged insane, mentally incompetent, or mentally ill, or is committed to an institution for the mentally ill other than by voluntary admission. The court so adjudging or committing shall promptly file with the Clerk of the Supreme Court a certified copy of said adjudication or commitment, and the Supreme Court shall, upon receipt of the same, enter its order suspending the member until reinstatement by the Supreme Court.

(c). In the cases mentioned in (3), (4) and (5) of subparagraph (a) of Rule 177, the procedure for suspension shall follow the rules provided for the discipline of members on other grounds, except as hereinafter otherwise provided. In such cases the accused member must be represented by an attorney; if the member is not represented by counsel of his own choosing, the Committe on Discipline must appoint counsel to act for and on behalf of the member.

(d). No discplinary proceeding, other than proceedings to suspend a member of the Idaho State Bar as provided in Rule 177, shall be instituted or maintained against a member who has been adjudged insane, mentally incompetent or mentally ill, or who has been committed or admitted to an institution for the mentally ill, until either (1) judicial restoration to competency has occured, or (2) a determination has been made by the Committee on Discipline in an appropriate proceeding after notice to the member and appointment of or appearance by an attorney to represent the member, that the member understand the nature of the charges against him and is competent to aid in his own defense. Upon such restoration or determination, the proceedings shall be instituted or recommenced at the same stage where the proceedings were abated. If, after charges of misconduct have been filed against a member, the Committee on Disscipline has reason to believe and after a hearing before it finds that the member is of unsound mind, mentally ill or incompetent, to such an extent that in its judgment the member is incapable of conducting a proper defense to the formal complaint against him, the Committee on Discipline shall recommend to the Supreme Court that the member be suspended and that all further proceedings on the formal complaint be held in abeyance until it shall appear to the Committe on Discipline, upon application made by the member, that he is mentally capable of conducting a proper defense to the formal complaint. In such hearing the member must be represented by an attorney, and if he is not so represented, the Committee on Discipline must appoint counsel to act for and on behalf of the member. Upon such application by member that he is mentally capable of conducting a proper defense to the formal complaint, a hearing

on the formal complaint shall be had as in other cases under these rules. If the Committee on Discipline concludes that the charges in the formal complaint have not been sustained, or having been sustained do not warrant suspension or disbarment, the member shall be reinstated upon application as hereinafter provided.

(f). If a member of the Idaho State Bar interposes the defense of his mental incompetency to abate any disciplinary proceedings filed or then pending against him, the Committee on Discipline shall immediately certify this fact to the Supreme Court and upon receipt thereof said Court shall enter an order suspending said member until reinstatement by said Court.

(f). In any proceeding under Rule 177 where the accused member introduces medical evidence of his mental condition by a physician who has examined or treated the member, the Committee on Discipline may require the member to submit to examination by a physician chosen by the Committee, and evidence based upon such examination may be received by the Committee on Discipline.

(g). Where the Committee on Discipline appoints counsel for a member of the Idaho State bar under Rule 177, such counsel shall be entitled to receive his actual necessary expenses approved by the Board of Commissioners; and the Board of Commissioners may provide for compensation of such counsel by agreement with him.

(h). No member of the Idaho State Bar suspended under Rule 177 shall be reinstated until he has satisfied the Board of Commissioners and the Supreme Court by clear and convincing evidence that he is completely cured of such insanity, mental incompetency, or mental illness. A member who has been suspended for such reasons may be reinstated upon application in writing, verified by the applicant and addressed to the Board of Commissioners, accompanied by a fee of $....., and filed in the office of the Idaho State Bar at Boise, Idaho. The application shall set forth the following information:

(1). Name, age, residence and address of applicant.

(2). A brief statement of the facts and circumstances surrounding the suspension of applicant.

(3). A detailed description of applicant's activities since suspension setting forth in detail the following:

—Any employment or occupations of applicant during suspension, together with the names of employers, partners or business associates, if any; the date and duration of all such relations and employments and a statement of any earnings during the period of suspension.

—A statement showing all residences maintained during the period of suspension, including the names and addresses of landlords, if any.

—The details with respect to any matter involving any arrest or prosecution of the applicant for any crime, whether felony or misdemeanor, during the suspension.

—The details of any civil litigation of any nature involving the applicant at the time application is made for reinstatement.

(4). A statement of the facts and circumstances which in the opinion of the applicant entitles him to be reinstated.

(5). The names and addresses of all physicians, phychiatrists, psychologists, all assistants of any of the foregoing, and all other persons who have treated applicant with respect to the matters which brought about the suspension.

(6). The names of all hospitals or other institutions in which applicant was hospitalized, confined or treated during the period of suspension.

(7). A statement of any other matters which applicant believes should be brought to the attention of the Board of Commissioners in connection with his application.

(8). Any orders of a court restoring applicant to competency, duly certified.

(9). If applicant has been treated by any persons mentioned in (5) above, letters from such persons summarizing the current condition of applicant. Statements from hospitals or institutions in which applicant was confined during suspension, showing the date and circumstance of applicant's discharge from such hospital or institution.

(10). The application shall include an authorization to all physicians, psychiatrists, psychologists, all assistants of any of the foregoing, and all others persons who have treated applicant, and to all hospitals or other institutions in which applicant was hospitalized, confined or treated, with respect to the matters which brought about the suspension**

(i). Upon applications for reinstatement, the Board of Commissioners may employe a physician and may require the applicant to submit to a physical and mental examination by such physician.

(j). No application for reinstatement shall be considered by the Board of Commissioners within one year next after an adverse decision of the Supreme Court upon a former application, unless a different period is fixed by the Court in its order denying the application for reinstatement.

(k). In all cases of suspension under Rule 177, the Committee on Discipline shall report its findings and recommendations to the Supreme Court as in other cases of disciplinary proceedings. In all cases of reinstatement, the Board of Commissioners shall make appropriate recommendations to the Supreme Court. In all cases of denial of reinstatement, the Board of Commissioners shall make appropriate recommendations to the Supreme Court. with a concise statement of reasons therefor.

MR. MERRILL: Thank you, Jim. Next will be the Committee on Uniform Assessment of Law Libraries for Ad Valorem Tax Purposes, June 19, 1964. to read it.

MR. LYNCH: Report of Idaho State Bar Committee on Uniform Assessment of Law Libraries for Ad Valorem Tax Purposes, June 19, 1964.

Since 1958 the Idaho State Tax Commission has been investigating the

**This authorization shall authorize the release of requested information to the Board of Commissioners of the Idaho State Bar and to persons acting under said Board's authority.

possibility of developing a uniform system of assessing law libraries throughout the State. The Tax Commission determined that Oregon had, through the cooperation of the Oregon State Bar, developed a uniform method of assessment, which is revised from time to time. Inquiry by the Tax Commission indicated that the Oregon system has met with the general approval of both assessors and lawyers.

The Idaho Tax Commission has now taken the position it will follow the Oregon system with revisions to conform the same to Idaho. At the request of the Tax Commission a Committee was appointed to advise that Commission on how to change the Oregon list of law books to conform to Idaho practice and to make any recommendations on the system of assessment.

Your Committee has met with a representative of the Tax Commission in an effort to present as effectively as possible any objections the Idaho attorneys might have to this method of assessment in Idaho. Accompanying this report is the tentative list of law books and their valuations, which the Tax Commission will recommend for use by County Assessors, unless further modifications are presented and accepted.

Your committee has been assured by the Tax Commission that it will recommend to the Assessors that law books be assessed at 20% of the valuations shown on the accompanying list.

The members of the Idaho State Bar are urged to review the values shown on the list and send their comments and suggestions to the Ad Valorem Tax Committee, at Box 835, Boise, Idaho, prior to July 20th, 1964.

Respectfully submitted,
CALVIN DWORSHAK, Chairman.

(Note: Copies of the Report were distributed and are available at the Secretary's Office.)

I might mention that I have mimeographed copies of this and will hand them out at the coffee break. It contains seven pages of lists of values that they propose to be applied uniformly throughout the state in assessing the law books. This is not the idea of the committee or the Bar Commissioners; we are just responding to the request, and I think Mr. Dworshak will really appreciate any comments or ideas you have in writing so that he can go back to the Tax Commission and present the best argument possible to support the lawyers' position.

MR. MERRILL: Thank you, Jim. I will commend this to your attention and ask that you pick up these lists at the coffee break and give them some careful study, and your comments are certainly solicited. Send them to Box 835, the office of the Idaho State Bar, so that Mr. Dworshak will be able to consolidate these problems while he is still on speaking terms with the Commissioner.

The balance of the committees that we have are either on a standby type of activity or have no report, and rather than to lengthen the proceedings this morning those who are on standby and have essentially a negative report

I will not call, having in mind especially the Legislative Committee and committees of that type. The work of the Western States Bar Association Internal Revenue Service Liaison Committee, Myron Anderson, has been very apparent during the last several days as it was Mr. Myron Anderson's work that was responsible for our program yesterday afternoon.

Are there any other committee reports from the floor?

(No response.)

If not, gentlemen, we will have a coffee break, and I would like to announce that this coffee break has been arranged by the Mutual of Omaha, John Squires, and we would certainly like to thank him for it, and with that information I am sure you will enjoy your coffee more.

(Coffee break.)

MR. MERRILL: We now come to the portion of our business meeting dealing with the resolutions, and I have on the stand with me at my request and with his kindness Jim Donart to act as our commentary to keep you out of trouble for the next hour, hour and a half.

The resolutions to be first submitted are those from the Resolutions Committee. For those of you who might not have it in mind our Resolutions Committee is composed of the presidents of the 11 district bar associations in the State of Idaho. The ground rules upon which they were required to operate are that the resolutions would be submitted to the State Bar on or before the 15th day of May prior to the annual convention. If they were not so filed they could not be considered by the Resolutions Committee except upon a two-thirds vote of the members of the Resolutions Committee to allow the matter to be considered. Each district bar in the Resolutions Committee has one vote. Each proposed resolution that deals with statutory changes must have accompanying it the draft of the statutory change on the bill that is proposed, together with a statement of the purposes. There were the ground rules adopted by our Resolutions Committee, and Mr. Robert Bennett, Pocatello, Idaho, is the chairman of the Resolutions Committee. He is the immediate past president of the Fifth District Bar.

I will then ask Bob Bennett to present the work of the Resolutions Committee. Bob.

R. BENNETT: Thank you, President Merrill. Resolution No. 1

Resolution No. 1. Whereas, the American Bar Association has recognized a manifest need for the prompt solution by constitutional amendment the problems of presidential succession and inability, and whereas the American Bar Association has urged that State and Local Bar organizations support by all appropriate means an Amendment to the Constitution of the United States in accordance with the principles set forth in the recommendation of the Committee on Jurisprudence and Law Reform;

NOW, THEREFORE, BE IT RESOLVED by the Idaho State Bar now assembled, that the Idaho State Bar adopt a Resolution worded as follows:

I. **Be It Resolved,** That the Idaho State Bar recommends that the Constitution of the United States be amended in accordance with the prin-

ciples set forth in the Consensus of the special conference convened by the American Bar Association in Washington, D.C., January 21, 1964, as follows:

(1) In the event of the inability of the President, the powers and duties, but not the office, shall devolve upon the Vice-President or person next in line of succession for the duration of the inability of the President or until expiration of his term of office;

(2) The inability of the President may be established by declaration in writing of the President. In the event the President does not make known his inability, it may be established by action of the Vice-President or person next in line of succession with the concurrence of a majority of the cabinet or by action of such other body as the Congress may by law provide;

(3) The inability of the President to resume the powers and duties of his office shall be established by his declaration in writing. In the event that the Vice-President and a majority of the cabinet or such other body as Congress may by law provide shall not concur in the declaration of the President, the continuing disabilty of the President may then be determined by the vote of two-thirds of the elected members of each House of Congress;

(4) In the event of the death, resignation or removal of the President, the Vice-President or the person next in line of succession shall succeed to the office for the unexpired term; and

(5) When a vacancy occurs in the office of the Vice-President the President shall nominate a person who, upon approval by a majority of elected members of Congress meeting in joint session, shall then become Vice-President for the unexpired term.

II. **Be It Further Resolved,** that the Idaho State Bar reaffirm in principle the support of the need for interim statutory clarification of the problem after the constitutional proposals have been submitted by Congress for action by the State legislatures, such legislation to provide a remedy while the constitutional proposals are under consideration.

Mr. President, I move for the adoption of this resolution.

MR. MERRILL: Gentlemen, you have heard the resolution. Is there a second?

MEMBER OF AUDIENCE: Second.

MR. MERRILL: The matter has been seconded. It is open for discussion. Prior to discussion may I request that anyone wishing to address the chair please state your name first. Is there any discussion?

MEMBER OF AUDIENCE: Question.

MR. MERRILL: There being no discussion the matter will be placed to a vote. It being the policy and decision of the Idaho State Bar our rules require that the vote be held by association. If you haven't already done so I would suggest you gentlemen rally around your local president or your group representing your association.

Pursuant to our procedure on voting by association each local bar association shall have as many votes as they have members, and these members shall cast the entire vote of their local association.

MEMBER OF THIRD DISTRICT BAR: The Third District Bar votes aye, but I believe that we should explain the vote for this reason. That Section 5 of the proposed resolution calls for the nomination of one man by the President in the event there is a vacancy in the office of Vice-President, and then the approval, or at least his selection is subject to the approval of the joint House and Senate. Our committee recommended that Section 5 be amended to provide that the President of the United States would nominate not less than two nor more than five persons who would be considered for election by the joint House and Senate of Congress, and the Congress would then select one of the nominees. Now this amendment was accepted by the Third District Bar. I think I speak for the delegation in saying that this does not indicate that we must vote against the resolution because as we see it the American Bar Association is merely attempting to take the lead in discharging an obligation of lawyers in this country to see that some provision is made in this area so that with the consent of the other members of the Third District Bar delegation we have voted aye but recommend the amendment of Section 5 as I have outlined.

MR. MERRILL: That being an explanation of your vote?

MEMBER OF THIRD DISTRICT BAR: Yes.

MR. MERRILL: I think, gentlemen, I can now state that the resolution has passed; it requiring only a majority. I declare the resolution passed. Mr. Bennett.

MR. BENNETT: Resolution No. 2.

WHEREAS, Section 18-4604 of the Idaho Code defining Grand Larceny does include, among other things, the taking and stealing of property in excess of a value of Sixty Dollars ($60.00), and

WHEREAS, such statute was first passed by our legislature in the year 1864 and as originally passed in relation to the statement of the value of the property taken to constitute grand larceny has not been changed since said date, and

WHEREAS, the value of Sixty Dollars ($60.00) in property which could be purchased with such amount has greatly changed in the past one hundred (100) years.

NOW, THEREFORE, BE IT RESOLVED by the Idaho State Bar now assembled that we do recommend that said statute be amended to make larceny Grand Larceny only when the property taken is specifically the item set forth therein or when the property taken is of a value exceeding Two Hundred Fifty Dollars ($250.00).

APPENDED LEGISLATION

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 18-4604, Idaho Code, as amended, be, and the same is hereby amended to read as follows:

18-4604. Grand Larceny defined.—Grand Larceny is larceny committed in either of the following cases:

1. When the property taken is of a value exceeding **Two Hundred Fifty** Dollars.

2. When the property taken is from the person of another.

3. When the property taken is a horse, mare, gelding, cow, steer, bull, calf, mule, jack, goat, jenny, sheep or hog, or a fox of any breed or a cross thereof, when in captivity and owned or held for the purpose of breeding or of fur production.

Mr. President, I move for the adoption of this resolution.

MEMBER OF AUDIENCE: Seconded.

MR. MERRILL: Thank you. The motion has been made. Is there a second?

MEMBER OF AUDIENCE: Second.

MR. MERRILL: Is there any discussion?

MEMBER OF AUDIENCE: I would like to direct one question. Is there any thought given to the idea of eliminating this section that makes every small farm animal subject to grand larceny?

MR. BENNETT: No, there wasn't.

MR. MERRILL: Any further discussion? There being no further discussion I will place the matter to a vote. This again is a vote by association.

MEMBER OF NINTH DISTRICT BAR: Mr. President, the Ninth District would like to vote no. Our district approved $100 limit on it, but not the $250 limit.

MR. MERRILL: The vote is aye. The Chair declares the resolution passed. Mr. Bennett.

MR. BENNETT: Resolution No. 3.

BE IT RESOLVED: That the Supreme Court of the State of Idaho be encouraged to adopt rules of criminal procedure and that said Court, if it does not have adequate funds for this purpose, ask the assistance of the Code Commission in any preliminary work or studies necessary in the preparation of said rules and any proposed legislation which may from time to time be necessary to segregate substantive from procedural law.

Mr. Chairman, I move the adoption of this resolution.

MR. MERRILL: Do I hear a second?

MEMBER OF AUDIENCE: Seconded.

MR. MERRILL: Is there any discussion on the resolution? Being no discussion this matter will be placed for a vote by association. The Chair declares the resolution passed. Mr. Bennett.

MR. BENNETT: Resolution No. 4.

BE IT RESOLVED: That the Idaho State Bar appoint a committee to study

the adoption of some system for the removal of Supreme, District, Justice and Probate judges, who, during their term of office, become incompetent by reason of physical and/or mental infirmities and unable to perform the duties of their office; that a study be made of the new procedure adopted in this regard by the State of California and that appropriate legislation therefor be prepared and submitted to the Idaho State Legislature.

Mr. Chairman, I move the adoption of this resolution.

MR. MERRILL: Do I hear a second?

MEMBER OF AUDIENCE: Second.

MR. MERRILL: Is there any discussion. There being no discussion the matter will be placed to a vote. This, gentlemen, is only for a study. The vote will be each individual indicating a preference on the floor. All those in favor of the resolution please say aye. Opposed? Resolution is carried. Mr. Bennett.

MR. BENNETT: Resolution No. 5.

WHEREAS, 16-1506 of the Idaho Code provides that upon the filing of a petition to adopt a minor child by a person unrelated to the child or unmarried to a natural parent of the child a copy of the petition together with a statement containing the full names and permanent address of the child and the petitioners shall be served by the court receiving the petition on the Commissioner of the Department of Public Assistance and that the Department of a child-placing agency shall verify the allegations of the petition and make an investigation of the matter and report his findings in writing to the court and return all papers, records or files relating to the adoption to the court; and

WHEREAS, the code provision further provides that if the report disapproves of the adoption of the child, "motion may be made to the court to dismiss the petition;" and

WHEREAS, in actual practice the invesitgation is done by the local representative of the Department and requires a great deal of unnecessary inquisitiveness on his part, asking many trivial and sometimes humiliating questions from the persons seeking to adopt the child; and

WHEREAS, the same type of an investigation is made of the mother of the child and in the case of illegitimacy causes a great deal of unnecessary embarrassment of the mother; and

WHEREAS, this does, in effect, set up the Commissioner of the Department of Public Assistance and his department as a "super-court" and is a further erosion of the traditional functions of our Courts and is a further proliferation of the delegation of judicial authority to administrative bodies and therefore repugnant to our concept of our court system; and

WHEREAS, this portion of the Code is a reflection on the ability and character of our Probate Judges; and

WHEREAS, the provision in the statute providing that motion to dismiss the petition is vague and ambiguous in that it does not indicate who is to

move for dismissal and if it refers to the court, motion to dismiss by the court is inherent and does not need legislative sanction;

NOW, THEREFORE, BE IT RESOLVED by the Idaho State Bar that the provisions regarding the investigation in adoption matters by the Department of Public Assistance be changed by the Idaho Legislature so that they be discretionary rather than mandatory, and that the provision regarding dismissal of the petition be deleted, and that the Idaho State Bar further instruct an appropriate committee to take the necessary action to carry into effect this resolution.

LEGISLATURE OF THE STATE OF IDAHO THIRTY-EIGHTH SESSION

IN THE .....

.....No. .....

By .....

AN ACT

AMENDING 16-1506 AS AMENDED TO PROVIDE THAT UPON FILING OF A PETITION TO ADOPT A MINOR CHILD THE PETITION SHALL BE SERVED UPON THE COMMISSIONER OF PUBLIC ASSISTANCE AT THE DISCRETION OF THE COURT.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 16-1506, Idaho Code, as amended, be, and the same is hereby amended to read as follows:

16-1506. PROCEEDINGS ON ADOPTION.—Proceedings to adopt a child shall be commenced by the filing of a petition together with a copy thereof. Said petition shall be initiated by the person or persons proposing to adopt the child and shall be filed with the probate court of the county in which said person or persons reside and have residence. The petition shall set forth the name and address of the petitioner or petitioners, the name of the child proposed to be adopted and the name by which it shall be known if and when adopted, the degree of relationship of the child, if any, to the petitioner or petitioners and the names of all persons whose consent to said adoption is necessary. The person adopting a child, and the child adopted, and the other persons, if within or residents of the county, whose consent is necessary, must appear before the probate judge of the county where the person adopting resides, and the necessary consent must thereupon be signed, and an agreement be executed by the person adopting, to the effect that the child shall be adopted and treated in all respects as his own lawful child should be treated. But if the parent or guardian of the child, or either of them, is a nonresident of the county where the application is made, such nonresident parent or guardian may execute his consent in writing, and acknowledge the same before any officer authorized by the laws of this State to take acknowledgment of deeds, which consent being filed in the court where the application is made, is deemed a sufficient appearance on the part of such nonresident.

Upon the filing of a petition to adopt a minor child by a person unrelated to the child or unmarried to a natural parent of the child and at the discre-

tion of the court upon the filing of any other petition for adoption, a copy of such petition, together with a statement containing the full names and permanent address of the child and the petitioners, shall be served by the court receiving the petition within five (5) days on the Commissioners of the Department of Public Assistance of the State of Idaho by registered mail or personal service. It shall then be the duty of the said Commissioner, through the personnel of the Department of Public Assistance or through such qualified child-placing agency incorporated under Chapter 11 of Title 30, Idaho Code, as the said Commissioner may designate, to verify the allegations of the petition, and as soon as possible not exceeding thirty (30) days after service of the petition from the Commissioner to make a thorough investigation of the matter and report his findings in writing to the Court, and return therewith the petition, statement and all other papers, records or files relating to said adoption to the Court. If the report disapproves of the adoption of the child, motion may be made to the Court to dismiss the petition.

MR. BENNETT: Mr. President, I move the adoption of this resolution.

MEMBER OF AUDIENCE: Seconded.

MR. MERRILL: The motion having been made and seconded is there any discussion? Being no discussion we will place the matter to a vote. Again, gentlemen, it will be a vote by association. The Chair declares the resolution adopted. Mr. Bennett.

MR. BENNETT: Resolution No. 6.

WHEREAS: The growth of administrative and regulatory agencies within the State of Idaho manifests ever increasing jurisdiction and control over the everyday activities of its citizens;

AND WHEREAS, many claims, demands, assessments, and deficiencies are, in the regular course of business of the administrative agencies of the State of Idaho, assessed against firms, businesses, and individual citizens, calling for the payment of sums of money, or the regulation by rules or otherwise, of various persons, businesses and industries;

AND WHEREAS, by reason of the diverse climate, utilization, and economic development of this State requires that such claims, assesments, deficiencies, rules, regulations, claims or protests are often local or regional in character, or, have much more impact upon certain areas, counties, cities, or individuals of this State than upon the State generally;

AND WHEREAS, many of such claims or rules or regulations relate to small or moderate sums of money, or isolated instances affecting only one individual, firm, or business;

AND WHEREAS, it has been the practice of the Legislature of the State of Idaho, prior to 1964, to place the venue and jurisdiction of all actions in courts and administrative agencies, boards and commissions, in the Third Judicial District, or in Ada County, in the City of Boise, Idaho;

AND WHEREAS, many of the aforementioned firms, businesses, or indi-

viduals are located in areas of the State geographically remote from said Third Judicial District, the County of Ada, or the City of Boise, Idaho;

AND WHEREAS, the cost and expense of many of the citizens of this State in appearing at hearings, producing evidence, being represented by counsel, results in expense to the individual firms, businesses and citizens involved with such dealings with administrative agencies, courts, departments, boards, and commissioners in costs and expenses far in excess of the amount involved;

AND WHEREAS, as a consequence of such economic loss and expenses, the attorneys of this State often feel it necessary to advise their clients that even though moral right and the status of the laws, both statutory and judicial, is in their favor, that it would be uneconomic, expensive, fruitless, and therefore unwise, to appear in person, attend hearings, present evidence, be represented by counsel, or to in any manner have their side of the case, controversy, dispute, claim, protest or appeal heard, solely by reason of the venue and jurisdiction being located in many instances in the Third Judicial District, Ada County, City of Boise;

AND WHEREAS, despite the active cooperation of the members of the Bar of the Third Judicial District and the presentation of such causes, it has been impossible for the members of the Bar of the Third Judicial District to adequately represent clients before boards, commissions, administrative agencies, or in the courts, when dealing with such agencies without the opportunity to personally interview their clients, prepare their evidence, to secure the rights of such persons, firms, or businesses within reasonable economic costs; that in many cases it has been deemed advisable either to drop such proceedings, not appear thereat, or to pay costs, assessments, forfeitures and similar charges, or to submit to rules and regulations which were felt to be grossly unfair and unjust;

THEREFORE, THE IDAHO BAR ASSOCIATION, composed of all of the licensed attorneys of the State of Idaho, in convention assembled at Sun Valley, Idaho, on this 11th day of July, 1964, do hereby resolve:

That it be enacted by the Legislature of the State of Idaho to be the policy of this State that the citizens of this State shall have a right to have any and all causes tried by State Agencies, Departments, Boards, Commissions, and legal actions in the courts in which agencies are involved, in the county of the residence of such citizen, and that all hearings, public or private, to do with any State official, agent, department or commission, or protesting of any rule or regulation, or having of any hearing, shall be in the county of the residence of the citizen of this State affected by such rule or regulation or hearing; that such policy shall be deemed to be governed and limited, and that its application shall be compatible with reason, and convenience of parties; that in the event any State Agency, Board, Commission or Department should desire the removal or change of venue of any such proceedings from the county or residence of the parties, that this may be accomplished upon due application to the District Court of the county of residence of any such party, and that such matters shall be determined by said District Court in like manner as motions of change of venue.

BE IT FURTHER RESOLVED, that the Secretary of the State Bar Asso-

ciation and the legislative committee thereof be instructed to prepare an appropriate bill for presentation to the Thirty-eighth session of the Legislature of the State of Idaho to carry and to effect the provisions of this Resolution, and which would, in effect, (1) substitute for the words "Third Judicial District," the words, "Any judicial district in this State, wherein the defendant, claimant, or regulator resides or does business"; (2) that all of such departments, agencies, boards, commissions, of the State of Idaho, be prohibited from, by rule or regulation or otherwise, specifying what the jurisdiction of any matters before them be heard, determined, or otherwise resolved in the Third Judicial District, or the County of Ada, or Boise, Idaho.

BE IT FURTHER RESOLVED, that the Secretary of the State Bar Association and the legislative committee thereof are further instructed to forward copies of this Resolution, together with the appropriate bill as aforesaid, to all of the newly elected members of the State Senate and House of Representatives of the Thirty-eight session of the Idaho Legislature, on or before November 30, 1964; that said Secretary and members of the legislative committee be further instructed to diligently promote, follow, and urge the passage of such legislation.

STATE OF IDAHO

HOUSE OF REPRESENTATIVES

H.B. No. .....

An Act relating to the venue and jurisdiction of actions and defenses within the State; defining jurisdiction and venue of actions in courts and administrative agencies; providing for hearings, protests and appeals from rules and regulations promulgated by state agencies, department boards and commissions; setting venue and jurisdictions in State Courts, district, and those limited jurisdiction; setting the policy and declaring the policy of the State of Idaho.

Be it enacted by the Legislature of the State of Idaho.

Section I. Policy.

It is hereby declared to be the policy of this State that the citizens of the State shall have a right to have any and all causes tried by State agencies, department boards and commissions and where such are involved in District Courts in the county of the residence of such citizen, and that all hearings public or private to do with any State official, agent, department or commission or protesting of any rule or regulation or having of any hearing shall be in the county of the resident of a citizen of this State affected by such rule or regulation or hearing so far as is compatible with reason, and convenience of parties.

Section II. Definitions used in Idaho Statutes and the Idaho Code, and statutory terms defined. The following words have, in the compiled laws, Idaho Code and Idaho statutes the significance attached to them in this section, (1) The words "third judicial district" shall mean any judicial district in this State. (2) The words "Boise, Idaho" shall mean any county seat in this State in any county of the State.

Section III. In any proceeding in this State in which the statute otherwise grants exclusive or proper jurisdiction to be held in either Boise, Idaho, or in the Third Judicial District, such hearing or proceeding shall occur and must be heard or tried in the county in which the defendant, protestant, respondent or party primarily affected, or some of them, reside, at the commencement of the action; or, if none of such parties reside in the State. or, if residing in this State, a county in which they reside is unknown to the instigator of the action, the same may be tried in any county which the said instigator may designate, subject to a change to county of residence.

Any Court or Judge, hearing officer, or person or commission, must, on motion, when it appears by affidavit or other satisfactory proof, change the place of trial to the proper county.

Section IV. Any action to enforce any administrative order of this State, the determination of any administrative decision, body or person, to which judicial review is authorized by law, may be reviewed in the District Court for Ada County or the county in which the aggrieved citizen resides or has its principal office or place of business, but the Third Judicial District in and for Ada County, shall not be the exclusive venue or place of jurisdiction, but the same said venue and jurisdiction shall be shared by each and every county in the State of Idaho and each and every Judicial District.

MR. BENNETT: Mr. President, I move the adoption of this resolution.

MEMBER OF AUDIENCE: Second.

MR. MERRILL: The motion has been made and seconded. Is there any discussion?

MR. PAUL ENNIS: Mr. Chairman, the other day at the meeting of the Resolutions Committee I thought that, as a representative of the Third District Bar, I made a rather reasonable, if not eloquent statement, in opposition to this bill, and as I remember it after due deliberation a vote was taken and my vote was the only one recorded in opposition to it. I assume that the vote there reflected the instructions of the other district bars, and a similar outcome will prevail here today. I might explain to the members who are here today, however, that the Third District Bar did appoint a committee composed of Mr. Willis Moffat, Mr. Tom Miller and Dale Clemons. They studied this proposal very carefully and came up with a four page report, which I am not going to read, but I would like to quote just the last paragraph of it, if I may. It reads as follows:

"Your committee recommends that the Third District Bar Association oppose this resolution and proposed legislation. Besides being ambiguous, general, and probably impractical in performance, the proposal would increase the cost of the administrative agencies greatly. The committee assumes that there must be some specific demand for hearings of specific commissions or of certain actions now triable in courts of Ada County, and recommends that the Bar Association at its convention appoint a committee to make recommendation relative to the venue of hearings of specific agencies, commissions or matters, rather than the general ambiguous proposal now presented." And I would like to close by this general remark that I believe if we have studied this bill carefully you will agree with the committee as to its impracticability and its ambiguity in certain respects, and I believe that

you are imposing an impossible condition on your Legislative Committee. I just believe, and our attorneys in the Third District Bar believe, that the legislature would not be able to adopt this, and the Legislative Committee under the circumstances would have to report back to the commission, and I assume this is still the procedure, that the proposed bill is unacceptable in form, content, and ask that it be relieved of going further in support of the bill.

MR. MERRILL: Any further discussion?

MR. PHIL PETERSON: Mr. President, in reading the bill I noted that in private rule making, a public hearing would be required, and that the hearing would apparently have to take place in every area of the State where any individual would be affected by the proposed rule. As I remember correctly the administrative practice act was passed by the legislature last time but vetoed by the Governor. The bill would have required a hearing under the proposed rule. I believe this bill would require such a hearing to take place at any place throughout the State, and I would think for that reason it would be impracticable in its application.

MR. MERRILL: Any further discussion?

MR. GLENN COUGHLAN: Mr. Merrill, was there an actual proposed bill attached to this preliminary statement that Mr. Bennett read?

MR. BENNETT: Yes. There was, Mr. Coughlan.

MR. MERRILL: Any further discussion? There being no further discussion the matter will be placed to a vote. This again, gentlemen, by association.

MEMBER OF NINTH DISTRICT BAR: Yes, Mr. President, with the following comment: We would like to recommend and suggest that the bill be studied very closely to make sure that the bill only encompasses the various administrative agencies originally set out in the petition there; that certain matters still be left to be tried in the Third District other than the administrative agencies mentioned there.

MR. MERRILL: That is by way of explanation of the vote. The vote will be cast as aye, is that correct?

MEMBER OF NINTH DISTRICT BAR: Yes, sir.

MR. MERRILL: The Third District and the Shoshone District Bars voted no but all other local Bars having voted aye, the chair declares the motion passed. Mr. Bennett.

MR. BENNETT: Resolution No. 7.

Judge Emory T. Knudson is a candidate for reelection as Justice of the Supreme Court of the State of Idaho. He has already rendered distinguished service as a Justice in that Court, and has the confidence of the citizens of the State and the respect of the Idaho State Bar. He merits recognition and consideration.

The Idaho State Bar, therefore, endorses the candidacy of Judge Knudson and recommends his reelection as Justice of the Supreme Court.

Mr. Chairman, I urge the adoption of this resolution.

MEMBER OF AUDIENCE: Second.

MR. MERRILL: The motion having been made and seconded. Is there any discussion? Being no discussion the matter will be placed for a vote, and it is the ruling of the Chair that this vote will be by association. The Chair declares the resolution unanimously adopted. Mr. Bennett.

MR. BENNETT: Resolution No. 8.

BE IT RESOLVED that the Idaho State Bar express its sincere and grateful appreciation to the employees of Sun Valley for their efficient and courteous service to the members of the Idaho State Bar, their wives and guests during the annual meeting at Sun Valley.

Mr. Chairman, I urge the adoption of this resolution.

MEMBER OF AUDIENCE: Seconded.

MR. MERRILL: The motion having been made and seconded, is there any discussion? There being no discussion this can be a vote by voice of those on the floor. All those in favor say aye. Opposed? The Chair declares the resolution adopted. Mr. Bennett.

MR. BENNETT: Resolution No. 9.

WHEREAS, the Bender-Moss Company, Bancroft Whitney Company, The Caxton Printers, Ltd., the Bobbs-Merrill Company, Matthew Bender & Company, the West Publishing Company, and Commerce Clearing House have generously donated various legal publications for door prizes at this annual meeting, and

WHEREAS, the Mutual of Omaha has donated the funds necessary for the coffee break we had this morning,

BE IT RESOLVED, that the Idaho State Bar extend its thanks and appreciation to these companies for their generous prizes and contributions which contributed to the interest of those attending this meeting. Mr. President, I urge the adoption of this resolution.

MEMBER OF AUDIENCE: Second.

MR. MERRILL: Motion having been made and seconded, is there any discussion? Hearing none, it will be put to a voice vote. All those in favor? Those opposed? Chair declares it passed. Mr. Bennett.

MR. BENNETT: Resolution No. 10.

BE IT RESOLVED that the Idaho State Bar extend to Mr. Joseph A. Ball, Thomas F. Lambert, Jr., John F. Boland, Jr., and Hon. William E. Doyle our most sincere thanks and grateful appreciation for honoring us by their personal appearance at our annual meeting and delivering to us their inspiring and interesting, and most instructive addresses.

Mr. President, I urge the adoption of this resolution.

MEMBER OF AUDIENCE: Second.

MR. MERRILL: The motion having been made and seconded, is there

any discussion? All those in favor say aye. Opposed? Motion is declared passed. Mr. Bennett.

MR. BENNETT: Resolution No. 11.

BE IT RESOLVED that the Idaho State Bar express its appreciation to the commissioners and the officers of the Bar who have served during the past year for their contribution of time and effort which has resulted in accomplishments of an active and productive year of bar activity.

Mr. Chairman, I urge the adoption of this resolution.

MEMBER OF AUDIENCE: Second.

MR. MERRILL: The resolution having been made and seconded, is there any discussion? All those in favor? Opposed? I declare the motion passed. (Applause.)

MR. BENNETT: I want to take this opportunity to thank the members of the Resolutions Committee and the members of the Idaho State Bar for the very fine and prompt way in which they handled their resolutions, in which they met with us and urged the adoption and cooperation with the Resolutions Committee during the year. It certainly made our work easier and made your work a lot shorter this morning.

MR. MERRILL: Thank you, Bob. May I also express the appreciation of the commission to the presidents of the local bars who are members of the resolutions committee and Mr. Bennett, their chairman. I think they have done a fine job and I would like to congratulate them.

Do I have any resolutions, motions from the floor?

MR. TOM MILLER: Mr. President, I have a resolution, Resolution No. Twelve. I regret that the following resolution was not prepared in time to submit to the local bars and to the Resolutions Committee. It has been prepared by the Committee on Lower Court Reform, and it reads as follows:

WHEREAS, the report of the Bar Committee on Lower Court Reform was presented to the members of the Idaho State Bar in convention assembled at Sun Valley, Idaho, on July 9, 1964; and,

WHEREAS, it is the consensus of the Bar that the recommendations contained in such report have merit, and should be studied further, and supplemented and perfected prior to presentation to the Legislature and people of the State of Idaho; and,

WHEREAS, any significant and workable plan of court reform in Idaho can be adopted only after intensive accumulation, organization and analysis of all pertinent statistical data, including that relating to expected caseloads, geographical factors, income, expenses and need for and availability of judicial and staff personnel; and

WHEREAS, there is necessity for a substantial appropriation by the Legislature in order to carry out the foregoing; and,

WHEREAS, the Constitution should be amended so as to permit six-man

jury trials in cases within the jurisdiction of the proposed lower court system; and,

WHEREAS, the Supreme Court and District Courts are presently without adequate fiscal staff personnel, and lack the assistance with which to carry out the mandate of HJR 10; now, therefore,

BE IT RESOLVED, that the Idaho State Bar request that the Legislature appropriate at least $25,000 for a thorough and complete study of court reform in Idaho, in which study the Bar shall lend its advice and assistance; and,

BE IT FURTHER RESOLVED, that the Idaho State Bar request that the Legislature adopt a joint resolution for submission to the people at the general election in 1966, on the question: Whether the Constitution shall be amended to permit six-man jury trials in cases within the jurisdiction of courts inferior to the District Courts; and,

BE IT FURTHER RESOLVED, that the Idaho State Bar urge the Legislature to enact a statute in form similar to the Model Act to Provide for an Administrator for the State Courts, adopted in 1948 and amended in 1960, by the Commissioners on Uniform State Laws; and,

BE IT FURTHER RESOLVED, that the Board of Commissioners of the Idaho State Bar be authorized to submit to the local bar associations said committee report for further study and recommendations, and to take such other action as it shall deem proper and advisable to carry out the spirit and intent of the foregoing resolution.

Mr. President, I move to take a vote on the question of whether the rules will be dispensed with, and I also move the adoption of this resolution.

MEMBER OF AUDIENCE: Second.

MR. MERRILL: Thank you, Mr. Miller. By way of clarification, the rules governing proposed resolutions require that resolutions presented from the floor must be accepted for submission by two-thirds vote of those present and voting. This is the same rule we have in the Resolutions Committee. I will, therefore, call for the vote relative to the submission of this proposal as to whether or not we shall be able to consider it. All those in favor please raise your hands. All those opposed? It has been unanimously voted that the matter be proposed. Therefore, the matter that is before this house is the resolution presented by Mr. Miller. It has been seconded. Is there any discussion? Hearing no discussion I will put the matter to a vote. This is a combined type of resolution and the Chair will rule that it will be voted on by association. I declare the resolution adopted unanimously.

Are there any other resolutions from the floor?

I would like to take this opportunity to personally thank the committee of the State Bar on Court Reform Mr. Tom Miller and George Bell for their excellent work they have performed in getting this problem off the ground so we have a chance for the State Bar to act upon it.

I also would like to thank Jim Donart, my shortstop for the morning.

And now just one or two words. I would like to thank also as President,

Mr. Alden Hull, general chairman of the convention, who arranged the program, for a most excellent program. The comments I have heard have indicated to me, although I am somewhat prejudiced, that the membership of the Bar has accepted this as a very excellent program. (Applause.)

I have two other things. One is my distinct pleasure to introduce to you the new president of the Idaho State Bar, Mr. Alden Hull of Wallace. Alden. (Applause.)

MR. HULL: Mr. President Merrill, immediate past-president Glenn Coughlan, Ed Benoit, President-elect Kidwell, and gentlemen of the Bar. What I say, and what I am about to say I think you can guess, but what is in my heart today I am sure only those who have stood here before me can express that. Because I am not able to put into words my feelings I can assure you that my remarks will be extremely short. This job, and it is a job, is one that is certainly humbling, and it becomes increasingly so as I tour about the country attending meetings of other bar associations to find the high regard that this Bar has held, and I must say that we are the envy of many Bars because of the fact we are very companionable; and second, because the lawyers of the State of Idaho conduct themselves with a high degree of responsibility. When I hear disciplinary problems and the other problems that confront other commissions about the Nation your Commission here can indeed be proud of the lawyers of this state, and I feel that this is being felt by the lawyers of this State. I think there is indeed a sense of pride in the Idaho State Bar.

Now I would be very remiss if I didn't take this opportunity to call your attention to the tremendous task that Wes Merrill has done the past year, and I know that Glenn Coughlan was equally capable the year before last when I served with him. I would estimate that Wes Merrill has been out of his office 60 to 90 days this past year on Commission business. If he hasn't been out of the office he has been devoting time to Commission affairs. I also know that Wes is the type of lawyer we all can be proud of. He has the highest degree of integrity, and he is so proud of this organization. I don't want to become maudlin about it, but it is one of the greatest experiences of my life to have known Glenn and to know Wes. I have known Wes and Ed Benoit, and I know Vern Kidwell. I know I got a tiger by the tail, and I think we are going to have a working Commission.

I am not going to go into the plans of the Commission for the future. We are going to, of course, carry out your mandates as best we can. I am going to say this, that our experience with use of the General Counsel has been excellent, and the disciplinary proceedings handled the past year by using a regular Prosecuting Committee with General Counsel acting as both investigator and prosecutor has been very successful. We are disposing of those maters much faster and much more accurately. I feel that the attorneys in this State should appreciate the fact that there are capable young men who are willing to handle their assignments as General Counsel. We are going to experiment further with the use of retained attorneys. We are going to expand into the field of the unauthorized practice of law; use the services of General Counsel in that area. As you know when the Commission approached you two years ago and asked your support for an increase in license fees this was the primary request; that is, the use of General Counsel for the unauthorized

practice of law, and discipline. We are going to attempt to continue and implement the continuing legal education program. I think Bob Huntley has a wonderful start for this fall season. I hope you will all support that institute.

I would not want to leave this platform without thanking Jim Lynch for the tremendous effort he put forth in this convention. I am sure that it will take two files to hold the correspondence that he has written and directed to speakers, to the Sun Valley management, to a thousand and one things that have to be attended to. It is almost unbelievable, and I do personally want to thank Jim for the tremendous effort in this regard. I wouldn't want to leave unnoticed Mrs. Olive Sherer, his stenographer.

I just want to make one more mention here. There is some feeling sometimes that the Commission is an umbrella under which the lawyers of the State can hide; that sometimes instances of unethical conduct, perhaps unauthorized practice of law, are being ignored and that that is the Commission's function. I suggest, gentlemen, that we are all handling it, the Bar, together, and each attorney has still the primary responsibility of being his own policeman, and the Commission is not a place to hide or for the attorneys as a group to hide. We must ask that this spirit continue to exist. The Commission is an administrative body and is responsible for the enforcement of the rules so far as it can, but it is still the individual attorney's responsibility.

Before turning this back to Wess for final words, I want to call on Commissioner, or Vice-President Benoit.

MR. BENOIT: Thank you, Alden. First of all I want to welcome Vern Kidwell as chief errand boy and bottle washer. I will say it has really been a pleasure working with these two gentlemen. Of course, I've known Alden since we were undergraduates at the University of Idaho. He is a very intelligent man. I think it is quite obvious when he picked his wife, a lady from the magic city of Twin Falls. I want to say this about Mrs. Merrill. I will say it in a very few words. He is one of the real true gentlemen I have met. I will say that during his past year our meetings have been, short and well run. Of course, Wes had a certain device he used to make sure that Alden and I behaved and performed correctly, and he wore out this device. Therefore, Alden and I want to give him a little gift to replace it and ask him to hang it on his wall, and when he thinks of his term of office and the two of us he can look at this little jewel. However, Vern Kidwell and I ask that he does not pass it on to Alden Hull. I would like Wes to open this and show you how he has run the commission.

MR. MERRILL: I'm a little suspicious about this, but I have had this chit chat back and forth for a year now. (Applause. Bull whip presented to Mr. Merrill.)

Thank you very, very much. I am advised that the scars from a whiplash on the back disappear within five to six years.

Thank you very much, Alden, for your kind words. I do appreciate them. You know it is the commission that runs the State Bar rather than the president, and the president can't do any better than the Commission, and I would certainly like to thank Alden and Ed for their wonderful support.

It has been a tremendous personal pleasure for me to be president of your Bar, and your cooperation has made the job of president easier and certainly an extreme pleasure. Thank you.

MR. TOM MILLER: Mr. President, I would move a standing ovation for all the members of the commission, the secretary, and particularly for the outgoing president, Wes Merrill. (Loud applause and standing ovation.)

MR. MERRILL: Thank you very much, gentlemen.

Is there any other business to come before this meeting? (No response.)

MR. MERRILL: If not, I do pronounce this convention adjourned. Thank you.

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12:05 P.M.

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