IDAHO STATE BAR COMMISSION

By_____, Secretary

# PROCEEDINGS

*of the*

# IDAHO STATE BAR

VOLUME XII, 1936

TWELFTH ANNUAL MEETING

Proceedings of the

## JUDICIAL SECTION

Second Annual Meeting

Volume II

PAYETTE LAKE INN, McCALL, IDAHO

July 23, 24 and 25

# OFFICERS OF THE IDAHO STATE BAR

## COMMISSIONERS

JOHN C. RICE, Caldwell, Western Division.....1923-25
N. D. JACKSON, St. Anthony, Eastern Division.....1923-25
ROBT. D. LEEPER, Lewiston, Northern Division.....1923-26
FRANK MARTIN, Boise, Western Division.....1925-27
A. L. MERRILL, Pocatello, Eastern Division.....1925-28
C. H. POTTS, Coeur d'Alene, Northern Division.....1926-29
JESS HAWLEY, Boise, Western Division.....1927-30
E. A. OWEN, Idaho Falls, Eastern Division.....1928-34
WARREN TRUITT, Moscow, Northern Division.....1929-32
WM. HEALY, Boise, Western Division.....1930-33
JAMES F. AILSHIE, Coeur d'Alene, Northern Division.....1932-35
JOHN W. GRAHAM, Twin Falls, Western Division.....1933-36
WALTER H. ANDERSON, Pocatello, Eastern Division.....1934 —
A. L. MORGAN, Moscow, Northern Division.....1935 —
J. L. EBERLE, Boise, Western Division.....1936 —

## OFFICERS—1935-36

WALTER H. ANDERSON, President
A. L. MORGAN, Vice-President
SAM S. GRIFFIN, Secretary
212 Capitol Securities Bldg., Boise, Idaho

## LOCAL ASSOCIATIONS

Shoshone County Bar Association, James E. Gyde, Wallace, President; H. J. Hull, Wallace, Secretary.

Clearwater Bar Association (Second and Tenth Districts), Alex Kasberg, Lewiston, President; Edward E. Poulton, Moscow, Secretary.

Third Judicial District Bar Association, E. B. Smith, Boise, President; Kenneth O'Leary, Boise, Secretary.

Fifth District Bar Association, W. C. Loofbourrow, American Falls, President; John Black, Montpelier, Secretary.

Seventh District Bar Association, R. B. Scatterday, Caldwell, President; John T. Kenward, Payette, Secretary.

Eighth Judicial District Bar Association, E. W. Wheelan, Sandpoint, President; George W. Beardmore, Sandpoint, Secretary.

Ninth District Bar Association, Kenneth S. MacKenzie, Idaho Falls, President, Henry S. Martin, Idaho Falls, Secretary.

Eleventh Judicial District Bar Association, J. Paul Thoman, Twin Falls, President; Paul S. Boyd, Buhl, Secretary.

# PROCEEDINGS

MORNING SESSION
Friday, July 24, 1936
10:00 A. M.

MR. GRAHAM: Gentlemen of the Bench and Bar, the time has arrived for calling our annual convention to order. The Commissioners were in doubt as to what kind of program would create more interest in the annual meeting, that is, whether to have some local talent discuss local matters, or have an outside speaker. We had a combination last year. This year we have tried to get subjects with which lawyers have to deal every day, with the hope that you might get a keener interest in the meeting of the Bar.

The first thing in order will be the report of our Secretary, Mr. Griffin.

MR. GRIFFIN. Following the meeting of the Bar at Hailey July 11, 1935, and the election thereat of A. L. Morgan as Commissioner for the Northern Division, the Board met and directed an investigation of alleged illegal practice of law by bond companies, particularly Murphy-Favre Co. of Spokane. Such investigation resulted in the filing of contempt charges in the Supreme Court, which, after hearing, adjudged such company guilty and imposed a fine of $500.00. The company had entered into an agreement with the County Commissioners of Shoshone County to act as fiscal agent in refunding bonds, and had agreed to obtain and employ, in connection with the services it was to render, expert legal services of some bond attorney. Justice Givens, with whom concurred the other Justices, held, in part:

> "The following propositions of law * * * lead to the inevitable conclusion that Murphy-Favre & Co., a corporation, was illegally practicing law. First, being a corporation, it is conceded that it cannot itself practice law, and it may not do indirectly what it cannot do directly. While herein there was but a single transaction, similar agreements providing for a continuous furnishing of legal services have been prohibited. And one instance of practicing law is as much practicing law as many.
>
> "Murphy-Favre & Co. therefore by this contract, in effect obligated itself to practice law illegally, and in its admitted performance thereof * * * did work amounting to the illegal practice of law and therefore is in contempt of this Court, and so adjudged."

The decision is a further step taken by the Board with respect to illegal practice, two previous decisions having been theretofore secured, i.e., In Re Eastern Idaho Loan and Trust Co., 49 Idaho, 280, and In Re Brainard, 55 Idaho, 153. Another case of alleged illegal practice has been filed with the Court and is now pending, and investigations of other instances, brought to the attention of the Board, are being investigated.

As usual, numerous informal complaints against attorneys have been satisfactorily explained to, and adjusted with, clients. In addition, three attorneys have been suspended by the Court, after proceedings by the Board, for practicing without payment of annual license fees. Application of one for reinstatement has been denied, and of one

granted. Two attorneys, after trials, were reprimanded by the Court upon recommendation of the Board. A committee to prosecute contempt charges against an attorney alleged to have made false statements in Court papers has been appointed. The Board dismissed three complaints on the ground that the dispute was the subject of civil action; four dismissed as stating no cause of action; and in two disciplinary proceedings have been ordered and are pending.

In connection with discipline the Board has been studying changes in the Rules, and will shortly present such changes to the Supreme Court.

Investigations relative to illegal practice of law have been conducted in Caribou, Bannock, Latah, Clearwater, Nex Perce, Idaho, Lewis and Twin Falls Counties. A letter explaining the decisions and definition of practice of law was prepared and, through co-operation of the Idaho State Bankers Association, sent to every banker in Idaho.

One of the more important activities of the Board has been organization of local bar associations. After considerable discussion a rule was proposed to the Supreme Court, and by it adopted as Rule 49, in substance directing the Board to organize the entire State into local associations, with boundaries determinable by the Board, all members of the Bar within such boundaries being members thereof, and permitting such locals a large measure of local self government. Pursuant thereto the following have been organized:

Shoshone County Bar Association (First Judicial District)
Clearwater Bar Association (Second and Tenth Districts)
Third Judicial District Bar Association
Fifth District Bar Association
Seventh Judicial District Bar Association
Eighth Judicial District Bar Association
Ninth Judicial District Bar Association
Eleventh Judicial District Bar Association

leaving but the Sixth and Fourth Judicial Districts to be organized. Each has adopted tentative By-Laws, and committees from each are to meet July 23rd, in an endeavor to adopt uniform by-laws, which the Board hopes to have adopted, and enforceable, as Rules of the Supreme Court.

Two examinations for admission were conducted. There were 34 applicants for examination, 2 were rejected before examination; there were 6 failures in examination (two failed twice). Three of those failing applied to the Supreme Court for review of examination, of which 2 are pending, and of which 1 was admitted by the Court on review. Twenty-eight were recommended by the Board, and with the 1 above, make 29 admitted or entitled to admission.

There were 6 applicants for admission by Certificate, 4 of whom were rejected by the Board, and 2 recommended and admitted.

The Board has been studying revision of Rules of Admission, and will shortly recommend changes to the Supreme Court.

The members of the Board have given 20 days (exclusive of time in travelling, and in their own offices) to the nine formal Board meetings held since the last annual meeting of the Bar.



## APPROPRIATION

| | |
|---|---|
| Balance July 1, 1935 | $ 3112.63 |
| Receipts from license fees | 3335.00 |
| | $ 6447.63 |

## EXPENDITURES

| | | |
|---|---|---|
| Office expense | | $ 1324.64 |
| Personal services | $ 1080.00 | |
| Supplies, etc. | 244.64 | |
| Travel expense | | 788.48 |
| Meetings | | 325.25 |
| Publication 1935 Proceedings | | 510.13 |
| Examinations | | 127.49 |
| Discipline | | 165.99 |
| Survey Committee | | 3.50 |
| | | $ 3245.48 |
| Balance in appropriation July 14, 1936 | | $ 3202.15 |

It may be interesting to note the relation of income to expenditures during the past five years:

| | Income | Expense | Balance | —Balance |
|---|---|---|---|---|
| 1932 | $ 2,915.00 | $ 2,878.77 | $ 36.23 | |
| 1933 | 1,805.00 | 2,338.48 | | 533.48 |
| 1934 | 3,208.00 | 2,220.89 | 987.11 | |
| 1936 | 2,545.00 | 3,449.63 | | 904.63 |
| 1936 | 3,335.00 | 3,245.48 | 89.52 | |
| | $13,808.00 | $14,133.25 | $1,112.86 | $1,438.11 |

Excess of expense over receipts in five years $325.25

In other words, funds do not permit of any increase in activities entailing expense by the Board.

## LICENSED ATTORNEYS

The 1935 report of the Secretary showed a decrease of number of attorneys licensed, from 1931 to 1935, of 34. For this year an increase of 10 is noted.

| | 1935 | 1936 |
|---|---|---|
| Northern Division | 121 | 122 |
| Eastern Division | 131 | 131 |
| Western Division | 271 | 277 |
| Out of State | 23 | 26 |
| | 546 | 556 |

The following deaths have been reported:

T. K. Hackman, Twin Falls
Wm. J. Hannah, Orofino
Chas. W. Sandles, Idaho Falls
Samuel O. Tannahill, Lewiston
Warren Truitt, Moscow
Frank T. Wyman, Boise
J. H. Richards, Boise

MR. GRAHAM: In the absence of any objection the report will be received and placed on file.

MR. A. L. MORGAN: I want to ask a question with respect to out of state members of the Bar.

MR. GRIFFIN: Those are members who have at one time been admitted and have removed and are still paying their annual license.

MR. GRAHAM: There is an election in the Western Division this year. I will appoint as canvassing committee: Paul Thoman, Twin Falls, Clarence Thomas of Burley and McKeen F. Morrow of Boise.

The next thing on the program is a report of the prosecuting attorneys' section. We have heretofore had the judicial section, and we have created also the prosecuting attorneys' section so that they may meet the day before the convention and thresh out their difficulties and render such recommendations or report to this body as they see fit. I will now ask the chairman of the prosecuting attorneys' section if he is ready to report.

MR. BABCOCK: The section of the prosecuting attorneys met yesterday afternoon, and we had a remarkably better attendance than we had a year ago. Prior to this meeting I wrote the prosecuting attorneys of every county in the state and asked them to determine any changes or any recommendations they would like to make in regard to criminal procedure and statutes in this state. Yesterday we had quite a few suggestions and we have decided to appoint a committee to investigate and draw up changes in the criminal statutes and meet in Boise at the time the Legislature meets and try to get through these changes. One change is that we establish a state police system for the assistance of the prosecuting attorneys; also some changes in regard to insanity as a defense in a criminal action, and also some changes in regard to filing several counts in an information similar to the California practice. There were also suggestions to reduce some of the indictable misdemeanors to misdemeanors.

The resolution relating to the defense of insanity follows the California statute. We had some different ideas on what we should try to accomplish, hut at this time we thought maybe we were a little bit radical, so we followed the California statute as follows:

"19-162. KINDS OF PLEAS.—There are five kinds of pleas to an indictment. A plea of:

1. Guilty.
2. Not guilty.
3. A former judgment of conviction or acquittal of the offense charged, which may be pleaded either with or without the plea of not guilty.
4. Once in jeopardy.
5. Not guilty by reason of insanity.

A defendant who does not plead guilty may enter one or more of the other pleas. A defendant who does not plead guilty by reason of insanity shall be conclusively presumed to have been sane at the time of the commission of the offense charged, provided that the court may for good cause shown allow a change of plea at any time before the commencement of the trial. A defendant who pleads not guilty by reason of insanity, without also pleading not guilty, thereby admits the commission of the offense charged."



The other one also follows the California statute:

"Sec. 19-1313. TWO OR MORE OFFENSES IN ONE INDICTMENT. An indictment, information, or complaint may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more indictments or informations are filed in such cases the court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the indictment or information, but the defendant may be convicted of any number of offenses charged, and each offense upon which the defendant is convicted must be stated in the verdict; provided, that the court in the interest of justice and for good cause shown, may, in its discretion, order that the different offenses or counts set forth in the indictment or information be tried separately, or divided into two or more groups and each of said groups tried separately. A verdict of acquittal of one or more counts shall be deemed or held to be on acquittal of any other count. (Section 954, Penal Code of California, 1931.)"

We met together with the judicial section and adopted a resolution appointing a committee for enacting recommendations by Judge Koelsch which were proposed by him in the judicial section.

MR. GRAHAM: Consideration of the resolution might be deferred until such time as we hear the discussion of Judge Barclay.

I am glad to see so many prosecutors here, and if you don't get what your are entitled to just blame yourselves, because there are 44 of you and if you come in here and strike you can get anything you want because you have the votes to do it.

Custom has established the practice that the President make some remarks at this annual meeting. To follow that precedent, I have a few suggestions to offer:

Gentlemen of the Bench and Bar, for some time before and since I was elected as Commissioner of the Bar, I have realized that relatively few lawyers of this state knew about the work and purposes of the Bar organization, and that relatively few come to the annual meetings of the State Bar. Since many lawyers would not or could not come to our annual meetings, it seemed to me that the thing to do was, and is, to take the Bar activities out to its membership, explain its work to them, and help them to see the real need for a vigorous, live state organization, and to discuss with them the ways and means of giving to the average lawyer a part and place in the work, the policies and the control of the State Bar.

With that object in view, the Bar Commissioners have definite plans and are now trying to carry these plans into execution to make membership in this State Bar useful and even indispensable to the average lawyer in his profession. The plan is to form a local Bar Association in each and all of the Judicial Districts in the State, each District to be an entity in and of itself, requiring all members of the Bar in that

District to be members of the local District Association, leaving to the Local District Association as much home rule and self-government as possible, subject, however, to such supervisory powers by the State Bar Commission and the Supreme Court as may be necessary to make an efficient working organization. The Bar Commissioners are now trying to work out such a plan with the locals and hope to have the same in operation shortly. The purpose of this is to work out a plan of co-operation and co-ordination between the Locals and the State Bar so that each member of the Bar in this State will fully realize that he is a part and parcel of a live State organization.

There are at present about 550 lawyers in the State and with a license fee of $5.00 per, we can raise only about $2750.00 per year. Out of this we have to pay a secretary, pay the travelling expenses of the Commissioners, conduct two Bar examinations a year, institute and prosecute such complaints as the Commissioners may find necessary, paying all expenses connected therewith, printing our annual proceedings and such other incidental expenses as may arise. With our funds so limited, the scope of work of the State Bar Commission must, of necessity, be limited.

There are two main objects to be attained by the State Bar Commission to justify its existence, which are:

(a) To put an everlasting stop to the members of the Bar indulging in unprofessional conduct, thereby bringing themselves into disrepute and lowering the standing of the legal profession in the community, the State and Nation. There was a time some thirty for forty years ago when the lawyers were the leaders in the community, and their counsel and advice were sought on social, civic, religious, political and economic matters, but such is not the case at the present time. With a full realization of these facts, it is up to us as members of the legal profession in Idaho to restore the legal profession to its once enviable position in the community.

(b) To prevent members of the laity from performing duties and rendering service to the public rightfully belonging to the legal profession. Thousands upon thousands of dollars in fees are being lost annually which rightfully belong to the profession. This practice results in a great economic loss to the puhlic and the profession.

The Judicial branch of our government is a separate and distinct branch of our government which should be operated, manned and controlled by the lawyers of this state. The method of procedure in all its phases, both civil and criminal, should be defined by rules of the Supreme Court rather than by legislative enactment. The Supreme Court should constitute the administrative and governing body or cabinet of this branch of the government. The Bar Commission should be, and is, a commission under the control and supervision of the Supreme Court, looking after the admission of new members to the ranks and investigating and prosecuting violations of rules of the Supreme Court.

The responsibility for the administration of justice falls squarely on the shoulders of the administrative officers of this branch of our government, that is, the Justices of the Supreme Court. That responsibility should be gladly assumed hy that Court. If there are any laws,



rules or regulations on the Statutes of this State, which hinder or delay the speedy administration of justice, then they should be repealed, if legislative enactments, and the Court adopt a complete set of rules governing practice and procedure in all courts that will speed up the adminstration of justice. In other words, I want the Supreme Court to exercise those latent constitutional rule-making powers which it possesses and make its own rules, rather than have the legislative branch of the government tinker with something they know nothing about. If this practice were adopted, I feel that a lot of criticism now directed against the lawyers and courts for seemingly unnecessary delays, particularly in criminal cases, could be easily overcome.

The Constitution is the fortress of our freedom. It is our only refuge against the storms of oppression. It is a written, definite expression of the fundamental principles of human liberty and justice that never have changed and never can change; and it is a solemn compact between the founders of our Nation, and the present generation, and the generations that are to come that these principles of liberty and justice shall be preserved unto us and to those who come after us.

But there are politicians today who would, either by unlimited extension of the Doctrine of Implied Powers or by indirect amendment of the Constitution, or by discarding it entirely, revert to a government of men instead of a government of laws, and regulate and control the minutest details of our every-day lives and business until our people are deprived of every vestige of liberty and our citizens of their very manhood.

As conditions change it may be, and it has been, necessary to change and amend the Constitution, so far as it applies to the mechanics of government. Ample provision is made for amendment in this respect, and it has been so amended on many occasions, but these changes should be made only when the great majority of the people, who are the government, after due deliberation consent to the changes, and not at the whims of any politician, or group of politicians, or any political party.

And these changes should be in matters purely governmental only, and not to deprive the citizens of their liberties. For the fundamental principles of human liberty can never change and cannot be amended. And the Constitution stands as a protection to these principles of liberty and justice, and says to any ambitious politician or any ambitious congress, or any ambitious government,

"Beyond this point you shall not go."

It is the only restraint upon the thoughtless future generations from the tempting excess of political power. If this restraint is removed, the American Democracy, with its principles of liberty and justice, will surely perish.

The first duty imposed upon the lawyer by the Statutes of the State of Idaho and the first sworn obligation of his oath is to support the Constitution of the United States. In times of National Emergency, when politicians find their power limited and their ambitions thwarted by a written Constitution, and the Constitution is under

attack, the Courts and the lawyers are its natural guardians and its strongest defense.

The Constitution was written by lawyers, and the lawyers and judges have been its sturdy wall of defense, whenever it has been attacked; and the various courts and Bar Associations of our country must rally to its defense today and assume their natural position as defenders and guardians of the Constitution and protectors of the liberties which it guarantees.

## RECOMMENDATIONS

I recommend to the Bar Commissioners:

First: That all outside lawyers desiring to come to Idaho to practice law be required to establish a bona fide residence in the State for six months before they are eligible for admission, and that they be required to take the examination the same as other resident applicants, and that the present practice of admitting non-resident applicants by certificate be discontinued.

Second: That the Bar Commissioners tighten up on the grading of applicants, thereby raising the standard of applicants. If, on the other hand, applicants for admission gain the impression that all graduates of the College of Law are admitted, then our College of Law will be flooded with students and the profession over-crowded with lawyers. The profession must be protected.

MR. GRAHAM: In the absence of Mr. Oversmith, who is ill, and Mr. Black, who is unable to be here, I want to appoint this temporary resolutions committee: Carey Nixon, Mr. Boughton and Judge Varian.

The next subject has been prepared by one of our District Judges on the question of Defense of Insanity in Idaho Criminal Cases, Adam B. Barclay. Judge Barclay.

JUDGE BARCLAY: Mr. Chairman, and gentlemen of the convention. What I have to say is on the subject of insanity as a defense in criminal cases generally. Of course, it is tied into Idaho law in lots of phases and some of it has not yet reached us. The subject itself is not one which is in prominence with the Bar or public generally. It only comes into notice when a tragedy has occurred some place, and those interested in taking care of what has happened, the district judge, prosecuting attorney and defense counsel, have to go to digging in the books, because they have not been required to dig into it before. So I covered the subject pretty generally, and perhaps will have something to say about the proposed recommendation on the part of the prosecutors here, which, of course, I didn't know about when I prepared this article.

The substantive rules of criminal law governing insanity are ambiguous and confused. The human mind is as little understood as the mystery of life or any other phenomena or nature which man has not yet been able to analyze or understand. It necessarily follows that there is a great confusion among the authorities in their attempt to define and apply legal tests of mental responsibility.



There is an extreme divergence of opinion as to what is the legal conception of insanity, and it is all based on ancient precedents. English and American courts still cite Blackstone, who in turn cites Lord Hale who lived sometime in the 1600's, when judges and priests associated insanity with demons, witch-craft, sorcery and the like, and sought to stamp it out by torture and the stake. As a sample of such trend of thought, Lord Hale had this to say concerning some phases of dementia, which to him would have perhaps explained what the modern psychiatrists and some courts denominate "irresistable impulse," "manic depressive," "uncontrollable mania," and the like:

> "The moon," said Hale, "hath a great influence on all diseases of the brain, especially in this kind of dementia: such persons, commonly in the full and change of the moon, especially about the equinoxes and summer solstice, are usually at the height of their distemper. . . . But such persons as have their lucid intervals (which ordinarily happens between the full and change of the moon) in such intervals have usually at least a competent use of reason. . . ."

In the year 1800 Lord Erskine, as counsel for defense, in his argument tried to lay down a universal test of responsibility in cases where the defendant suffered from mental disease. Delusion, he said, in cases where there is no frenzy or raving madness, is the true character of insanity. This test was more or less followed by the English and American courts until the year 1843, at which time the House of Lords requested the opinion of all of the judges of England as to what was the proper test of mental responsibility, the result of which is known as "The Opinion of the Judges," in which was laid down the rule that knowledge of right and wrong was the test to be applied. About the same time two early American state courts, Massachusetts and Pennsylvania, attempted to lay down the same rule, but in addition thereto attempted to deal with "irresistable impulse," "homicidal mania," etc. Later, various courts in both countries have devoted their talents to expounding what they conceive the correct rules on the subject, and it remains today almost as confused as ever. In some states the legislatures have tried to establish a statutory test. Erskine's theory has been abandoned. Thousands of opinions have been written, trying to lay down correct rules as legal tests of responsibility, with the result that the subject yet remains a most fertile field of debate.

One author says, "No matter what charge a trial judge may give upon the legal test of insanity, it is a poor lawyer who cannot find some flaw in it upon which to argue for reversal, and more cases in which insanity is an issue are reversed for an erroneous wording of the test, or for refusal to grant correct instructions, or the giving of erroneous instructions regarding the test of insanity, than for any other reason."

Some of the confusion which arose from the earlier courts trying to attach the irresistable impulse theory onto the "right or wrong" test has been in later years partly cleared up by the courts rejecting the irresistable impulse idea entirely. The rule which is now followed in the majority of the states, that knowledge of right and wrong in

regard to the particular act charged is the only test of responsibility, rejects the irresistahle impulse test, by implication, and the most of the states have rejected it expressly, some for one reason, some for another. Some courts content themselves by simply saying, "The irresistahle impulse theory has never been adopted as the law in this state," which is perhaps the most clear and cogent reason which could be given and the least liable to dispute, criticism or debate.

A summary of the reasons some of the courts have laid down for rejecting the irresistable impulse test, as near as I can determine, are:

(1) The belief that no such disorder is in fact possible;

(2) If it does exist it is too difficult to prove to be allowed as a defense to crime;

(3) It is a defense too dangerous to society.

So, it would seem that the irresistable impulse theory is on its way out, to join Lord Erskine's test of delusion. Peace be to its ashes. It was certainly dangerous to society.

When we come to the burden of proof it seems that there are two distinct views existing in the American courts: (1) The prosecution must prove beyond a reasonable doubt that the defendant, at the time of the commission of the offense, was sufficiently sane to be held criminally responsible; (2) The defense of insanity is an affirmative defense raised by the defendant himself, and he must prove his lack of mental responsibility at the time of the offense.

Under the second rule there are three variations, in the different jurisdictions, as to the quantum of evidence required. They are: (a) Beyond a reasonable doubt; (b) To the satisfaction of the jury; (c) By a preponderance of the evidence. Twenty-two states have this second rule by applying one of the above named variations. Twelve states say the defendant must prove his insanity by a preponderance of the evidence. Other states of the twenty-two adopt the same rule by using different or additional language, such as "to the satisfaction of the jury," "clearly proved to the reasonable satisfaction of the jury," and such like expressions. In Oregon a statute requires the accused to establish his irresponsibility beyond a reasonable doubt.

Idaho is one of six states which has abandoned the rule requiring the accused to convince the jury of his defense of insanity, and adopted the rule that the burden shifts to the prosecution when a doubt arises in the trial as to mental responsibility of the accused at the time of the commission of the offense charged. Beginning with People v. Walter (1871) 1 Idaho 386, and following down to and including State v. Larkin (1897) 5 Idaho 200, our Supreme Court held that insanity is an affirmative defense and must be proved by the defendant by a preponderance of the evidence. In State v. Shuff (1903) 9 Idaho 115, without expressly overruling the previous cases, the court adopted a different and opposite rule, and since that time has adhered to it,—that the defendant has the burden in the first instance of raising a reasonable doubt as to his sanity, but when such reasonable doubt is raised the burden shifts to the prosecution to prove mental responsibility. Our Supreme Court has not said expressly what quantum of evidence is necessary when a reasonable doubt has been raised and the burden shifted, to meet and overcome the doubt so raised, but



it is to be inferred that nothing less than beyond a reasonable doubt would be sufficient. Our state in this regard seems to follow the minority rule, and the modern text writers seem to agree that the rule of requiring the defendant to maintain the burden is being adopted by an increasing number of courts.

Some jurisdictions recognize mental disorder as ground for reducing punishment. This rule is that the insanity of the accused may be used for the purpose of reducing his crime from murder in the first degree (if it be a homicide charge) to murder in the second degree. In other words, where an accused is somewhat disordered mentally, but not to such a degree as to relieve him from responsibility for crime, the punishment should be reduced. If he is so incapable, he cannot be convicted of murder in the first degree but only for the second degree. This rule has been adopted in eight states and rejected in seven.

Our Supreme Court seems to have settled this question in Idaho, in State v. Wetter, 11 Idaho 433, by approving an instruction which said in part: "If the defendant at the time of the killing was insane, as above defined, he would not be guilty of either murder in the first degree, or murder in the second degree, or manslaughter, and should be acquitted."

The methods or ways and the time in which the question of insanity may be raised are different in each jurisdiction, according to the various state statutes. It is raised in this state, under our statute, under the plea of "not guilty." No other or special plea is necessary. This statute was enacted in territorial days, in 1864, and it seems never to have been amended in this regard. That this puts society to a disadvantage can be seen at once. The time and place of the appearance of the question in the case is within the control of the defendant, and he may, if he choose, spring it in his defense and produce an array of psychiatrists, other expert and non-expert testimony, together with family records, as to none of which the prosecution has been apprised and may be in no position to meet. Under our procedure and practice the trial then assumes a dual purpose, with the State being in the position of being required to prove everything beyond a reasonable doubt. The State must first prove the crime charged; second, if the burden has shifted by the raising of the question of sanity of the defendant, it must prove the sanity of the accused, even under the handicap above stated.

There is a vast distinction between the trial of a criminal case and an investigation or inquisition to determine sanity or insanity. In fact, other than our statutes make it so (and I refer to I. C. A., sections 19-1616 and 19-2205), I have never understood that an inquiry as to sanity is a trial at all. Our proceedings, says the Supreme Court in Re Hinkle, 33 Idaho 605, for commitment of insane under whatever form insanity may arise, are paternal in character, and are not in any sense penal.

By the way, may I discuss what was submitted by the prosecutors?

MR. GRAHAM: Go ahead. The sky is the limit.

MR. BARCLAY: Logically, and in the last analysis, an inquiry into the sanity of an individual is not a penal matter and is not a trial, and to my mind it is extremely illogical to prosecute a man in the guise of a legal action for a thing that he could not possibly be guilty of if he is insane. An inquiry to determine insanity at any point of any proceeding should be separate, totally and completely apart from the inquiry as to the crime. Now, the California statute that the boys have recommended here is not in accord with my idea of this matter at all. To me it was startling. A man accused of the crime there has plead not guilty by reason of insanity; they first try him for the crime, and in that the Legislature has told the Court that he is conclusively presumed to be sane. Now, to me that was an innovation; I don't understand that any Legislature has any right to tell the Supreme Court or any court what is to be conclusive evidence. They have tried it many times, but I have the idea that tbat is not good law and in the trial of a criminal case the burden has always been to establish or prove beyond a reasonable doubt. For the Legislature to assert that when a man is tried he is conclusively presumed to be sane is startling to me, and I wondered how the Supreme Court was going to get by. That was the law, but they said that is not what the Legislature meant, and they interpret it as some do the Bible, that only for the purpose of the trial was he conclusively presumed to be sane. That is not true and it never can be read that way according to the most modern authorities and men who, I think, have given the most thought to this subject and know best what to do. Why do the prosecutors insist on prosecuting a man under the guise of a criminal statute if he is insane and could not commit a crime? No, I think the method should be in some other way that I will point out later.

The rules of evidence in a criminal trial are well known. In cases where insanity is involved there seems to be a complete relaxation of all rules of evidence, if knowledge of the matter testified about can be brought home to the subject; hearsay, true or false, non-expert testimony, conclusions, and anything else, all go in, if they can be shown to have a possible bearing on the conduct or actions of the person under inquiry. Take all these matters introduced under the guise of evidence and add to them the testimony of psychiatrists produced by the defendant—who find it necessary to deliver a lecture to explain their conclusions (which, by the way, invariably is that the defendant is insane)—and no average jury on earth can arrive at a verdict which would do justice to society except by accident. The language used is not that of the average juror, cannot be understood by the average man on the street nor anywhere else, and yet the jury is expected and required to say whether a doubt as to sanity has been raised, and, if so, whether the state has overcome it by proof beyond a reasonable doubt. Here are some of the words, phrases and weird language at one time used in a murder trial by one of these gentlemen, which came under my observation: Agitated melancholia; chronically temperamental; depressive insanity; manic depressive, straight and mixed (eight different types); war of emotions; psychosthenia; Mendelian law; law for Obries; amnesia; hypomania; the Hixon



theory; going through a stage of psychosis; and so on. Try these on yourselves and see if you would want to be responsible for any conclusion you might reach involving the life of a human being. This is not a case of Justice being blind, she has put a night cap over her mask, retired and left the result to the Gods of Chance, because juries are as other man,—they cannot reason if they do not understand.

I have been able only to hit some of the high spots of the subject assigned to me. That our method of handling the question is archaic, out-moded and wrong, is apparent to anyone who has come in contact with it. Our statutes have not been changed since early territorial days, which was only a few years after Lord Erskine's theory of delusion was abandoned, and it was only a few years farther back when some people believed in the lunar theory of Lord Hale.

I am persuaded that trial for crime and inquiry as to sanity should be two different, separate and apart proceedings; that the defense of insanity connected with the main trial should not be permitted.

And that is where I differ with the resolution proposed by the prosecutors. When I read the California opinion that sustained the statute, in which, as I say, they indulged in too fine reasoning for me, I also found a vigorous dissenting opinion. With all due respect to the Supreme Court of California, who have my highest regards, I think they are in error, and I think, just as I have read here, that the two inquiries should be separate, distinct and apart. So, the prosecutors will find, if they investigate, while California has tried that method, other states have tried this other method, which is the only logical way to protect society when a question like this comes up, or any part of it.

Which is the best is of course debatable. To my mind, where the question appears, the criminal proceedings should be held in abeyance until some tribunal has acted—perhaps a state board appointed for the purpose, composed of citizens who by reason of their education and training are qualified to hear and determine the question of insanity, without reference to the crime charged, and who would be able to understand tbe language of the psychiatrists and intelligently reason out a conclusion from evidence submitted and observation of the patient. Then, if the accused is found by this tribunal to have been insane at the time of the commission of the offense charged, that would end the proceedings as far as a trial for the offense were concerned. If the accused be found sane at the time of the commission of the crime charged and at the time of such hearing, the matter of insanity would then be adjudicated and could not be urged again, and would have no place in a criminal trial. This, I think, could be done within our Constitution, as the laws regarding insanity are not penal but paternal. If it could not be so done, then change the Constitution.

One of the most useful books I have found on the subject, Insanity as a Defense in Criminal Law, was written in 1933 by Henry Weihofen of the School of Law of the University of Colorado, published by the Commonwealth Fund of New York, upon which I have drawn liberally in the preparation of this address.

MR. GRAHAM: That now throws open the discussion. That will take in the resolution of the prosecutors.

MR. DONALD ANDERSON: Mr. Chairman, we discussed this matter that Judge Barclay has just brought out, and I believe we were fairly well agreed that that would be the best procedure. There was one question raised, however; whether or not that would be constitutional under our present Constitution. If it were, I believe that the prosecutors would all be for it, and personally I believe, just as the Judge has stated, that it would be constitutional, and I believe that the prosecutors probably might reconsider the matter.

MR. MOFFATT: I think I raised the objection. It is my understanding—I have not gone into the matter nearly as fully, of course, as Judge Barclay—that the matter of defense raises the whole issue as to the possibility of the commission of a crime. In Utah they have a somewhat similar set-up as the Judge has advocated, except that the trial is conducted by a jury. As I understand his position, if a defendant raised a question of insanity as his defense (which is a complete defense) he then is judged by a tribunal, and I presume that if found sane by that tribunal, that defense is taken away from him and he is conclusively presumed to be sane at the time of the trial of the main issue as to whether that crime was committed and whether he is the man that committed it. As I understand it—I don't presume to he an authority on constitutional law—taking away from him a defense of that character by a trial before an administrative body would most certainly take away a right which he has to a trial by his fellow men on that issue. I may be wrong, but that was the question presented, and I think that is the reason why you had to have preliminary trial before a jury.

JUDGE BARCLAY: Under the theory of many authorities an inquiry into sanity is not a trial and they could inquire into it before he committed a crime, as they could after, and the crime has nothing to do with an inquiry except it perhaps brings it to a head. Our Supreme Court has already said that these statutes concerning the inquiry into sanity or insanity are not penal statutes. There is where the confusion comes in, I think.

MR. MOFFATT: I agree with you in that respect. For instance, the adjudication by the Probate Court cannot be admitted by either party as an indication of sanity at the time of the commission of the crime, but the basis for that, as I understand it, is that the adjudication we have under our statute now does not involve the legal test for insanity. I cannot give the figures, but Dr. Lowe of the State Hospital in Blackfoot made a survey of his patients and presented a legal test of insanity to his inmates, all of whom have been adjudicated insane, and there were considerably better than 50 per cent straight out and out insane given our legal test of right and wrong, and about 30 per cent answered to his test that they would be willing to kill a man providing it was in self-defense, which would very likely leave about 20 per cent that would be relieved of criminal responsibility, and in this case adjudication by a tribunal or administrative board could not be a defense.

JUSTICE MORGAN: I am considerably impressed by the discussion of this matter by Judge Barclay. I could not help but cast back over forty years or more in and about the courts and the struggles



I have seen made by juries with this most perplexing and difficult question. Now, I am assuming that a jury desires to do right, almost to the exclusion of its desire to follow the law. Where insanity is a defense, if the crime committed is sufficiently heinous, it would be disregarded. It doesn't make any difference how conclusive a distinction might be established, to the mind of anybody but a juror, he proposes to exact an eye for an eye and a tooth for a tootb. Upon the other hand I have been, as you have been, puzzled by the testimony of those who know about these things, and let's give them about the same measure of confidence and same presumption of a desire to do right that we insist be extended to us, those so-called mental experts. I think they know more about it than the ordinary run of men.

It is a public calamity when a man by a framed up defense of insanity escapes merited punishment; it is a public dishonor as well as a calamity when a man deranged beyond the power to distinguish between right and wrong has been forced to meet the end of a convicted murderer.

I am wondering if it would not be a good idea to get before our courts this question before the Legislature meets. Possibly one of these proceedings for an advisory judgment, might be had. It is a matter of very great public importance; it is a matter that the Legislature should not be permitted to undertake blindly and without the benefit of a forecast as to what the courts may be expected to do with this constitutional question which puzzles our Ada County prosecuting attorney and which, I might say, raises considerable question in my mind, a question which ought to be determined finally and for all time, and then let Idaho go ahead, and in an enlightened way. If it be determined that we may do this without the amendment of our constitution, do this; and, if not, procure an amendment.

To a board of alienists and men skilled in weighing matters of this kind, the circumstances of that particular crime as charged would not be a prevailing consideration, and justice would be much more likely to prevail, it seems to me, were the machinery of the law in the hands of those who know just how to use it. I am very much in accord with Judge Barclay's suggestion, if it may be done, and it seems to me that the Legislature has to prepare the way or determine whether it is constitutional or not.

JUDGE WINSTEAD: We might consider this subject of insanity as a defense along the lines laid down by the Supreme Court in connection with sanity in civil matters where the question is raised in regard to instruments which have been executed. The rule is laid down in a recent case in north Idaho, I believe, that the result of an inquisition adjudging or putting a man in an insane asylum raises no presumption as to his sanity; it is a question of fact to be determined, whether or not he was insane or sane at the time the act was committed. If you follow the same rule in criminal matters, it seems to me that the result of a board of inquisition would be questionable; in other words, there must be a jury to pass upon the question of fact of whether or not the defendant was sane or insane at the time the act was committed. Now, from that point of view, it occurs to me that the California statute which is suggested by the prosecutors is a

great improvement over our present system, and personally I am in favor of the recommendation of the prosecutors.

The experts' testimony in a murder case, upon either side, is no more difficult for a jury to consider than the expert testimony in your average automobile accident case. That goes back to the whole question of the allowance of the use of expert witnesses in any kind of a case unless these experts are selected either by the court or by some disinterested party.

In this matter of insanity as a defense you are determining whether or not the defendant was insane at the time the act was committed; if you follow the rule laid down for civil actions it is a question of fact. There must be some jury, if a man's constitutional rights are to be upheld, to pass upon this question of fact, and the jury should determine from all the facts and circumstances in connection with the transaction whether or not the man was insane at the time the act was committed.

MR. PAINE: As part of the same trial?

JUDGE WINSTEAD: As I understand it, after the plea of not guilty by reason of insanity is raised, if the jury determines that the man was sane at the time the act was committed, it is in effect an admission of guilt and a plea of guilty.

JUDGE BARCLAY: The California statute requires them to try the offense first and the insanity second, and for the purpose of the criminal trial the law says that he is conclusively presumed to be sane. Now, if you can get by that with most of the Supreme Courts, that is good.

MR. MOFFATT: Doesn't that make two pleas?

JUDGE BARCLAY: Under that statute, if he does not make the plea of not guilty by reason of insanity, of course, it is not heard.

MR. MOFFATT: In the Hickman case I think you will find the state introduced the indictment and the plea and rested, and the defense undertook the burden of the rest of the case.

MR. WALTER H. ANDERSON: It seems to me that this method that prevails in California and, I believe, in Utah too, is somewhat cumbersome, and simply leads into a great many difficulties. The first trial is had and under this so-called alleged conclusive presumption the man is sane and that question is not tried at all; in other words, the jury goes out and determines whether or not a crime has been committed, which it seems to me must necessarily involve that matter of intent, but they are not permitted to consider that, and they merely consider whether or not the crime has been committed and whether the defendant committed it. With that judgment they have no difficulty. They merely bring in a verdict of guilty, we will say. Then suppose that they submit the question of insanity or sanity to the jury, and they go out and it is a hung jury. Just where are you under this proceeding at that time? Do you impanel another jury to try the whole issue, or to try the question of sanity or insanity? I think the law provides for trial before the same jury. Where have you gotten to, and what are you going to do about it? I believe there is some such question now down in Utah, and they don't know what to do with it. The first jury convicted the fellow and the second jury was



hung as to whether or not he was insane, and I understand his counsel is insisting that he is entitled to another new trial on the whole issue by reason of this provision to try the issue of insanity before a jury.

As to the question of a board or commission to pass upon the insanity, that might be a very good method, but it seems to me that over the period of the last twenty-five years the lawyers have either acquiesced in or aided in the removal of business and the trying of cass from the courts to boards and commissions, and, to start with, I am naturally prejudiced against anything that looks like a board or commission. I may be a little bit old-fashioned, but I believe the place to try all questions is in courts of justice. The pages of history will not disclose a better place to try them than before the courts, and I would be opposed to any method that would take the trial outside of the court.

JUDGE SUTTON: My experience with the defense of insanity in criminal cases (and I have had two of them) leads me to believe that the entire confusion and difficulty arises from a lack of legal standard of accountability as distinguished from a medical standard. If you want to adopt the medical standard as the legal standard of accountability, why, our present system is about the only way you can do it, as I view it, but if we had some established legal standard of accountability you would eliminate a lot of this fine spun language that Judge Barclay is talking about, and the average jury, I believe, is capable of determining a man's ability to determine between right and wrong, we will say, but if you let these fellows fill the record full of a lot of high-sounding phrases you are not going to get anywhere. My objection to the California system is in permitting a man to offer two pleas. If he is not guilty, let his plead not guilty; if he is insane, let him plead that; and you won't be troubled with that situation. It is the double-barreled plea that causes the trouble down there.

MR. FRASER: Do I understand in California they have a right to plead not guilty, and then not guilty by reason of insanity, and he is tried on the insanity plea and if they find he is sane he can be tried for the crime?

JUDGE BARCLAY: They try the crime first.

MR. FRASER: I think he has then the right to have two pleas and he is entitled to be tried on both, because the attorney would not know which end of the string to take hold of, whether to try him for one or the other.

MR. MARCUS: I have been informed—I have not looked it up sufficiently to state the authority—that the English rule is this: if a fellow comes in and pleads not guilty by reason of insanity, they take him at his word and put him in some special asylum for insane people who commit crimes, for life. It seems to me that would be the quickest way to get rid of them. They are dangerous to society. Why not put them away for life and thus get rid of them and they cannot take the life of anybody?

JUDGE KOELSCH: It seems to me you cannot get away from what Judge Winstead said here. A man charged with a crime says, "I was insane at the time I committed it." He is raising a question

of fact. He has a right to have that tried out just the same as he has a right to have any other question of fact tried out. Now, the California system is, if he puts in both pleas, they first try him on the plea of not guilty. During that trial the question of insanity is not permitted to be raised, and he is conclusively presumed to be sane. Then, if he has also entered the plea of not guilty by reason of insanity, they try that out afterwards by the same jury. I don't think that is a very good system. As a matter of fact, under our Constitution and under any amendment we can make to the Constitution, as long as that raises a question of fact, I don't think you can improve upon it, except that I have this suggestion, which I have seen somewhere, that would meet the objection raised by somebody; if he wants to plead insanity, he should notify the prosecuting attorney ahead of time; if you want to make it a separate plea, very well, or try both of them at the same time, but give the prosecuting attorney a chance to meet it. As was said here by Judge Barclay, if that is not done, then at the trial the prosecuting attorney, not having any advance notice of it, is taken at a disadvantage; the defendant has his psychiatrists in the offing and the prosecuting attorney knows nothing about it.

MR. WELKER: If I remember correctly, at the prosecutors' meeting yesterday it was the conclusion that we would accept the proposition here of Judge Barclay if we could be assured that this constitutional question of the trial by jury in the case of insanity would not be raised, but in view of that fact it was our suggestion that we adopt this California system until arrangement could be made to clear it up. Then we would suggest this proposition that was suggested by Judge Barclay.

Judge Barclay suggested an administrative or semi-judicial board be appointed to determine the sanity or insanity of a defendant—I would like to ask how this board would be appointed?

In this little case at Cascade we didn't have much trouble getting defense witnesses, psychiatrists, and I found, much to my embarrassment and chagrin, that the state was a lot better equipped when it came to psychiatrists than we were. The leading psychiatrist, superintendent of a certain insane asylum in southeastern Idaho came up here and testified for the state, very strongly, I might say, yet at the same time when I was prosecuting attorney that same individual came to Weiser and testified for the defense. I believe we are getting along all right under the present system.

MR. McCARTY: It seems to me that at every meeting I come to the prosecuting attorneys are wanting to pass some resolution in some way to give the state some advantage over the poor individual who may happen to fall within their toils. The prosecutors ask that they be permitted to join all of the counts they see fit in one information and they cannot be required to elect between the different counts set forth in the information, and that you can be convicted of any or all of the offenses charged, and then on top of that they come in and ask that defendant must state who his witnesses are and what his plea is. My position is that whenever a man is charged with a crime, if he



enters a plea of not guilty, as at the present time, he can raise any defense that he might have.

MR. SWANSTROM: I think perhaps we were at fault in not fully explaining to the Bar why we favor that resolution. I am certain that the prosecuting attorneys in their meeting yesterday had no desire, as was intimated by one speaker here, to prosecute any man in the State of Idaho who is insane. That can be accepted as the concensus of opinion of the prosecutors. I am certain that the prosecuting attorneys had no desire to dictate the manner hy which these various issues of sanity or insanity might be determined in criminal procedure, but that they simply want some changes whereby the state might have notice of the raising of that plea prior to the actual trial of the case.

In the defense of a man charged with crime, there are only two defenses, namely, that the man did not do the act charged, or that he was justified in doing it. Now, you say suppose he is insane. In any crime involving intent, if the man was insane, he didn't commit the crime, did he? He could not do it, and it resolves down to this: Is insanity a defense at all, or is it a state of mind, a state of intellect, a condition under which crime cannot be committed? If a man is insane, he has no defense to the charge of murder, hecause he cannot commit murder; he cannot form the intent.

Now, as to the determination of that state of mind; if he is entitled to use that as a defense, then I think it should properly be determined by the jury, the same as any other fact; hut if he cannot commit the crime, then why should he go before a jury and present it as a defense. There ought to be another way of determining that state of mind, whether or not it is possible for him to commit a crime.

MR. GRAHAM: I am glad the suhject has drawn forth so much fire. What animated me in suggesting the subject was the length of time it generally takes to try a criminal case where the question of insanity is raised, as was the case in the Van Flack case down at Twin Falls. Three or four weeks time is taken, a lot of expense incurred, psychiatrists, and so forth, and I was wondering whether there wasn't some easier way of disposing of the question of insanity rather than submitting it to the jury.

We don't seem to be any nearer the goal than we were when we started. I am going to appoint a committee and refer this resolution to a committee, for it is well worth more discussion and more investigation. Judge Winstead is chairman; Judge Barclay, Mr. McCarty, Herman Welker, and Mr. Moffatt. If this committee in their judgment deems it wise to propose any legislation at the next session of the Legislature, as far as I am concerned they may do it; if they do not deem it wise, then we will expect you to report one year hence at our annual meeting.

That still leaves for our discussion here the question of the prosecutors in regard to two or more offenses in one indictment.

I am going to refer that same resolution to that same committee. You are to take the proposed resolutions and work out some method, if in your conclusion you deem it wise.

JUSTICE MORGAN: I suggest that an effort be made to get an

advisory judgment on the constitutionality of the changes suggested.

MR. GRAHAM: This finishes our forenoon program, and we will now adjourn until two o'clock.

(Adjournment)

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## AFTERNOON SESSION

Friday, July 24, 1936, 2:00 P. M.

MR. GRAHAM: The next thing is the report of a committee. Mr. Bistline.

MR. BISTLINE: The committee on uniform by-laws met yesterday afternoon, and after considerable deliberation have to submit a code of uniform by-laws for the local bar associations. Necessarily this has some blanks in it as we found it impossible to make a uniform set that would apply to each district. I believe, Mr. President, it would be advisable for me to read the entire proposed code rather than discussing it section by section.

## REPORT OF COMMITTEE ON UNIFORM BY-LAWS

Your Committee met at Payette Lake Inn, July 23, 1936, pursuant to call of the Commissioners of the Idaho State Bar, and now recommend the adoption of the following:

### CODE OF UNIFORM BY-LAWS FOR LOCAL BAR ASSOCIATIONS

Section I. Name. The name of this Association shall be the..... .....Bar Association.

Section II. Purposes. The purposes of this Association shall be to cultivate and advance the science of jurisprudence; to promote reform in the law and in judicial procedure; to facilitate the administration of justice; to uphold and elevate the standard of honor, of integrity and of courtesy in the legal profession; to encourage a spirit of cordiality and harmony among its members, and to co-operate with the State Bar Association in its efforts to prevent the illegal practice of law.

Section III. Membership. Any person who is a member in good standing of the Bar of the State of Idaho and a resident within the .....District of said State, shall ipso facto be a member of this Association, and shall pay a membership fee of $..... to the Treasurer of this Association on or before the.....day of each year.

Section IV. Meetings. The annual meeting of the Association shall be held at.....within.....days prior to the Annual Meeting of the Idaho State Bar, on a date to he fixed by the Executive Committee.

Special meetings may be called by the President, or upon the written request of any.....members. At least.....days written notice of any meeting shall be mailed by the Secretary to each member of the Association, at his last known address.

Section V. Quorum. Until further action by the Association, ..... members of the Association shall constitute a quorum for the transaction of business at any meeting.



Section VI. Officers. The officers of the Association shall consist of a President, a Vice-President, a Secretary and Treasurer, an Executive Committee and such other officers as the Association may deem necessary. The President, Vice-President, Secretary and Treasurer shall be elected at the annual meeting of the Association and shall hold office for the period of one year and until their successors are fully elected.

Section VII. Executive Committee. The Executive Committee shall be composed of one member from each of the.....Counties within the.....Judicial Districts comprising the Association. The members of this Committee are to be appointed by the President upon the recommendation of the members of the Association residing in the County from which a particular member is appointed. The President and Secretary shall be ex-officio members of the committee. The executive committee shall have full executive power and authority in the interval between the meetings of the Association. A majority of the committee shall constitute a quorum. Meetings may be called by the President upon the request of.....members of the committee. At least ..... days written notice of any meeting shall be mailed to the members of the committee at their last known address. Notice of the time and place of any meeting may be waived, or any action of the committee ratified by non-attending members at any time.

Section VIII. Committees. At the regular annual meeting of the Association the President elected thereat shall appoint tbe following named standing committees to serve until the next annual meeting thereafter, namely: A committee of three on proposed legislation and court rules; a committee of three on ethics and grievances; and in addition thereto may, at any time, appoint such special committees as he may deem necessary.

It shall be the duty of the legislative committee to consider, and in their judgment propose, any legislation relating to the judiciary, the Bar, practice and procedure in the courts, the practice of law and all kindred subjects; it shall be the duty of the committee on etbics and grievances to receive and investigate reports involving any breach of legal ethics, and also any breach of by-laws or adopted regulation.

Section IX. Ethics. The cannons of professional ethics of the American Bar Association now in effect or as hereafter amended or adopted shall constitute the Code of Ethics of this Association.

Section X. Rules and Regulations. The Association is empowered to adopt such rules and regulations as it shall see fit, including a minimum fee schedule as hereinafter defined, to fix and prescribe penalties for the violation thereof and the machinery for the enforcement thereof not inconsistent with the rules and regulations of the Supreme Court, the State Bar Association or Board of Commissioners of the State Bar.

Any minimum fee adopted shall not be construed as fixing the maximum fee or the reasonable fee to be charged in any given case or situation; in determining the amount of fee to be charged for any

legal service, there should be taken into consideration the actual time required, the character of the questions involved and their difficulty, and the skill required to properly conduct the business; the possibility of an acceptance of the particular business precluding the lawyer's representing other persons in similar cases, or cases likely to arise out of the transaction, and when there is a reasonable expectation that otherwise he would be employed on the other side of the transaction; the customary charges for similar services; the amount involved in the controversy; the contingency of certainty of the compensation; the character of the employment as being casual or for an established and constant client; the standing, experience and ability of the lawyer; the relations existing between the attorney and the client in reference to other business, particularly the annual retainers; the ability to pay and the results obtained—the reasonable or maximum fee being ultimately a question between the attorney and the client.

Section XI. Amendments. These by-laws shall be amended only at a meeting of the State Bar Association, provided the rules and regulations which may be adopted by the Association under the authority of these by-laws, may be amended in a manner prescribed by the Association.

MR. BISTLINE: Mr. President, I move the adoption of this uniform code of by-laws.

A VOICE: Second the motion.

MR. HARDY: Who fixes this minimum fee schedule?

MR. BISTLINE: The local bar association will fix that, if they want to, or don't want to.

MR. HARDY: I am thoroughly opposed to it.

JUSTICE MORGAN: Is the adoption of the fee schedule compulsory?

MR. BISTLINE: No. That will be left to the discretion of the local association whether it adopts a fee schedule.

MR. GRIFFIN: I notice one suggestion of a legislative committee. Would it not be better for the local legislative committee to refer any matter of legislation to the State Bar legislative committee and have it all handled in one place?

MR. GRAHAM: They might act in conjunction with the State Bar committee.

MR. MOFFATT: If there be disciplinary action on the minimum fee schedule, and the fee schedule is to be determined by the district bar association, supposing there is a difference between the Third District fee schedule and the Seventh District fee schedule, and the Seventh District attorney comes over in the Tihrd District and tries a case, the question would be as to what fee schedule applies in the case of disciplinary action by the proper authorities, there being no state-wide schedule.

MR. BISTLINE: That matter was not discussed by the entire committee. The question was not raised, and the matter of the minimum fee schedule was left entirely to the discretion of the association. It would be my idea that each association could make some rule in connection with their fee schedule that might cover it. In drafting



these proposed by-laws we did not want to go into anything like that, but left it entirely up to the association.

MR. WALTER H. ANDERSON: It would seem to me in this case it is assumed that the rules of the district wherein the case is being tried should prevail.

MR. NIXON: I would think in view of what Mr. Bistline has just said about that, if these rules are to be uniform, that that very thing should be incorporated so that there would be no question.

For instance, if they come from Canyon County into the Third District, and this Third District fee schedule is to be applicable, that ought to be put in the uniform rules so that it would be uniform throughout the state.

MR. BISTLINE: It might be that a section should be added stating that "within the jurisdictional limits of the Association the rules would apply to all attorneys coming into the district."

MR. GRAHAM: Before we adopt that, I will defer action on that to give you a few minutes, and take up the next order of business.

MR. WALTER H. ANDERSON: Is it the purpose to organize and charge dues in addition to what we pay for the license fee each year to belong to the State Bar?

MR. BISTLINE: That is in the discretion of each district association.

MR. GRAHAM: We are now ready to receive the report of the judicial section. Judge Koelsch.

JUDGE KOELSCH: We discussed two subjects—one the adoption of uniform rules for the district and trial course, and the other were some changes in substantive and procedural law pertaining to crime. I have here the rules and I can read them if you desire. I don't know that anything would be gained by it. I don't know whether they are open to amendment even. They are adopted—

MR. GRAHAM: (Interrupting.) May I ask you a question? Was it the intention that these rules be now adopted and be put into execution at once, or was it the purpose of your committee that you would rather that they lie over for one year for further consideration?

JUDGE KOELSCH: No, as I understand it, the consensus of opinion was that these are the final draft of the rules that we have. Of course, other rules can be added from time to time, but at the present time these are the rules that are to be adopted by the various courts.

MR. GRAHAM: I think we should have those rules read. It is unfair to have them adopted without reading them.

JUDGE KOELSCH: Rule No. 1: "Immediately prior to the commencement of every term, the clerk shall make up a calendar of all criminal cases, including appeals from inferior courts, and of all civil cases at any issue pending in the court, or in which the time for appearing is shown to have expired. The clerk shall note opposite each case briefly the nature of the action, the names of attorneys and upon what issue the case is pending, and in criminal cases whether the defendant is in custody or has been admitted to bail.

"The clerk shall arrange the calendar into such divisions as the Court or Judge may direct."

Rule No. 2. "The Calendar will be called at the opening of each term, and at such other times as the Court or Judge may designate."

Rule No. 3 was eliminated. I might read it: "All motions, demurrers or other proceedings involving only issues at law may be called for hearing immediately following the call of the calendar and parties must be ready to try them without prior setting thereof." I think the main objection to that was that it should require notice, and the rule was therefore eliminated entirely.

Rule No. 4: "All attorneys having matters pending before the Court must, unless excused by the Court, be present or be represented by some one at the calling of the calendar; otherwise the cause may, in the discretion of the Court, be stricken from the active calendar."

Rule No. 5: "Any case in which no action has been taken by the parties for one year, may be ordered dismissed by the Court, unless good cause for non-action be shown."

Rule No. 6: "All defendants on bail in criminal cases must be personally present in court at the opening thereof on the first day of each term, or in lieu thereof may appear by counsel, but must thereafter be ready for arraignment or other proceedings at such time or times as the Court shall appoint, defaulting in which the bail bonds will be forfeited."

Rule No. 7: "No ex parte divorce case will be granted until after the expiration of the full statutory time for appearing, even though a waiver of such time of appearance has been filed by or on behalf of the defendant."

Rule No. 8: "If any case is set for trial, and it is subsequently ascertained by counsel that same cannot be tried on the date set, said attorney is required to forthwith advise the court of such situation to the end that valuable time will not be consumed or unnecessary expense incurred. If application for continuance is to be made, same must be timely presented, as soon after the setting of the case for trial, as the ground for continuance is discovered. No continuance will be granted unless diligence is shown in this respect."

Rule No. 9: "When a demurrer or motion to reform a pleading is sustained, the pleader shall have five days to amend, unless the Court shall fix a different time; when a demurrer or motion to reform a complaint is overruled, and no answer is on file, the answer shall be filed within five days, unless the Court shall fix a different time."

Rule No. 10: "In cases where the right to amend any pleading is not of course, the party desiring to amend, except when the application is made during the trial of a cause, shall serve adverse party with notice of application to amend, an engrossed copy of the pleading with the amendment incorporated therein, or a copy of the proposed amendment, referring to the page and line of the pleading where it is desired that the amendment be inserted, and if the pleadings were verified, shall verify such amended pleading or such proposed amendment before such proposed application shall be heard."

I did not explain that these rules I am reading from were prepared by Judge Hunt, and I have read them as he sent them, with Rule 3 eliminated by the discussion yesterday, and Rule No. 11, to which I now have arrived, also ordered amended so that it reads this way:



"Whenever counsel for either party files a demurrer, either special or general, or a motion directed to the adverse party's pleadings, he shall, within five days after service of the demurrer or motion, serve upon the adverse party or his counsel, and file with the Clerk, a short brief of the points and authorities relied upon in support of such demurrer or motion. Unless such brief is served or filed within said time, the party attacking the pleadings will not be permitted to cite authorities or file any brief in support of said demurrer or motion."

Rule No. 12: "No paper, record or file in any cause shall be taken from the custody of the Clerk, except for the use of the Court, or upon written order of the Court or Judge."

Rule No. 13 reads as follows: "Arguments in civil jury cases shall precede the giving of instructions to the jury by the Court."

This rule was also eliminated.

Rule No. 14 reads: "All requested instructions must be presented at or before the close of the evidence, and accompanied with citations, and a copy thereof served on opposing counsel. * * * "

I haven't the amendment that was added to that, but the amendment was to the effect that the Judge may give an opportunity for counsel to be heard to raise objections to any proposed instruction, eight that submitted by adverse party or on the motion of the Court itself, and that objection made of record in the case. If slch an opportunity is presented by the Court and no objections are made, the party will thereafter be precluded from raising any such objections; if the Court does not give that opportunity, he can thereafter raise any objections that he can now. The rest of Rule 14 pertains to form:

"2. Instructions shall be on white typewriter paper of legal size, typewritten and double spaced. They shall be furnished to the Court in two sets, the original and carbon copies. **The citations offered shall be noted only upon the carbon copies.**

"3. The carbon copies shall have a cover sheet upon which will be written the title of court and cause, together with the following endorsement signed by counsel representing the party presenting the instruction:

'Comes now the plaintiff (or defendant) and requests the Court to give the following instructions:

.....

Attorney for Plaintiff (or Defendant).'

"4. All original instructions shall be headed in capital letters as follows:

'INSTRUCTION NO.....'

"5. The carbon copies may be numbered in order, but on all original instructions the number shall be left blank.

"6. The heading 'INSTRUCTION NO.....' heretofore referred to, shall be at least two inches from the top of the page, and the instructions shall be not less than 1½ inches (four double spaces) below the heading.

"7. No word in the body of an instruction shall be capitalized, underscored, or emphasized in any manner."

MR. GRAHAM: Pardon me. In that rule you don't mean that proper names cannot be capitalized?

JUDGE KOELSCH: I presume that means spelled entirely in capitals in order to emphasize it. It doesn't mean not to commence a proper name with a capital letter. It means not to capitalize, underscore or emphasize.

Rule No. 15 reads: "When a cause is decided requiring findings of fact, conclusions of law and decree, same shall be prepared by counsel representing the party in whose favor the decision is rendered, and a copy thereof shall be served upon opposing counsel, who shall have five days in which to file written objections and propose amendments, and if no objections be made or amendments be proposed within said time, such findings, conclusions and decree shall be deemed in conformity with opposing counsel's view of the decision and may be adopted or modified as the Court deems proper."

Rule No. 16: "Transcripts on appeal from Justice and Probate Courts must be filed in this Court and costs of filing paid by appellant within fifteen days after the perfection of said appeal, when said appeal is taken on questions of both law and fact, and within thirty days after the perfection of said appeal when said appeal is taken upon questions of law only; and upon failure so to do, the respondent in the appeal, at any time before said transcript is filed by said appellant, may cause such transcript to be filed, paying the prescribed fee, and placed upon the calendar for dismissal; Provided, that in case the delay is caused by any default or neglect of the Justice of Clerk of the Probate Court, the fact may be shown by affidavit and dismissal denied."

Rule No. 17: "I. In all civil causes transferred from another county, the party at whose instance such order of transfer was made, must deposit witb the Clerk of this Court statutory filing fees. If said party fails to pay said fee within five days after said papers have been received, the opposite party may pay the same, have the cause placed upon the calendar and move for its dismissal.

"2. When any cause is transferred from another county upon stipulation of the parties, such parties must arrange to pay such filing fee between themselves. If said filing fees are not paid within five days after said papers are received, the Court may, upon its own motion, order the dismissal of said cause."

Rule No. 18: "1. In all causes, transferred from the Justices' Courts by virtue of the provisions of Sec. 10-207, I. C. A., the moving party must, witbin five days after said papers have been received by the Clerk of the District Court, deposit with said Clerk the statutory filing fee. Upon failure to make such deposit within said five days, the opposing party may pay said fee and have said cause placed upon the calendar for dismissal."

Rule No. 19: "No attorney shall be received as surety upon any bond, undertaking or recognizance filed in any action or judicial proceeding in which he is attorney or of counsel."

Rule No. 20: "Any of the foregoing rules may, in special cases, be suspended to meet the exigencies of the case. The party applying for such suspension shall make proper showing of such exigency."

MR. GRAHAM: Are there any objections now, or suggestions, in regard to any particular rule?



MR. WALTER H. ANDERSON: The rule 17 does not seem very clear to me. Suppose it was the plaintiff and he didn't want it dismissed. That appears to be his only remedy, and there are such things as transfers in that manner, and that rule provides only for dismissal whether it is plaintiff's or defendant's. That is the only remedy and he would have his own action dismissed.

MR. GRAHAM: In other words, the application for change of venue came from the defendant and the plaintiff could pay the fee and then what remedy would he have?

MR. WALTER H. ANDERSON: Most of the change of venues are by the defendant because they are brought in the wrong county and he can move them into the other county and leave them and the plaintiff can only go and pay the fees and dismiss his own action.

MR. GRAHAM: If the case is not removed by the defendant, the plaintiff has to pay the filing fee. He doesn't have to take advantage of the motion to dismiss. That is for his protection.

JUDGE KOELSCH: I think Mr. Anderson's point is good.

MR. WALTER H. HANSON: Does that say "may" or "must"?

JUDGE KOELSCH: Even if it doesn't say "may" or "must," it makes the plaintiff pay the fee. He starts it in Bannock County and defendant moves it to Ada County and doesn't pay the fee. Then the plaintiff has to come in and pay that fee, and if he doesn't want it dismissed he has got to pay that fee.

MR. WALTER H. ANDERSON: Yes. If he does pay the fee and had it transferred, he ought to have some remedy.

JUDGE KOELSCH: My understanding is that the plaintiff can go in and move to have it transferred back.

JUDGE SUTTON: If he files it in the wrong county, why shouldn't he pay the fee?

MR. O'LEARY: The statute is this: When an action is filed in that county, the defendant may move to have it transferred to another county, and the plaintiff may then come in on payment of the fee and remand it to the original county on certain grounds, which grounds are: First, on the ground that it would be an unreasonable expense to the plaintiff to try it in another county. In other words, suppose you have an action in Bannock County, the defendant being a resident of Shoshone County. The plaintiff may come in Shoshone County (there is an annotation on the Code to that effect) and move it back to Bannock County on a showing that the expenses and costs of bringing the witnesses to Shoshone County and the residence of the defendant would be so great that it should he moved hack to the original county, and the only authority that I am aware of is that it shall be moved back to Bannock County.

MR. THOMAS: Has the judicial branch of the government the right to legislate? Suppose we find a conflict between the judicial rules as adopted and what the legislature says. Who has the right to legislate

JUDGE KOELSCH: I think we will hear more about that from Judge Ailshie.

MR. THOMAS: Suppose the defendant in a divorce case comes in, must we have the delay? Is there anything in the statute that says

that he can't? Which prevails, the rules adopted by the court or by the legislature? Who has the supreme power, the legislature or the judiciary? Is that substantive law or is that merely procedure?

JUDGE KOELSCH: Judge Ailshie will discuss that and I think you will get some information, but if you are asking me that question I will say that within the jurisdiction of the court itself it has power to regulate. The legislature cannot interfere with the Supreme Court. The Supreme Court makes its own rules, and if there is conflict, the court's rules would be supreme.

MR. PAINE: I assume that it meant that the plaintiff would have the right of dismissal of the application to have it removed. Why would he want it dismissed if he is plaintiff in that action?

JUDGE KOELSCH: He doesn't, but Mr. Anderson's point is that he is penalized to this extent that he bas to pay the fee in order to have it placed on the calendar in the new county where he probably doesn't want it.

MR. PAINE: And then it is dismissed after he had paid that fee. Could you assume that that meant that it was remanded back to the original county?

MR. WALTER H. ANDERSON: If that is the construction put on the rule, of course, I think that would be all right, because I think that is where it should go to, if the defendant takes the removal and does not pay the fee to have it refiled.

JUDGE VARIAN: In that case you can vacate the order.

JUDGE KOELSCH: I don't think the removal is complete until the fees are paid and the case is put upon the calendar.

MR. GRAHAM: Why not fix a time in which the defendant must pay the fee on his motion to remove, or it is remanded back to the court from which it arose? Unless the defendant pays, he is not in the other court and the plaintiff can have his papers sent back without paying the filing fee.

JUSTICE MORGAN: Why wouldn't it be well to refer this rule back to tbe judicial section? The ultimate decision has got to be made by the district judges.

MR. DONALD ANDERSON: Before you refer that back, may I make one suggestion? In order to avoid the necessity of having to contest a motion for removal and then having to pay the fee, why not provide that the fee be tendered at the time the motion is filed and it could be remitted with the papers?

MR. McCARTY: I believe the rule should be that if the person who makes the motion doesn't pay the fees, then it stays in the court where it originally started.

MR. GRAHAM: I think you have several suggestions. You can amend that accordingly. Are there any other suggestions?

MR. PAINE: I want to make a further suggestion with reference to rule 11 requiring briefs to be filed in support of general and special demurrers and motions. It occurred to me that the judges are inviting us to withhold cases in point. Our reward will be that the judge makes a mistake and when we get to the Supreme Court we can spring this case we have for the first time. Now, as members of the Bar we should disclose everything. There is no way of enforcing



this, as the rule is read and I understand it, in the Supreme Court. I demur; I file no brief; and Judge Koelsch says, "I will overrule the demurrer." That is just what I want him to do. There is a fatal defect in the pleading, and it goes to the Supreme Court, and there I job the Judge and my opponent. Now, many, many years ago Judge Dietrich joined me in preparing a bill that went through the legislature, to remedy this thing of keeping up your sleeve a fatal defect in a complaint on the ground that it doesn't state a cause of action, and a very able lawyer, who was then Governor of the State, vetoed it before Judge Dietrich and I could get to him and explain what we had in the bill. That is hardly justice; that is playing a game. That is just what this rule invites. Unless the Supreme Court is going to say that I cannot urge that objection before Judge Koelsch or any other trial court, if I don't give him the benefit of it—it is a bad rule.

MR. GRAHAM: Will you read that rule, Judge?

JUDGE KOELSCH: Let me read the proposed rule that this rule was to supplant. Rule No 11 (this is as originally submitted): "Whenever counsel for either party files a demurrer, either general or special, or a motion directed to the adverse party's pleadings, he shall within five days thereafter, serve upon the adverse party, or his counsel, and file with the Clerk, a short brief of the points and authorities relied upon in support of such demurrer or motion, and a failure to file such brief within said time shall be deemed a waiver of such motion or demurrer."

MR. PAINE: Yes. Well, both rules are very bad. I don't know which rule is the worse. All you are entitled to in any trial is such a brief as is given the Supreme Court.

JUDGE WINSTEAD: For the information of the attorneys, the rule first read, which was in the original draft, is the Oregon rule of practice, and the rule which was last read is the Utah rule of practice, partially.

JUDGE KOELSCH: It might not be becoming, but I will say I agree with Mr. Paine. If a general demurrer is filed, nobody knows whether the attorney who files it means anything by it or not. We have no such rule, but I have done this time and again—I have said, "Is your demurrer merely an appearauce demurrer?" Ninety times out of a hundred tbe attorney will tell me, "Yes," and sometimes they will say, "No, I have a point."

MR. HAWLEY: What is the necessity of either rule?

JUDGE KOELSCH: A general demurrer is filed. Now, as I said, it may be good. They may have a point up their sleeve that really is meritorious, but here is a general demurrer and you have nothing to indicate that point they have in mind, and if they were required to show the authorities and show the points, you could rule intelligently, which cannot be done on a blind demurrer.

MR. MOFFATT: As I understand it, rule 9 on pleadings after demurrer, changes the time for answer. My understanding of the statute is that there is a difference between the time set up in the rule now and the statutory time to plead after demurrer. It is ten days, isn't it, in the statute?

MR. A. L. MORGAN: The statute says ten days unless another time

is fixed hy the Court. At any event I think the Court has the right to fix the time irrespective of what the legislature says about it.

MR. THOMAN: May I ask Judge Koelsch if it is intended by that rule 11 to limit any argument or points raised to the points set forth in the memorandum?

JUDGE KOELSCH: I presume that is intended.

MR. THOMAN: I asked that question for the reason that frequently the attorney gets a brain-storm between the time he files the demurrer or motion and the time that he argues it, and I think the Court should receive the benefit of that. Isn't the Court to determine the matter on its merits after hearing the complete argument, and not after hearing an argument on the points that may be set up in some memorandum that he files?

JUDGE KOELSCH: The real purport of the rule is this: To prevent the filing of general demurrers that have nothing in them, blind demurrers. That is the real purpose of it. If a man wants to file a demurrer that he thinks has some merit to it, he has got some authorities to submit with it, and he may enlarge upon them afterwards. As a matter of fact the Court can then require argument. I doubt very much whether he would be confined to that, because he files that brief within five days and then the Court looks it over and possibly there is something in that and he wants argument, and on that day he can argue it on his brief.

MR. HARDY: Suppose the client came in just two or three days before this time for appearance is out, and suppose you are busy on some other matter. You have an intricate question you have to plead to. Are you going to be limited to points that occur to you offhand when you file a brief in five days? I have a case now that is going to present an intricate phase of law; if I have to submit a brief in five days, I cannot do it. Lots of times after a person has filed a general demurrer some point of law occurs to him that he has not thought of before. Are you going to deprive him of something he thinks of later?

JUDGE KOELSCH: My experience has been that the attorneys that have the most business always give their cases the most attention.

MR. HARDY: The attorney that does less business isn't able to take care of it at all, and in my county the Judge does not reside there and it is a 75 to 80 mile drive to Lewiston to get to the Judge and get an order. If he resided there, it would be different. It is cumbersome and invites errors.

JUDGE KOELSCH: Suppose you file a demurrer and the other side immediately gives you five days notice of a hearing on that demurrer, as he has a right under the statute—what do you do?

MR. HARDY: If you have any point to your demurrer the Judge finds it out, and if you have a point the Judge usually gives you five days to file a brief.

JUDGE KOELSCH: You have it here.

MR. HARDY: And you are limited to five days.

JUDGE KOELSCH: There must be a short brief.

MR. HARDY: It seems to me you are trying to take away the discretion of the Judge unnecessarily.

MR. PAINE: I suppose, of course, the members of the committee



considered the fact that it is federal practice for the attorney to certify that his demurrer has merit, and some states require the attorney to so certify, otherwise it is considered as for delay. It makes it a matter of honor; if it is merely a time demurrer, an attorney won't certify that his demurrer has merit. I presume you have considered that.

MR. McCARTY: The biggest objection that I see to this rule is that it is unfair to the district judge, because if the brief is not filed, then the person who has filed the demurrer is deprived in the district court of citing any authorities, and the district judge does not get the advantage of authorities, and when he appeals to the Supreme Court it is not binding on the Supreme Court and he can raise all these authorities, and the district judge is getting the worst of that by not having the benefit in passing upon it.

JUDGE KOELSCH: The purpose was to do away with that fault. At the present time we are in that situation. A general demurrer is filed and I ask the attorney, "Is it a good demurrer?" and he says, "I will submit my demurrer." It may have a good point, and I don't know anything about it and I have to hunt high anl low to find out anything about it. That is the purpose of this rule.

JUDGE VARIAN: That was my own opinion of it, that it was unfair to the district judge when they are cut off by that time limit.

MR. PAINE: If the legislature could correct it—that no objection could be raised in the Supreme Court that was not raised either on demurrer or in connection with the evidence during the course of the trial.

JUDGE KOELSCH: That wouldn't pertain to a cause of action.

MR. PAINE: Your statute says that you may object to a pleading on the ground that it does not state a cause of action or a defense, at any time, and so I may plead or demur and on the trial permit the evidence to go in and for the first time in the Supreme Court disclose my point and you have no protection. If your rule reads that no objection can be urged in the Supreme Court for the first time that is not raised in your court—

JUDGE KOELSCH: Within the objection that there is no cause of action?

MR. PAINE: Yes.

JUDGE KOELSCH: That is impossible.

MR. PAINE: That has been passed by the legislature.

MR. A. L. MORGAN: That sounds like the legislature.

MR. HANSON: I thing I can see where that rule may cause great hardship to clients who have been neglected by their attorneys and are not to blame for that. I move that that particular rule be eliminated.

A VOICE: Second the motion.

MR. A. L. MORGAN: The judges have a right to pass it or not as they see fit, and if we eliminate it and the committee isn't going to—

MR. HAWLEY: (Interrupting) They know what we think about it, and they know that we think it is a very poor rule.

MR. GRAHAM: Those in favor of the motion signify by saying "Aye." Those opposed "No." The "Noes" prevail.

MR. THOMAN: Referring to Rule 7 concerning ex parte divorces, I take it that the intent of that is to prevent hasty divorces, to give the plaintiff and defendant a little time to think the matter over and possibly patch up their difficulties, but I am wondering if the rule will have that effect in view of Rule 9, I believe it is, that provides that after a demurrer is overruled and no answer is on file the answer shall be filed within five days unless the Court fixes a different time. If the demurrer were filed and presented the same day and overruled after summary argument or no argument and the five day rule would come in, the defendant would be in default after five days. I am wondering if there are not possibly too many rules, and that if any judge feels that the parties should not be granted a divorce prior to ten days in the ordinary case if it would not be better for him to take the case under advisement. He can always do that and hold the matter in status quo for a reasonable time.

JUDGE KOELSCH: All I can say is that this rule has been an unwritten rule in the Third District for a good many years. I have an idea it was done to prevent collusive divorces more than anything else. The parties come in and agree to have a divorce and the defendant comes in and commits herself or himself to the jurisdiction of the Court and the divorce is granted at once. It is intended to do away with that.

MR. SWANSTROM: The rule in connection with the instructions submitted in a criminal case. As I understand that, the instruction is written up by counsel and presented during or at the close of the trial, and if it is not properly objected to by opposing counsel, he is thereafter forever precluded from raising any objection to the correctness of that instruction either on appeal or otherwise. Now who is there among this aggregation of legal talent who can take a set of instructions handed to him just as the argument is closed and the jury are ready to get the case, and maybe a dozen or fifteen instructions handed to him by opposing counsel, and check the correctness of them with any half-way chance of certainty; and if the instructions should be given by the Court and be held erroneous, does that mean that he cannot even raise it on appeal?

MR. A. L. MORGAN: May we have the rule?

JUDGE KOELSCH: It is to this effect: That the district court gives opportunity to counsel on either side to have the instructions and read them over and study them and object to any instruction, either given by opposing counsel or by the Court on its own motion; and if he fails to take an exception to any instruction, then he is precluded from doing so.

MR. A. L. MORGAN: Would such a rule promulgated by the district judges be binding on the Supreme Court?

JUDGE KOELSCH: They could if they would.

MR. A. L. MORGAN: If they pass a rule to that effect. But as the matter now stands, I am wondering how much of a conflict we would get into there in a matter of that kind unless the Supreme Court does amend its rules. I hope they don't, but if they do—

JUDGE KOELSCH: I think you should refer that question to Judge Givens, who has a proposed bill.



MR. McCARTY: We used to have the practice in Idaho that you always had to except to an instruction before you could raise the objection in the Supreme Court. We would go in then and except to all of the instructions as soon as they were submitted.. Then the legislature passed a law that relieved us from that and said that all instructions are deemed excepted to. Now, apparently we are going back to where we were with a rule of this kind, so that every attorney who is defending in a criminal case must at the close of the case except to all given instructions whether they are right or wrong, so that he won't overlook any. My idea is that if an instruction is wrong in the beginning it is wrong all the time, whether excepted to or not. It should never be rectified by some attorney who fails to take an exception to it, and I think we should stay where we are, with instructions deemed excepted to. Our Supreme Court has gone so far that if an erroneous instruction is given, unless the defendant offers an instruction that rectifies it, he is precluded that much. You can't make it right by someone failing to take an exception to it.

MR. GRAHAM: Undoubtedly the adoption of that rule would lead to just what Mr. McCarty says. Every attorney would take his objection and exception to each and all instructions to protect his record.

MR. SWANSTROM: Perhaps I didn't make myself clear. Apparently in the suggested rule there is no definition of the time or opportunity which will be given counsel to except to proposed instructions. What is a reasonable time? There is a jury waiting for the case, and the Court will simply say, "Here are plaintiff's instructions. Look them over and see if you have any objections." Well, now, there are very many cases where doing that would take a day or two or even longer, and others may be perfunctory, but unless the opportunity to examine and to object to them is rather limited or defined, it might be, if I wasn't sitting well with the Judge that particular day, he would say, "Swanstrom, take ten minutes and look these over," and I have had my opportunity to propose and make objections, and I don't find them in that time—am I to be barred on appeal? Perhaps I don't comprehend just what is meant by the term "opportunity to examine."

MR. GRAHAM: The suggestion in regard to instructions will be referred back to the committee for further consideration and report later.

MR. PAINE: I was going to suggest you get no help at all from that if the exception is general, and if the purpose of it is that the defect in it should be specifically pointed out, then Mr. Swanstrom is right. In the heat of a trial a man gets somewhat tired. It is not fair to a man to shut out his client to cure a defect in that way because without any time for consideration he fails to point it out specifically.

JUDGE KOELSCH: As a practical question, I think you are unnecessarily alarmed. I find that counsel generally know the theory of their case and the law that pertains to it, and if an instruction is offered by the other side, he reads it over and knows then and there whether he can agree with you or not and he can point out the reason.

MR. PAINE: You forget the Boise-Payette case in which the

district judge reversed himself on the ground that he didn't understand his own instructions.

MR. HAWLEY: The Supreme Court held that he did.

JUDGE KOELSCH: It would serve in a good many instances a good purpose. Judge Morgan called attention to the fact that in a certain case the district judge in writing his instructions, in referring to the parties in two cases that were consolidated for trial, used the plural in defining contributory negligence and said the plaintiffs were guilty of contributory negligence; whereas, if that had been called to the attention of the court he would have seen in a moment that it should have been in the singular.

MR. PAINE: Calling it to their attention, that is fine, and give them a chance to argue. That should have been done years ago, but as a matter of fact the trial judge generally has the tax-payer in mind more than anything with a long trial and cuts down always on the attorney and tells him to get in there right now.

JUDGE KOELSCH: That is the purpose of the rule, and like many other rules, as Mr. Swanstrom pointed out, it may not be workable because of the lack of time, hut that is the intent and purport of the rule.

MR. FRANK RYAN: Another situation happens quite frequently with all of us in practice. A client employs one attorney in the district court and he is not satisfied, aud justly, with that attorney's handling of the case, and he will employ another attorney on appeal and that attorney readily sees errors in these instructions that did not occur to the attorney in the district court. Is it right that the client who was so unfortunate as to have an attorney that didn't see these defects be precluded then? I think the practice is better just as it is.

MR. HANSON: I practice in western Montana, and over there we had a rule that the instructions are always settled by the court; the instructions are read and then they make objections. I tried a case over at Missoula about a month ago in which 37 were shot at me at the close of the trial, questions which could not be or had not been anticipated by either side, several novel questions of law that went to the Supreme Court, which one side or the other was not prepared to argue at that time. It seems to me in many instances it would result in covering the ground and taking exceptions to all instructions that might be erroneous. While we don't desire to lead a court into error, we are also trying to see that the litigant gets a fair sbake. If he happens to pick a poor lawyer, that cannot be charged to the litigant; he cannot help it; he takes it for granted when I get my license, or any other man, we are qualified to practice law. Sometimes we are, and sometimes we are not, but the litigant should not be penalized.

JUDGE KOELSCH: I am sure you can sympathize with the situation of the district judge, because very seldom will the attorneys submit instructions for inspection of the court until he has to. If the judge refuses to give some, that is error, and if he gives some that are wrong, he is in error. He has to study them, and the time is just too short.

MR. PAINE: That is where you are wrong. You can send the jury out and tell them you will not give them instructions until you



are sure you are right, if it takes a week. But that is what the trial judge will not do. He takes into consideration that the case has reached its end and he wants to see his wife or baby that night and doesn't take time and gives these instructions. Now, we lawyers are absolutely up against it. If the judge says, "You go ahead right now," we have to go; and you don't have to, and in my judgment you shouldn't do it. You should try to be right before you give instructions.

JUSTICE MORGAN: It would be the better rule for the tax-payer Mr. Paine, if I am not mistaken, if you determine error in these instructions before they are given, or before it goes to the Supreme Court. The most expensive place I know of, to the tax-payer and to the litigant, is to correct it in the Supreme Court. The purpose of this rule, whether it is workable or not, is to require the district judge in cases where he entertains any doubt as to the law of the case to call counsel before him and, as Mr. Hanson has pointed out, as they do in Montana, go over these instructions one at a time; if you have objections to them, urge it then, or, if you don't, let's have a rule in the Supreme Court that if the record discloses that you have been given an opportunity to be heard and have not objected, that your objection cannot be urged before the Supreme Court on appeal. It doesn't contemplate that these will thrown at you or that you will be taken advantage of or hurried beyond your ability to discharge your duties, but it does contemplate that some time you are going to make up your mind whether you have an objection to that instruction or not, and that should be before the instruction is given. I am familiar with quite a number of cases that have come before the Supreme Court where error has crept in requiring reversal where there wasn't any occasion for appeal at all if the matter had been brought to the attention of the court when the instructions were given. It is an expensive thing to spend a full day giving these instructions, but it is not so expensive as going to the Supreme Court or trying the case over.

MR. A. L. MORGAN: It seems to me that the courts are trying to protect themselves rather than trying to protect the fellow who bas something at stake in the lawsuit. It doesn't make any difference whether the mistake is made by reason of the attorney or by reason of the district court. The client should not be precluded from going to the Supreme Court to have that error corrected. Now, the difficulty with this rule is that if I inadvertently, having had an opportunity to scan these instructions, have overlooked something, then I am absolutely precluded and my client is precluded from raising the question in the Supreme Court. Now, that is not right. Now, what is the Supreme Court for but to correct these errors? And, if an error is made, irrespective of how it happens to be made, I say you should not be precluded hy some ignorant attorney, or by something unforseen. I will say this that in the majority of instances the errors of the trial court in the instructions given have become apparent to me days and days after the case was closed.

JUSTICE MORGAN: Isn't it the remarkable thing that they ever become apparent to you?

MR. A. L. MORGAN: I will say the remarkable thing is that

after they have become apparent to me, half of the time I cannot convince the court or make them see it.

MR. PAINE: Since we have had Morgan vs. Morgan, I think I ought to be content, but I do want Judge Morgan to understand me, that I am in favor of the trial court having the benefit of criticisms and opinions of counsel, and I am complaining that the court does not take the necessary length of time to get the help that he is entitled to, but there isn't anybody that knows all the law of the case, the judges included, if it be a difficult and complex or conflicting case. Take any of your constitutional questions; they are decided by the Supreme Court, five to four. Am I a damn fool if in one of this sort of cases a bunch of instructions is handed to me and I cannot point out to you a specific objection in ten or fifteen minutes or an hour's time that I might a week afterwards, and should the Supreme Court be restrained from granting justice to my client? Call counsel in and submit the instructions to both sides, invite an argument, get all the help you can, and then the trial judge will assume the responsibility and not pass it over to the poor fellow who in some cases can't get a lawyer who knows as much as God Almighty, and God Almighty is the only one that knows what the decision should be.

MR. HAWLEY: Which is it? Do you have to make an objection or do you have to take an exception?

JUDGE KOELSCH: Make an objection to every instruction.

MR. HAWLEY: I want to participate in this Roman holiday that the members of the Bar are having at the expense of the bench. I suggest that we adopt the federal rule. The federal rule requires that as the instructions are given you have to get up and give your specific objections right on the spur of the moment.

JUSTICE MORGAN: The purpose is to give counsel ample opportunity to advise himself, if such a thing be possible, and if then he fails to object, he can't go out and find out from one of his neighbors and at the suggestion of somebody else raise the question thereafter. It requires him to be fair to the district judge and also would require the district judge to he fair to him.

MR. HAWLEY: The fact is that the district judge don't want you to take up his time in arguing instructions. You hand in a bunch of instructions and the district judge will go over them. Then if he wants you to argue any especial instruction, he should call you in.

JUSTICE MORGAN: Yes.

MR. HAWLEY: But if both sides present instructions and say they want to argue them, you get very unpopular with the judge.

JUSTICE MORGAN: Unless the district judge gives you the opportunity to argue and make a record on it and you are fully advised, you are not precluded from presenting the objection to the Supreme Court.

MR. HAWLEY: We had this rule in one of the District Courts years ago. A. F. James of Gooding and myself were on opposite sides, and the judge called on the attorneys for a discussion of our instructions, about 25 in number on each side, and spent all the morning and most of the afternoon listening to the argument that we made, and



after hearing the argument he did the very fair thing—he gave every instruction that either one of us asked for.

MR. GRAHAM: I am rather inclined to think the district judge may exercise the right to call on the attorneys for suggestions on the question of instructions, but not to penalize them if they don't happen to point out some particular error, because during the trial of the case lots of questions arise which the attorney has not had time to brief. The matter will be referred back to the judicial section for further consideration and later report.

JUDGE KOELSCH: I want to report that the judicial section also discussed certain proposed changes in criminal law, both substantive and procedural law, and after we had discussed them and practically unanimously agreed upon them some one suggested that report should be made and that matter referred to the Bar as a whole here today, and somebody got up and said, "Don't do that, because we want to make these changes and we want the legislature to pass the proper act to accomplish it, and if you let the Bar endorse it they will surely kill it." After the experience with the rules I have had just now, I think it is wise not to report what they agreed upon.

MR. GRAHAM: Is your commiftee ready to report, Mr. Bistline?

MR. BISTLINE: Yes. We have prepared two proposed amendments on this matter of practising in another district.

MR. GRAHAM: Just read the rules as amended.

MR. BISTLINE: This will be Section 10. "Rules and Regulations. The Association is empowered to adopt such rules and regulations as it shall see fit, including a minimum fee schedule as hereinafter defined, to fix and prescribe penalties for the violation thereof and the machinery for the enforcement thereof not inconsistent with the rules and regulations of the Supreme Court, and of the Board of Commissioners of the State Bar."

I will not read the second paragraph, defining the minimum fee schedule, but the following will be added at the end:

> "Any fee schedule and amendments thereto adopted by this Association shall not become effective until filed with the Secretary of the Idaho State Bar, and the secretary of this Association shall send a copy of any fee schedule and amendments thereto to the secretaries of all other District Associations."
>
> "All rules and regulations adopted by this Association shall be binding upon all members of the Idaho State Bar who perform legal services of any kind within the territorial boundaries of this Association."

MR. GRAHAM: Are there any further suggestions in regard to this amendment? If not, we will now vote upon the motion as to the adoption of the report. All those in favor of the adoption of the report signify by saying "Aye." Those opposed "No." The "Ayes" prevail. It is so ordered.

Mr. Eberle had a subject assigned to him. "Practice and Compensation of Idaho Lawyers—Report of Survey—J. L. Eberle."

MR. GRIFFIN: I have it.

MR. GRAHAM: Will you read the report

## REPORT OF SURVEY COMMITTEE

At the request of the Bar Commission, the Survey Committee proceeded to obtain additional data to supplement and bring up to date its report of last year. A questionaire was mailed to every member of the Idaho State Bar. Although every member was urged to cooperate to the end that the survey might be helpful to the Bar, only 15 per cent of the members of the Bar responded.

Assuming that those who returned their questionnaires represent a fair cross-section of the Bar, the data furnished by them shows that receipts from professional services in 1935 exceeded those in 1934 by an average of 10 per cent. It also appears that 22 per cent of the total revenues of those responding came from governmental agencies. Manifestly, had every member of the Bar cooperated, a most helpful analysis and report could have been made.

Recourse was again had to the records of the Commissioner of Finance, Income Tax Division. These records show that 30.53 per cent of the Bar filed income tax returns showing an income of $2000 or over. Out of the remaining 370 members of the Bar only 60 filed returns showing income of $2000 or less. 10.6 per cent of the bar filed income tax returns showing $4000 or over. 7.69 per cent of the Bar filed income tax returns showing an income from $3000 to $4000. These figures were all taken from that portion of the returns showing income from professional services. Accordingly, although the questionnaires showed an average increase in 1935 over 1934, it would seem that approximately 70 per cent of the Bar may be said to have had an income from professional services in 1935 of less than $2000. In these figures we have not taken into consideration employment of members of the Bar by governmental agencies. If we were to eliminate those thus employed, we would have approximately 8.5 per cent of the Bar with an income of over $4000 and 6 per cent of the Bar with an income of between $3000 and $4000.

The suggestions and comments made by those responding to our request may be summarized as follows:

1. Closer cooperation is vital to improvement of the condition of lawyers.
2. Minimum fee schedules should be adopted and lived up to.
3. Overhead in 1935 showed increase.
4. Trial work shows an increase.
5. Lawyers will eventually cease giving away all their services.
6. Lawyers should appreciate more that they are officers of the court.
7. Take the government out of the law practice.
8. State Bar Commission continue its efforts to strengthen the organization and obtain the support of the entire Bar.

Manifestly, without complete data, an accurate report can not be given. The Survey Committee has endeavored to analyze such data as it could obtain. We recommend that this work be continued and that questionnaires again be sent to the Bar at the end of 1936. We believe that the entire Bar will in time appreciate the helpfulness of such complete data, which cannot be obtained except with the cooperation of every member.

Respectfully submitted,

SURVEY COMMITTEE.



MR. PAINE: What do you mean by taking the government out of the law business?

MR. GRIFFIN: I take it, from having talked to Mr. Eberle, that he refers to these government agencies. For instance, all abstract examinations are going into the government loan agencies, taken out of the field of private practice and going into the government offices. I presume that is the class of thing that he refers to.

MR. GRAHAM: The report will be received and placed on file. The next subject is "Idaho Declaratory Judgments." Prof. Bert. Hopkins, of the University of Idaho Law School. Prof. Hopkins, we will now hear from you.

Mr. Chairman, and Gentlemen of the Idaho State Bar:

The declaratory judgment, which your program committee has asked me to discuss, is without doubt the most far reaching procedural reform which has attained general adoption in this country since the promulgation of the codes of civil procedure in the latter half of the nineteenth century. It is rather significant, I think, that this procedural institution should have been adopted by the Idaho Legislature in 1933[1] without, apparently, having received the discussion and attention from members of the Bar which it deserves. I do not know who sponsored the bill in the Idaho Legislature, but it does appear that in other jurisdictions the insurance company lobbyists have played an important part in securing the adoption of declaratory judgment legislation. Whatever its source in Idaho, it has aroused a somewhat belated interest among the members of the Idaho Bar. It is my purpose this afternoon to present, very briefly, the general purpose, something of the history, the scope and limitations, of the declaratory judgment procedure, with the hope that my remarks may stimulate some discussion of the matter.

### History.

Before sketching the history of the declaratory judgment, it might be well to note than an excellent and exhaustive account of the history and comparative law relating to this subject is now available in Chapter VI of Professor Borchard's recent book on Declaratory Judgments.

According to the legal historians, this procedural device originated in the classical Roman law, and later was adopted by and is still extensively used in many European and Spanish-American countries. The connecting link between the Continental declaratory judgment and modern English law is to be found in the law of Scotland. More than four centuries ago, declaratory procedure appeared in the Scottish law, where it has been extensively used, and in the nineteenth century found its way into English practice. Agitation in England

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[1]Idaho S. L., 1933, ch. 70. (The Uniform Declaratory Judgment Act, with very minor changes.)

for the adoption of the Scottish practice was begun by Lord Brougham in 1828. After introducing several bills into Parliament, he was finally successful in securing partial adoption by legislation in 1850, 1852, and 1858[2]. The power under this legislation was narrowly construed by the courts, so that no declarations were made in cases where there was no right to consequential relief.[3] This defeated the prime purpose of the reform, namely, to provide a means of preventive justice by securing judicial relief from peril and insecurity, and to establish and declare existing rights and other legal relations when they are challenged and uncertain, even though no act has been done which could be charged as a "wrong" in the traditional sense. This deficiency was corrected by rule of court in 1883, and the foundation was laid for the developments of the Twentieth century in this country.

The legislative movement spread rapidly throughout the United States, after 1918, following the publication of a number of articles in legal periodicals urging the reform.[4] The Uniform Declaratory Judgments Act was approved by the National Conference of Commissions on Uniform State Laws in 1922,[5] and has since been adopted in twenty-five jurisdictions.[6] Several states not adopting the uniform act have enacted statutes authorizing the courts to render judgments,[7] and the Federal Declaratory Judgments Act went into effect on June 14, 1934.[8]

This record of extensive legislative adoption, and also the thousands of cases here and abroad in which the declaratory practice has demonstrated its social utility, will indicate that the Declaratory Judgment is to become an important and permanent part of our jurisprudence. As such it deserves careful attention from the Judges and Lawyers of Idaho during its early use in order that its benefits may be fully secured to the people of the state, and at the same time possible pitfalls of its use avoided.

### Distinctive Characteristics, Scope and Limitations.

The nature and characteristics of the action for a declaratory judgment were well set out by the Pennsylvania Supreme Court in an opinion upholding the constitutionality of the Uniform Act which was adopted in that state in 1923. The court said, in part:[9]

"The distinctive characteristics of the declaratory judgment is that the declaration stands by itself; that is to say, no executory process follows as of course. Again, in order to obtain a declaration, it is not required that an actual wrong should have been done, such as would give rise to an action for damages, and no wrong deed need be immediately threatened, such as would be the proper basis for an injunction. In other words, a "cause of action," in the sense in which that term is ordinarily used, is not essential to the assumption of jurisdiction in this form of procedure. It is upon these characteristics of the declaratory judgment that the chief constitutional attacks have been based; its opponents contending the declaration of legal rights and obligations contemplated by the act represent the exercise of a nonjudicial duty, which the Legislature can not place on the courts, and that, since such declarations do not necessarily include the right to execution, they are not judgments at all, but represent the mere giving of advice, rather than the adjudication of controversies; further, than an occasion for judicial action cannot properly arise until some claim is made that an actual wrong has been done or is imminent; and, finally, that the whole idea of the declaratory judgment is an unallowable innovation.

In considering these contentions, it may first be noted that there are many judgments under present forms which do not include the right to execution, except possibly for costs, and the present declaratory judgment practice involves an award as to costs (see section 10 of the act); moreover, under the act before us (section 8), execution, or "further relief," based on a declaratory judgment, may be had where appropriate, and allowed by the court. Next, it may be noted that, since the numerous jurisdictions enjoying this practice all hold that a real controversy must exist, that moot cases will not be considered, and that declaratory judgments are res judicata of the points involved, such judgments cannot properly be held merely advisory; and that there can be proper occasion for judicial action before the infliction of injury or its immediate threat, is sufficiently shown, for example, by the quia timet action, which lay before damage and without imminent danger thereof. Finally, it should be observed that an act like the present one, which permits only a more general use of a device heretofore existing in our practice, cannot be held to be an unallowable innovation in Pennsylvania; for we in this state have long resorted to the declaratory judgment in many fields, though not calling it by that name."

The court then pointed out a number of situations in which the courts have long made declarations of legal rights without including a right to execution, the most common of which is the action to quiet title, and continued:

"No doubt many other instances could be cited where we in Pennsylvania are today, and have been for many years, indulging in declaratory judgments; the present legislation simply makes that practice more extensive. When this latter fact is realized, the whole argument as to the act's imposing on the courts something new, in the nature of a nonjudicial function, fails; for the statute before us merely presents the extension of a long and well established judicial function, previously enjoyed to a considerable extent in this state, of declaring the law which governs a given condition of facts so as to make the controversy covered by these facts res judicata, albeit in many cases no execution may be called for, and even though the action was start-

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[2] Borchard, Declaratory Judgments, page 240 (1934).
[3] Borchard, op. cit. supra, page 242.
[4] See Borchard, op. cit. supra, page 245, note 223 for list of citations on these articles.
[5] 9 U. L. A. 120.
[6] Reports of Am. Bar Association, Vol. 60, page 733 (1935).
[7] Borchard, op. cit. supra, page 245.
[8] Judicial Code, Section 274d; 28 U. S. C. A., section 400.
[9] Petition of Kariher, 284 Pa. 455, 131 A. 265 (1925).

ed before damages were actually inflicted or before danger thereof was imminent."

From these quotations it will readily appear that the recent extensive legislation authorizing declaratory judgments has not brought to American jurisprudence a totally new and unfamiliar procedural device, but rather it has authorized and encouraged the wider use of judicial powers well known and commonly used within restricted fields. In fact, the modifications of existing procedure necessary to broaden the scope of the declaration and to permit declarations of right without necessity of coercive relief throughout the law, were so slight that they were accomplished in England by Rule of Court,[10] rather than by resort to Parliament. Order 25, rule 5, of the Supreme Court Rules of 1883, provided: "No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of rights whether any consequential relief is or could be claimed, or not." This rule became the basis for similar court rules or legislation in most of the British Dominions, and it later became the basis for most of the legislation in this country, including Section 1 of the Uniform Act, adopted in Idaho.[11]

Once it is realized that a declaratory judgment differs from any other judgment primarily in that it does not look to coercive relief, it will be obvious that the courts of Idaho, as well as all other Anglo-American courts have long been accustomed to render such judgments, in limited fields. All that is provided by the new legislation is a new name for such judgments, and a broadening of the field of their usefulness. Courts of Equity long since evolved the now familiar practice of quieting title to real property by decree. Insofar as such decrees do not demand the destruction of instruments, or other specific relief, they are, in effect, purely declaratory. In the field of status we are also familiar with actions for the declaration of the nullity of void marriages. Unlike divorce decrees, these decrees of nullity of marriage do not profess to change the legal relations of the parties, but merely to declare judicially the existing relations on the basis of existing facts. Such proceedings are provided for in Title 31 of the Idaho Code, Chapter 5. Declarations of this kind should be distinguished from decrees of divorce, adoption, foreclosure, appointment of guardians, etc., for while the latter judgments may not look to execution; they are not merely declaratory, hut are investitive, in the sense that they create new legal relations between parties rather than merely declare existing relations.

The equitable bill of interpleader by a stakeholder is also a familiar example of an action looking to a declaratory judgment. So too are various statutory actions, permitted to trustees for securing a determination of their duties, or for the construction of wills, or for the validation of bonds by irrigation districts. It might be of interest to note in passing that the Idaho Legislature authorized as early as 1903, a proceeding to obtain judicial confirmation of the organization proceed-

[10] Statutory Rules and Orders, 54.
[11] Borchard, Declaratory Judgments, page 81 (1934).



ings of irrigation districts, and their issuance of bonds, whether such bonds are sold at the time of commencing action or not. These proceedings, declaratory in nature, were before the Supreme Court in 1905 in Nampa Irr. Dist. v. Brose,[12] litigation probably familiar to many of you. In addition to the above examples, the procedure developed by our western courts for the adjudication of water rights would seem to be declaratory in nature, at least where execution by water masters is not looked to.

The question which readily suggests itself, is why legislation was necessary to expand into general use a long recognized and useful judicial device. The truth is that the limits of the Equitable bill quia timet were never clearly defined, and the expansive powers of Equity, once so characteristic of its jurisdiction, have long been nearly as rigidly confined as the Common Law itself. While England could broaden the scope of the declaratory judgment merely by rule of court, it is probably characteristic of us in America to rely upon the legislature for the exercise of powers which have long been within the established "inherent powers" of a common law court.

Another distinctive characteristic of the declaratory judgment, referred to by the Pennsylvania court, in the above quotation, is that "in order to obtain a declaration, it is not required that an actual wrong should have been done, such as would give rise to an action for damages, and no wrong need be immediately threatened, such as would be the proper basis for an injunction. In other words, a 'cause of action,' in the sense in which that term is ordinarily used, is not essential to the assumption of jurisdiction in this form of procedure." It is this characteristic which has led to most of the confusion in our thinking about declaratory judgments. So accustomed is the Common Law lawyer to regard the perpetration of an actual "wrong" as necessary in order to invoke the aid of the courts that he has difficulty in visualizing a cause of action without such "wrong." Even the equity lawyer is inclined to look for an immediately threatened wrong in order to invoke the restraining power of the Chancellor. In fact, the inclusion of a wrong, or an immediately threatened wrong in every cause of action is inaccurate, and the more critical students of procedure have long since pointed out the error. Judge Phillips, in his book on Code Pleading published in 1896, took pains to point out the distinction between the remedial right the litigant has when a wrong has been committed, and the cause of action. He wrote:[13] "Primarily, an action is not for the redress of prevention of a wrong; it is a proceeding to protect a right. The basis of every action is, a right in the plaintiff; and the purpose of the action is, primarily, to preserve such right. Subservient to this primary object of the action, is compensation for infringement of the right."

In many actions, familiar to all of us, such as actions for partition, to declare a marriage void, to quiet title or to remove a cloud, and many others, there is in fact no wrong at all. Professor Borchard has

[12] 11 Idaho 474 (1905).
[13] Phillips, Code Pleading, page 28 (1896).

pointed out[14] that in such cases the occasion of the state's interference through the judicial power is not actual wrong, "but the denial or dispute of his right, placing him in danger or jeopardy and causing him detriment or prejudice, under such circumstances that the plaintiff may properly invoke the court's protection to re-establish, safeguard, and declare his right, and thus restore the social order."

Thus, although courts have long recognized causes of action in which no "wrong" is charged, it is equally clear that legislation broadening the scope of declaratory relief will make justifiable many controversies which heretofore could not be litigated at all. For example, the parties to a contract may get into a dispute concerning the scope of their respective duties under it. It is not unusual to find contracts so inartfully drawn that judicial construction of their meaning ultimately become necessary. Under our traditional procedure this judicial construction can only be had after one party has acted upon his own interpretation of his rights, and has committed what the other party considers a breach. This often results in further protective conduct on the part of the other contractor, such as notice of termination, notice of forfeiture, refusal of further performance, etc. which may completely shatter the harmonious economic relation between the parties and result in losses to all concerned. These losses can be and are being avoided by the use of the declaratory judgment procedure whereby the single key issue of the true meaning of the disputed clauses may be framed in adversary pleadings, argued by counsel, and submitted to the court for judgment—without any breach having taken place. Either party may become the plaintiff, and serve the other with process in the usual way. That such a proceeding is contemplated by the Act is perfectly clear from Sec. 3, which provides: "A contract may be construed either before or after there has been a breach thereof."[15] In an economy where long term contracts, leases, trust instruments, etc. are so common, the stabilizing effect of such a procedure may be a higbly beneficial influence. It is one of the leading claims made for the Declaratory Judgment by its advocates.

But what does all this do to our traditional concept of a "cause of action"? It merely means that the concept must be enlarged to include cases where declaratory relief is proper but where a traditional action would have been considered premature, as well as those in which a proceeding looking to coercive relief could have been brought. In the latter type of case, the plaintiff has his option whether to pursue his coercive remedy or to rely upon the milder declaration. In many cases, particularly those brought to test the validity of a statute or of some Administrative action, the mere declaration is sufficient to insure observance of the law by public officials, without resort to the injunction. The wide use today of the injunction in this type of test case seems to be an abuse of the equitable powers of the courts. The application for injunction is merely a screen behind which to get the controversy before a court for adjudication. What is really sought is the adjudication rather than the coercive relief. The declaratory proceeding also has the advantage of eliminating many of the hazards and technicalities incident to the suit for an injunction. No bond is required; the equitable conditions often attached to the issuance of the injunction may be burdensome to the plaintiff, and may be avoided. Furthermore, the remedies are not mutually exclusive, and often a prayer for a declaration is combined with a prayer for injunction, damages, or other coercive relief.[16] The advantage of the combined prayer is that in case injunction should be denied for some traditional reason, such as no showing of inadequacy of legal remedy or no showing of irreparable injury, the declaration may be issued nevertheless, and may often terminate the controversy.[17]

Certain other important characteristics of the Uniform Act adopted in Idaho should be noted. Section 1 provides in part, "The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree." This provision insofar as it authorizes a decree negative in form, was probably intended by the draftsman of the Uniform Act to make it clear that declarations are authorized which established the nonexistence of claimed legal rights. In other words, an immunity from liability may be judicially determined as well as rights, privileges, powers, and other legal relations. An unfounded demand by a creditor may undoubtedly result in as much peril to the alleged debtor's financial security and tranquility as would a cloud upon the title to his real estate; thus, it often happens that such debtor, instead of waiting to be sued, institutes the action himself for the clarification of his legal relations. One celebrated case of this kind appeared in the English courts in 1915,[18] under the name Guaranty Trust Company of New York v. Hannay and Company. In that case the plaintiff, an American concern, sued the defendant for a judgment to the effect that plaintiff was under no duty to pay back money demanded by the defendant, which money had been paid over under an assumption that certain bills of lading were genuine and not forged. In other words, the plaintiff sought a judicial declaration of its legal immunity from a money claim asserted by the defendant. The English court granted the relief only after some hestitation concerning who had the cause of action. It was probably the desire to make it clear that judicial relief against unfounded demands was contemplated by the Act, which led to the inclusion therein of provision for negative decrees. Professor Borchard was Co-Draftsman of both the Uniform Act and of the Federal Act. When he wrote his book on Declaratory Judgments, the courts of England and the British Dominions, as well as courts in this country, had made enough use of the negative declaration so that he was able to say:[19] ". . . it is believed clear today that relief from an unjust claim

[14] Borchard, Declaratory Judgments, page 3 (1934).

[15] Idaho S. L. 1933, ch. 70, section 3.

[16] See cases cited, Borchard op. cit. supra, page 162 et seq.

[17] See, for example, Ufa Films v. Ufa Eastern Division Distribution, Ins., 134 Misc. Rep. 129, 234 N. Y. S. 147 (1929). (Dispute over meaning of film distribution contract; declaration granted; injunction denied.)

[18] (C. A.) (1915) 2 K. B. 536.

[19] Borchard, op. cit. supra, page 420. See also Borchard's discussion

gives the plaintiff a sufficient legal interest in a judgment and hence a 'cause of action' in the technical sense. An action is equally justiciable whether it is initiated by the creditor, who sues on his claim, or by the debtor, who maintains that the creditor has no just claim upon him, as alleged." Perhaps it was this assurance that the matter was settled which led the author, when he drafted the Federal Act, to omit any specific reference to negative decrees. It was provided: "In cases of actual controversy . . . the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration . . . " It was probably thought to be clear that immunity from a claimed liability is a "legal relation" within the wording of the Federal Act. In a case decided a few weeks ago by Federal District Judge Otis of Missouri it was held otherwise.[20] The plaintiff was an Insurance Company which had issued an accident policy to one Foulke. While the policy was in force Foulke died, and his widow and beneficiary claimed the death was accidental, and that the company should pay. The Company denied that death was accidental, denied liability, and brought an action under the Federal Act to have the validity of the claim determined. Judge Otis sustained a demurrer to the complaint on the ground that immunity from asserted claims is not a right or legal relation of the plaintiff within the Act. The Judge also remarked that Counsel had cited no authority supporting the theory of the petition. Now it seems to me that Counsel for the Insurance Company might well have found ample authority for the action in the cases cited and discussed by Borchard in his exhaustive book published two years ago. As a matter of fact, a Federal District Judge in Texas has sustained a very similar action under the Federal Act just a few weeks before Judge Otis's decision.[21] In that case an Ohio casualty insurance company brought an action under the Federal Act for a declaration relieving it from liability for injuries to Texas residents from operation of an automobile which was insured by the plaintiff company. Judge Kennerly not only sustained the validity of the Act, but also the propriety of the action under the circumstances.

It would seem that if the insurance companies find the declaratory proceedure useful in disposing of doubtful claims without waiting to be sued on them, that is, if they wish to bring on the fight and get a judicial determination at a time when their evidence is available to defeat the claims, they should follow up their legislative program with more careful court work so as to prevent the unfortunate results of the Missouri situation above referred to.

It should not be concluded, however, that the declaratory procedure is beneficial alone to Insurance companies. The policyholders too, have found it useful. For example, in a case before the California Supreme Court in 1931,[22] it appeared that the Plaintiff had paid a premium on his fire insurance policy to an agent of the Company who had subsequently converted the premium and had absconded. The Company denied that it was bound. The question, of course, turned on the ostensible authority of the agent. Plaintiff established his claim by use of the declaratory procedure. The advantage of such procedure would seem to be that Plaintiff need not wait until loss by fire to find out whether he is covered by his policy.

[20] Columbia Nat. Life Ins. Co. v. Foulke, 13 F. Supp. 350 (1936).
[21] Ohio Casualty Ins. Co. v. Plummer, 13 F. Supp. 169 (1935).
[22] Frasch v. London and Lancashire Fire Ins. Co., 2 P. (2d) 147 (1931).



A slight modification of the Uniform Act was made in Section 2 as adopted in Idaho. In authorizing declaratory construction of deeds, wills, statutes, contracts etc. it was made clear that oral contracts were included. This precaution was probably inspired by uncertainty which had arisen elsewhere under the Uniform Act.[23]

While the declaratory procedure will probably find its greatest usefulness where the facts are agreed upon, or where only simple disputes of fact are involved, section 9 makes it clear that such issues may be tried in the same manner as such issues are determined in other proceedings. The Federal Act also expressly preserves the right to jury trial, probably out of caution to prevent constitutional attacks on that score.

Section 11 of the Idaho Act adopts the liberal Equity rule as to joinder of parties, and provides that no declaration shall prejudice the rights of persons not parties to the proceeding.

Section 8 provides for further relief based on a declaratory judgment or decree whenever necessary or proper.

An important limitation upon the scope of the Act is contained in Section 6, which provides that: "The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." This grant of discretion to the Courts would seem to be ample protection against ill-founded and carelessly prepared suits. It certainly was never intended that busy or careless Attorneys with complicated cases should be allowed to throw an unorganized set of facts into the lap of the Judge and ask him to isolate and determine as well as to decide the issues. The customary pleading and other procedural technique must be used with equal care, whether a declaration alone is sought or whether coercive relief alone is asked for, or whether the two are combined. The issues should be as clearly framed and can be as exhaustively argued in a declaratory case as in any other. In addition, the party seeking a declaration should come prepared to show the court that the declaration sought will serve its intended purpose of terminating the controversy.

Under the Act, only courts of record, within their respective jurisdictions, are granted the declaratory power. The usual jurisdictional requirements, of course, must be complied with. The case brought for a declaration must present an actual controversy based upon existing facts, not a moot or hypothetical case or one in which the parties have only a remote or speculative interest.[24] The declaration must also be

[23] Borchard, op. cit. supra, page 409.
[24] Borchard, op. cit. supra, page 35 et seq.

distinguished from advisory opinions,[25] which are authorized by Constitution in some states, notably Massachusetts. The giving of an advisory opinion at the request of the legislative or administrative departments of the government is not a judicial function at all. It does not purport to be a binding adjudication of rights between adverse litigants. It compares roughly and more nearly with the advisory function usually imposed upon the Attorney General.

It seems to have been a tendency to confuse the declaratory judgment with advisory opinions or moot cases which led the Michigan Supreme Court in 1920 to declare the legislation unconstitutional as imposing a non-judicial function upon the courts.[26] Since that time the question has been repeatedly raised, and consistently the decisions have been in favor of the validity of the Acts.[27] Even the Michigan court has changed its position.

It should hardly be necessary to add that not only should an actual controversy exist, but that the adverse interests should be made to appear in the pleading. Our Supreme Court has made this point sufficiently clear in State v. State Board of Education[28] in which the court assumed jurisdiction of an appeal in a declaratory judgment proceeding because of the public importance of the matter, in spite of the fact that the parties both urged the same conclusion.

One other important limitation upon the scope of the Act should be pointed out. If the declaratory procedure is to perform its prevenitve function of settling disputes at their inception rather than requiring them to develop into full-blown legal battles leading to protracted litigation, the courts must entertain suits, as I have pointed out above, which under our traditional procedure would be deemed premature. On the other hand, the parties can not rely on speculative or contingent facts which may or may not take place. Just where the line should be drawn is difficult to state in general terms. It should, I think, be left to that sound discretion of the Court under Section 6 to entertain such suits only when satisfied that the judgment will terminate the controversy.

Within these limitations, if sympathetically handled by our Courts and by the members of the Bar, the declaratory judgment procedure should attain the high purpose set for it by Section 12 of the Act which reads: "This Act is declared to be remedial; its purpose is to settle and afford relief from uncertainty and insecurity with respect to rights, status and other legal relations, and is to be liberally construed and administered."

JUSTICE AILSHIE: In what respect does the federal act differ from the Uniform Act?

PROFESSOR HOPKINS: I take it that the scope was intended to be exactly the same. The wording is very different. The federal

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25 Borchard, op. cit. supra, page 50.

26 Anway v. Grand Rapids Ry. Co., 211 Mich. 592, 179 N. W. 350 (1920).

27 For elaborate discussion of the cases, see Borchard, op. cit. supra Ch. VII.

28 State v. State Board of Education, 52 P. (2d) 141 (Idaho 1935).



act is in three short sections while the Uniform Act is in seventeen. The first section of the federal act, which in broad terms authorizes declarations, has in it the words "in cases of actual controversy." Presumably Borchard inserted them in the act to foreclose the idea that advisory opinions were authorized, and thus avoid constitutional attack. Section I of the Uniform Act likewise authorizes declarations in broad terms, but it is followed by sections 2, 3, and 4 which make specific reference to various types of cases contemplated under the Act. Then there is an added section in the Uniform Act saying that these specific cases referred to in sections 2, 3, and 4 are not to be deemed exclusive, but section 1 is to be given its broad scope. No specification is placed in the federal act. All of that is accomplished by saying nothing in the federal act, and leaving it to be covered by the broad section 1. In both acts there is specific reference to a right to a jury trial, and to supplemental relief based on a declaration. The Uniform Act alone makes specific reference to Costs and to Parties. Then, of course, there is a certain amount of paraphenalia that goes with the Uniform Act that was unnecessary in the federal act with regard to construction, uniformity of interpretation, and so on.

MR. HAWLEY: A suit brought in a state court may be removed to the federal court under the same rules as any controversy in an ordinary suit?

PROFESSOR HOPKINS: I should say removal can be had under the same circumstances that it now can be had. There is nothing in the act to enlarge or restrict federal jurisdiction. You still have your federal question.

JUSTICE AILSHIE: How many of the state acts provide for the declaring of an oral contract?

PROFESSOR: The Uniform Act was not specific on that. The Uniform Act was adopted without change in many jurisdictions in the '20s, and then subsequently a difference of opinion came about as to what was included under the term "contracts" which could be construed by declaration. I think California held that oral contracts were not included, though it was intended by the draftsman to include all contracts. It was perhaps a slip in drafting or mistake in interpretation. At any rate the more recent of the acts, as in Idaho, make specific inclusion of oral contracts. I think Oregon has amended its act to include a specific reference, and to include all contracts.

MR. THOMAS: Must you have a set of facts?

PROFESSOR HOPKINS: The act does not contemplate solving merely questions of law. Probably its greatest usefulness will be found in the test cases where the facts can be stipulated. The act can be used, however, with propriety and advantage in having declared a fact or set of facts where a series of rights will depend upon it. The act clearly provides judicial procedure for having declared the existence or non-existence of facts which are in controversy and which result in peril and insecurity to legal relations.

MR. THOMAS: Will you have a jury to determine that question or not?

PROFESSOR HOPKINS: Of course, the jury trial must be preserved. In any issue in which there was a right to a jury prior to this

Act, that must be preserved under the constitution because there has been no change in the constitution as to the right to a jury trial. I might add, in the Uniform Act adopted in Idaho, the section which refers to the declaration of facts provides that such an issue may be tried in the manner heretofore used in action at law and suits in equity. That is roughly the wording.

JUSTICE AILSHIE: In other words, the same state of facts in a real controversy that would entitle you to a jury, would entitle you to a jury under the declaratory judgment act.

PROFESSOR HOPKINS: That is correct.

MR. GRAHAM: Are there any other questions? If not, we thank you most heartily for the paper.

Is the committee on canvassing returns of the election in the western division ready to report?

MR. THOMAN: Mr. President, the result of the ballot for commissioner of the Idaho State Bar, Western Division, is as follows:

| | |
|---|---|
| Ballots cast | 34 |
| For J. L. Eberle, Boise | 33 |
| For R. B. Scatterday, Caldwell | 1 |

MR. GRAHAM: By the vote, J. L. Eberle has been elected as commissioner for the western division for the next three years, relieving me of any further responsibility.

PROFESSOR HOPKINS: There is one thing I overlooked. In case you have occasion to use the declaratory judgment procedure and want some authorities and cannot find any that give the answer. I suppose these Canadian and Australian reports are not available in most of your libraries. Mr. Borchard has made a comparative survey and throughout his book has included citations of all these British and Canadian cases. Probably that book will be available and you can get some reference to those cases.

MR. GRAHAM: On behalf of the Bar, I thank you.

JUDGE KOELSCH: The new book on American Jurisprudence has a very fine chapter on this subject.

MR. GRAHAM: Anything that anybody may have to say, speak now or forever hold your peace. Don't forget the banquet tonight at seven o'clock, and be on hand to-morrow morning at ten.

(Adjournment.)

## MORNING SESSION, SATURDAY, JULY 25, 1936, 10 A. M.

MR. GRAHAM: There is an unfinished matter referred for consideration to Judge Koelsch's committee and further report. What suggestions have you to offer?

JUDGE KOELSCH: The committee has not got together to make the amendment or discuss that or put it in shape. In fact, we will get together and frame such rules—we are the final authority anyway.

MR. GRAHAM: I am glad you are exercising the power that is within you. That being true, we will say that the report of the judicial section has been deferred. Unless the judges get together, we will bring it up next year.



The next thing on the program is a report by Judge Givens on the "Methods of Judicial Selection." Judge Givens.

JUDGE GIVENS: Mr. President, ladies and gentlemen:

## COMMITTEE REPORT ON JUDICIAL SELECTION

Your committee, appointed by President John Graham at the Idaho State Bar Association Eleventh Annual Meeting, July 11-13, 1935, to investigate and make recommendations with regard to the nomination, selection, and non-partisan election of judges, consisting of Judges C. F. Koelsch and C. J. Taylor of the District Courts, and Judge J. H. Anderson, Marcus J. Ware, Judge James R. Rothwell, and J. L. Eberle, members of the Bar, and myself as chairman studied numerous state laws, and innumerable law review and bar association magazines, a list of which is appended to this report, and a copy of the notes on the Selection of Judges, being a Brief Outline on the Selection of Judges as promulgated by the American Bar Association by the Committee on Judicial Selection of the Conference of Bar Association Delegates of the American Bar Association, of which organization Justice James F. Ailshie is a member.

After some considerable correspondence with each member of the Committee, discussing the various views, the chairman of the committee sent to each member a list briefly outlining each plan, as set forth below, asking the members to mark his choice of the various plans.

"QUESTIONNAIRE

| | | | |
|---|---|---|---|
| A. | Present Law | Yes. | No. |
| B. | Nominate and elect as at present but only those approved by lawyers in secret ballot. Advisory | Yes. | No. |
| C. | Nominate and elect as at present but only those approved by lawyers in secret ballot. Controllingly restrictive | Yes. | No. |
| D. | Present law, but longer terms | Yes. | No. |
| E. | Present law, but no re-election | Yes. | No. |
| F. | Present law but at bye, i. e., odd year judicial election only | Yes. | No. |
| G. | California System—Running against record, and if favorable elected. If not favorable may still run against opponents | Yes. | No. |
| H. | Appointment by Governor | Yes. | No. |
| I. | Appointment by Governor, with approval of the senate | Yes. | No. |
| J. | Appointment by Governor, for a term of years | Yes. | No. |
| K. | Appointment by Governor for life during good behavior | Yes. | No. |
| L. | Appointment by Governor from unlimited list from entire bar | Yes. | No. |
| M. | Appointment by Governor from limited list approved by the Bar | Yes. | No. |

In this way many of the present and proposed systems of Judicial selection were eliminated, and resulted in the following brief recommendations:

One member is in favor of the present law, with longer terms, but nominated from a list of candidates that have been approved by the bar of the state (a ballot having been taken thereon in secret). In

other words, the recommendation of the bar is to be advisory but not controlling, and the electors are not limited to the list submitted by the Bar, but may approve other candidates.

A second member of the committee recommends and favors our present system of nomination and election, but the candidates should be approved by the Bar of the state in a secret ballot, with the view of having their selection controllingly restrictive and not merely advisory. In other words, no candidate can be placed on the ballots or certified by the Secretary of State until he has been recommended by the State Bar, upon a proper vote of that organization.

Another member of the committee recommends that we keep the present system of election of Judges, but change the terms so that there is no re-election, and in this regard, he prefers the California system, whereby the Judge at the expiration of his term, runs against his past record only, and is opposed by no candidate, on the theory of course that the incumbent Judge is fairly entitled to re-election if his past record withstands the vote of the electors. Then in the event that he is defeated on this basis, and his record found unfavorable, he is entitled to run against any other candidates that will be proposed in a later election.

The fourth member favors our present system, but if any other plan were to be adopted he favors the California plan as above set forth.

The other three members of the committee have to date made no recommendation, so that we may say that there is a majority of the committee in favor of the present plan, although receptive to a closer control by the Bar, and with tendencies toward approval of the California system.

Two members of the committee sent in rather detailed statements of their personal views critical of the present method and many of those considered or suggested, but since they are merely individual views, though their views were sent to all members of the committee, but there was no opportunity for discussion of them, nor approval or objection, I have not incorporated any reference to them.

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Journal of the American Judicature Society: No. 1, Vol. XIV, June, 1930; No. 3, Vol. XV, October, 1931; No. 2, Vol. XVI, August, 1932; No. 6, Vol. XVI, April, 1933; No. 5, Vol. XIII, February, 1930; No. 4, Vol. XVII, December, 1933; No. 2, Vol. XX, February, 1934; No. 6, Vol. 18, April, 1935; No. 2, Vol. 19, August, 1936; No. 3, Vol. 19, October, 1935; Vol. 3, pages 37, 75, 165; Vol. 5, p. 41; Vol. 7, p. 258; Vol. 8, pp. 48, 258; Vol. 10, pp. 39, 42, 177; Vol. 11, pp. 133, 145, 164; Vol. 12, pp. 36, 104, 178, 186; Vol. 13, p. 37; Vol. 15, pp. 21, 38, 46, 139, 149, 150; Vol. 16, pp. 44, 45, 46, 126, 150, 155, 108; Vol. 17, pp. 75, 91.

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JUDGE GIVENS: I would like to read the outline of points for and against the various schemes that were considered, as promulgated by the American Bar Association, because I think this heading will perhaps aid in such discussion as you may desire to give to this matter.

## NOTES ON THE SELECTION OF JUDGES.

(December, 1933. This program, which was adopted by a meeting of state and local bar association officers at Grand Rapids on August 29th and was afterwards approved by the Executive Committee of the American Bar Association, provides for a unity of work by lawyers' organizations of the country over on four subjects in which the bar is

vitally interested—one of which is The Selection of Judges and Bar Activities in Connection Therewith.)

## A BRIEF DEBATE OUTLINE ON THE SELECTION OF JUDGES.

I. APPOINTMENT BY THE GOVERNOR:

A. Advantages
1. Eliminates necessity of currying favor with public.
2. Eliminates politics.
3. Merit recognized.
4. Opinion of bar considered.
5. Appointment has worked successfully in Federal Courts.
6. Appointment is regular method of choosing judges in every other country of the world except Switzerland.
7. Only way to attain recognition of minority groups.
8. Bar Associations have more influence over appointment than over election.

B. Disadvantages.
1. Could be used to pay political debts.
2. Places too much power in hands of Governor.
3. Depends too much on caliber of Governor.
4. Tends to make judges autocratic and overbearing.
5. Cloisters judges.
6. Inefficient, incompetent or corrupt judges cannot be reached except by clumsy and ineffective method of impeachment.
7. Political considerations will control Governor's choice.

C. Nomination by Special Body.
1. By Judicial Council.
2. By council composed of Chief Justice, 4 other judges elected by the judiciary and 3 attorneys appointed by Governor (Cleveland Plan).
3. By Chief Justice, Judge of Court of Appeals and State Senator (Commonwealth Plan).

D. Confirmation.
1. By Senate.
2. By Legislature.
3. By Judicial Council.
4. By Supreme Court.

II. ELECTION OF JUDGES:

A. Advantages.
1. Directly responsible to people.
2. A constant check on inefficiency.
3. A democratic system for a democracy.
4. Choice by party leaders has tendency to cause selection of high grade men.
5. Gives bar associations chance to express their opinion.
6. Tends to make judges less bigh-handed and despotic.
7. Tendency is to re-elect appointed judges.

B. Disadvantages.
1. Produces judge of political rather than legal ability.



2. Is not really democratic as party bosses, not people, nominate.
3. Causes opinions to be colored by desire for popularity.
4. Inconvenience, expense, and lack of dignity of political campaign cause many good men to decline to seek judicial preferment.
5. Results in attempts to secure publicity.
6. Causes incumbent to curry favor with politicians.
7. People cannot inform themselves of qualifications of judicial candidates.

III. COMMONWEALTH OR CLEVELAND PLAN:

A. Advantages.
1. Combines best features of appointment and election.
2. Provides for both nomination and confirmation (Cleveland).
3. Appointments made on merit are subject to check by electorate.
4. No campaigning or undignified attempt to secure votes.
5. Judge runs on his record.

B. Disadvantages.
1. Plan is untried.
2. Still necessary for judge to please public in order to remain in office.
3. Nomination by judicial council is advisory only (Cleveland).
4. Subject to many of the objections which can be made both to election and appointment.

IV. A DIFFERENT SOLUTION IS REQUIRED IN DIFFERENT PLACES.

A. In populous cities.
1. The candidates are comparatively unknown to the voters.
2. There is little opportunity for voters to discover their real qualifications.
3. Voting is likely to be purely on party lines.
4. Political leaders have more power to select unfit candidates.

B. In rural districts.
1. Candidates are generally known to voters.
2. It is easy to find out about them.
3. More necessity for men with good record and known ability to be selected by party leaders.

V. BAR ASSOCIATION PRIMARIES:

1. Selection of most suitable candidates from each party by poll of the bar.
   a. By questionnaire indicating opinion of bar as to particular qualifications each candidate possesses.
   b. By simple vote preference.
2. Requiring pledge to abstain from appearance at political meetings.
3. Requiring pledge of candidate not to accept campaign contributions.
4. Method of putting results of bar primary before public.
5. Methods of working to secure election of candidates regarded by bar as most fit.

At the present time in 39 jurisdictions judges of the highest court are elected by the people and the trial judges are similarly selected, except in Florida, where they are appointed. In Rhode Island, South Carolina, Virginia and Vermont the judges are chosen by the legislature. They are appointed by the Governor and are confirmed by the Legislature in Connecticut, by a Judicial Council or Governor's Council in Maine, Massachusetts and New Hampshire, and by the Senate in Delaware and New Jersey. In the 10 last mentioned states this applies both to judges of courts of last resort and trial judges, except that County Court judges are elected in Vermont, and all judges except justices of the Supreme Court are appointed in Rhode Island.

In New Jersey the Chancellor appoints seven Vice Chancellors to assist him in handling the work of the Equity Courts and this appointment does not require any confirmation.

(Published by the Committee on Judicial Selection of the Conference of Bar Association Delegates of the American Bar Association, of which Judge James F. Ailshie is a member. Edited by Will Shafroth, Assistant to the President of the American Bar Association, 1140 North Dearborn St., Chicago, Ill.)

MR. GRAHAM: Thank you, Judge. It shows comprehensive study of the different plans and advantages and disadvantages which are practically unknown to the members of the Bar. Is there any discussion? Mr. Glennon, you are down here for discussion of this. I thought George Donart was to be here, but he isn't. He is looking after politics.

MR. GLENNON: I rather anticipated that Mr. Donart would open the discussion and then I could take the opposite side and we could get an argument started, and that is about all I planned to do. I personally agree with the report of the committee given by Judge Givens, as I understand it, that is, the majority of the committee favoring our present system of selecting judges. Of course, our system of selecting judges is not a perfect one, and from personal experience I know that our judges are not 100 per cent perfect, but I think that would be true under any system that we might adopt. In order to materially change our system of selecting judges, of course, we would have to have a constitutional amendment, or maybe two or three of them. I doubt very much whether the results would justify making a change, and we might find that they were not as satisfactory as the present system. Of course, we want them as free as possible from partisan political activities, but human nature is human nature wherever we find it, and the man who is not a partisan is a nonentity, as I look at it, so that we cannot entirely eliminate partisanship from a man's make-up because we want to make a judge of him. The best we can hope for is to get a man, first, sufficiently learned in the law, secondly, who is broad-minded enough and independent enough that when he goes on the bench he will decide the case presented to him upon the facts and the law as he understands it.

I certainly would not be in favor of the appointive system. While it has its advantages, it certainly has its disadvantages, and I think its disadvantages would overcome all benefit we might derive from an appointive system, particularly if we leave it to the Governor to appoint with confirmation by the Senate. The Governor is no more com-



petent to select a judge than the average voter is. As to making a selection on any vote that the members of the Bar Association might take on the question, of course, we would have to have a constitutional amendment for it to be of any binding effect. I don't believe that it would be advisable to leave it to the members of the Bar to select the judges. I don't believe we could ever agree on them, and I fear we wouldn't have any judges.

I do think, however, that the members of the Bar should take an active interest in the selection of judges, more active than they do. There is no reason why we cannot have a very controlling influence in the selection of judges in this state, if we will do it, if we will be as fearless and as independent as we want the judges to be and as courageous in expressing our opinions as we want the judges to be. Every one of us, of course, is frequently asked about the qualifications of the candidate for judge, and we either recommend him or say nothing, and yet we want the judge to be absolutely fearless and independent. We must take an independent attitude ourselves, and we must have the moral courage to state our convictions and state them openly so that the people will have the benefit. If our views are worth anything, then the lay voter is entitled to the benefit of them.

Personally I have no particular criticism to make of our present system of our judiciary. During the long period of years that I have been practicing in Idaho I have appeared before a great many different judges in trial and Supreme Court, and, of course, I have not always been successful. The court many times has not succeeded in convincing me that I was wrong, but I accepted the results and hoped for better luck next time, and the next time I was luckier and then I felt better toward the judge. So, after all, my observation is this—I can say this truthfully—that I don't know of a single instance in all of the many years covering those years where a judge has been influenced by any ulterior motive, political or otherwise. I am still convinced that in every instance the judge has been wrong, but it might well be that some other judge in his place would have been equally wrong in his decision. No other system will be 100 per cent pefect, and I don't know of anything that would justify tearing up our present system and trying something entirely new. The only change that has been made in the selection of judges in this state, as I recall, has been the change from the partisan to the non-partisan. As far as I can see, it doesn't make any difference. I haven't seen any change in the quality of our judges since they were selected on the partisan plan and when they were selected on the non-partisan. Now, I don't expect everybody to agree with what I have said, and I hope somebody disagrees with it, because I would like to hear the subject discussed.

JUDGE AILSHIE: Mr. Chairman, and members of the Bar: I want to say a word with reference to the subject that has been presented by the Chief Justice. I have been a member of the Idaho Bar for forty-five years, and during that time I have seen some severe contests waged and participated in a good many of them. During that period of time I have engaged in the practice of law and I have spent quite a little time on the bench. In my judgment when you change from one system to another, you simply wish that you had the

other system. It makes very little difference in the result you get. For illustration, I was elected to the Supreme Court thirty-four years ago this election upon a political ticket, nominated and elected the same as the political officers, and I was elected after one of the most acrimonious and bitter contests that perhaps has ever been waged for judicial office in Idaho; not anything personal between myself and my opponent, but over the now somewhat unknown two-mile limit law. I had been in the employ of the cattle men and had prosecuted a great many violators of the two-mile limit law. My opponent had represented the sheep men. The question had been up as to whether the two-mile limit law was constitutional or not and the court divided two to one. The last three or four weeks of the campaign, campaigning for political offices was forgotten, and the contest was waged over the election of a Supreme Court justice. I carried counties that no Republican had ever carried before and lost some of the strongest Republican counties in the state to my opponent. When the final result was counted I was elected. I give you that as a result of the political election of the judge.

The last election two years ago is fresh in my memory. I was elected at that time as a non-partisan on a non-partisan ticket. Now, from a personal standpoint, if you want to relieve the candidate of grief and labor, you will take him out of the non-partisan campaign. He has got to run his own campaign then. He has no committee back of him; he hasn't anything back of him; if he wants to maintain an organization and become ecquainted, he has to do it himself. I am not criticizing any of the methods, but I am simply suggesting to you that when you get one you regret that you haven't got the other system. None of them are perfect, and in any system you have to get acquainted with the people and you have to wage your campaign. Either you have to do it or you have to have a committee or organization, whether it is political or non-partisan. Take into consideration time expended and expense to get acquainted with the people and run a campaign throughout the State of Idaho and you have a big job ahead of you. I think I might be called Exhibit "A," as a result of all the different systems. I have been elected under all of them.

MR. GRAHAM: Thank you Judge. I believe the best method of handling this would be to receive the report and place it on file and then have the Bar Commission refer the complete report back to the locals so that they can study the different plans outlined in the report and at the next meeting bring it up for discussion again. It is only by a system of education that we are going to get anywhere in any reform that we desire, and I know of no system of getting this back to the members of the Bar and the laity generally except through the locals. If there are no objections, I am going to receive the report and ask the Commissioners to refer it back to the locals for further discussion and to keep the subject on the calendar for discussion a year hence. It is a live question.

MR. A. L. MORGAN: I think that plan is correct, and I offer this suggestion to the various members of the locals in connection with what Judge Ailshie has told us of the campaign that he made some thirty years ago. Ordinarily where some question such as the two-



mile limit law is not injected into it, on a political basis, the judges are elected in accordance with the particular political party in power. I recall an election in which a Republican candidate was nominated for no other purpose in the world but to fill the ticket. That candidate at that time was from a city that was heavily Republican. That candidate ran 300 votes behind his ticket and defeated Judge Rice, whom every one of the lawyers loved and respected, by a handsome majority. Just a few years before I had active charge of my brother's campaign when he was running on the non-partisan basis, and I was anxious to know what the actual results of that election were, as a matter of how the scheme worked. At the same time Judge Steele, who had always been a Republican, was running for re-election in the Second Judicial District, at that time what is now embraced in the Second and Tenth Districts, and D. A. Needham was running against him. Burton L. French's own county, Latah County, always led the ticket, and Judge Steel would run right along with him. On the non-partisan plan, I discovered that both candidates for office of the Supreme Court and both candidates for office of judge in the Second Judicial District received forty-nine and a fraction per cent. of the votes cast for governor; in other words, both of them had received less than a majority of the vote cast. Mr. Glennon said that he finds this system satisfactory; he loses lawsuits occasionally, but he takes it, as he has to, and hopes that he will have better luck next time. The difficulty is that I am getting quite tired of relying on luck in these lawsuits; I am not very lucky.

MR. PAINE: I don't wish to discuss the subject, although I have convictions upon it, because it seems to me it is entirely a waste of time. We have been discussing it all my life, and, peculiarly the lawyers of the nation would not wish to elect the federal judges, and at the same time they are opposed to the appointment of the state judges. There isn't any logic in it, but it is a fact.

I just arose to say that I want to thank the gentlemen who have come here and delivered such helpful talks and read such valuable papers as the gentleman did yesterday upon declaratory judgments, and as the committee has done this morning through Judge Givens. We owe so much to them. The rest of us come here to have a good time. These other men work hard and give us the benefit of that. I don't want to select any one man but I want to say to you that I take this opportunity to thank them particularly for their work.

MR. McCARTY: In my humble opinion the selection of judges on a non-partisan basis is wrong, because I never saw a non-partisan judge yet. They are always partisan on one ticket or the other, so that unless we could find such an animal as a non-partisan, I think we should be back on the old system and let him have his party appoint him.

MR. GRAHAM: The next subject is a continuation of the discussion of the rule making power of the Idaho courts. A year ago Judge Ailshie read a paper on the rule making power of the courts, and this year he was asked to supplement that paper by bringing it down to date and making it apply to the Idaho law, to see whether or not the courts in Idaho cannot exercise the rule making power we

think they should have under the present constitution and the legislative system. Judge Ailshie, we will be glad to hear from you now.

JUSTICE AILSHIE: Mr. President: I realize that continued stories are not generally popular. A year ago I was requested to prepare a paper on the general subject of the rule making power of the courts. Now, any of you that were there and beard the paper, or might have read is in the report of the proceedings, will recall that I collated some of the authorities and commented on the original power assumed by the English courts and by the Supreme Court of the United States when it was organized, and courts subsequent to the organization of the government, and pointed out that they had at all times assumed as a matter of course that they had the power to promulgate all the rules of practice and procedure necessary to the privilege of the courts and the administration of justice. A few weeks ago I had notice from the Secretary of the State Bar that I had been selected to continue the discussion with reference to the power of the Idaho courts under the Idaho constitution. I have not prepared a great deal on the subject, but I shall give you briefly some of the things I have found and consider of sufficient importance to elicit your consideration.

A year ago, in addressing this association, I expressed the belief that we ought to have a set of rules governing the practice in district courts, uniform throughout the state, subject only to such possible exceptions as local conditions might demand in minor matters. Where each district court may adopt an independent set of rules, an adherence to them is difficult for attorneys from other districts and sometimes lends confusion and uncertainty to a record on appeal.

The Supreme Court can not take judicial notice of a variety of rules from the various districts of the state. (Powell v. Springston Lumber C., 12 Ida. 723, 88 Pac. 79; Peters v. Walker, 37 Ida. 195, 215 Pac. 845.) It follows, as a consequence, that where a rule of district court is involved it must appear in the record properly proven or identified.

If we had a uniform set of rules in force throughout the state, that fact alone would afford a very potent argnment for the Supreme Court taking judicial notice of them and more potent still if the rules had the approval of that court.

There are many things which arise in the course of a lawsuit, from the time the complaint is filed until the judgment becomes final, that must be done, the procedure for which is not prescribed by statute and which could not be so prescribed by reason of their unusual character or peculiar application to the facts of the particular case in hand. If we wish extra time in which to perform an act or desire an advancement or delay in a hearing, we must present our application to the court; and the time and manner of service, and hearing thereon, are appropriate matters to be prescribed by rules. Sometimes an extraordinary emergency requires prompt action—that can only be covered by a general rule.

Much must be left to the discretion of the judge, but there is one thing that should never be overlooked, and that is, to always give the opposing party such notice as will enable him to be present, or have



a representative present, to oppose, if he desires to do so, any and every application of every kind or character. Ex parte orders should always be looked upon with disfavor, except in those cases where the order or judgment applied for is a matter of right or is no longer open to opposition.

The general outcry that has gone up during recent years, over the delay of many courts in disposing of cases pending, coupled with the tremendous increase in crime, have spurred the courts to an assertion of their inherent powers to make and adopt rules governing the procedure and dispatch of business.

The importance of the courts and the bar taking positive and definite action on the subjects of the administration of the law, is made manifest by the tremendous drift that has taken place toward administrative bodies and boards away from the judiciary and into what is sometimes designated "quasi-judicial" bodies. In actual practice "quasi" is a mere weasel word, sapping the vitality from the judicial power.

As I said to you on a previous occasion, there is little room for comparison between the dispatch of business in this country and England. This is due to the fact that we dispose of hundreds of cases for every single case that is tried in England; and, in the second place, they have only one set of courts and one judicial system, while we have 49 independent judicial systems, with hundreds and hundreds of cases under each system. It has been said by an eminent American judge, that:

> "No other nation ever had so many kinds and varieties of courts; courts of general and courts of limited jurisdiction; courts superior and courts inferior; courts of law and courts of equity; police courts and justice courts; civil courts and criminal courts, courts of first instance and courts of appeal; state courts and federal courts; all equipped with judges, clerks, bailiffs, officers and machinery necessary for their successful operation."

It would be strange if the operation of so much judicial machinery didn't sometimes become clogged and even have break-downs. Nevertheless, the courts still function with a degree of judicial regularity in this country.

For generations the courts had been leaving the matter of practice and procedure to the various legislatures to provide, and, as a consequence, the courts relaxed and in many cases almost abandoned the exercise of the rule-making power.

An examination of present-day legal literature discloses the fact that some of the courts are asserting this inherent rule-making power, to the extent of ignoring legislation which attempts to regulate the practice and proceedings of the respective courts.

In the consideration of these powers exercised by the various courts, we find that many of them have assumed to exercise what they termed the common law right inhering in courts of record to govern and control their proceedings by their own rules. Some courts, however, have adverted to the constitutional or statutory provisions of their respective states: For instance, Missouri, which has gone a long way in the exercise of the rule-making power and has been widely advertised as taking an advanced step in this direction, is governed by a constitu-

tional provision conferring on the supreme court "general superintending control over all inferior courts." (Mo. Const., Art. 6, Sec. 3; N. D. Const., Sec. 2, Art. 5; Weibel v. Garner [S. Dak.] 23 A. L. R. 50.)

Taking this constitutional provision as meaning what it says, it seems that the court did not need to rely on any "inherent" power at all, but has been granted abundant power, by the Missouri constitution, to do all the things which it has done, in the way of promulgating rules.

In other states, such as Washington for example, (State ex rel. Foster, etc., Lumber Co. v. Superior Court, 267 Pac. 770) the legislature has by general statute conferred on the Supreme Court of the state plenary power to promulgate rules prescribing the "Practice and procedure to be used in all suits, actions, appeals and proceedings of whatever nature" in the courts of the state. Substantially the same statute prevails in Colorado. (Kolkman v. People, 300 Pac. 575.)

When we come home to our own state and examine our constitution on this subject, we find that

> "The legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a co-ordinate department of the government, but the legislature shall provide a proper system of appeals, and regulate by law, when necessary, the methods of proceeding in the exercise of their powers of all the courts below the Supreme Court, so far as the same may be done without conflict with this constitution."—(Sec. 13, Art. 5, Const.)

It will be seen that, under our constitution, the legislature is authorized to "regulate by law, when necessary, the methods of proceeding in the exercise of their powers of all the courts below the Supreme Court, so far as the same may be done without conflict with this constitution."

This latter clause, authorizing the legislature to "regulate the methods of proceeding" leaves the subject open to speculation and debate as to just what is intended by "methods of proceeding."

It is plain, however, from the language used that "the methods of proceeding," which the legislature is authorized to "regulate," may not extend to the point where "they conflict with this constitution." Now the constitution (Sec. 2, Art. 5) vests the judicial power of the state in the courts, and provides that

> "no person or collection of persons, charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted."—(Sec. 1, Art. 2, Const.)

As I pointed out to you, in my address one year ago, the rule-making power has been considered a judicial power from the earliest history of the English courts; and it was so recognized on the organization of our own courts under the federal constitution.

Many courts in recent years have considered this question in determining both the validity of rules by the courts and of legislation authorizing the courts of last resort to make and promulgate general uniform rules for all the courts of the state. (Kolkman v. People (Colo.) 300 Pac. 575; People v. Callopy (Ill.) 192 N. E. 634; City of Chicago v. Coleman, 254 Ill. 338; State v. Super. Court, 148 Wash. 1, 267 Pac. 770; In re Rules of Court Case, 304 Wis. 501.)



The exercise of the judicial power of the state means and embraces a great deal more than the mere hearing of proofs and deciding a case. It includes the power and authority over the processes, proceedings and manner of instituting and bringing to issue the questions to be heard and a control over the means and instrumentalities employed in presenting preliminary and ancillary issues and subjects, as well as the main issue in the case and final enforcement of the judgment. These and many similar powers are absolutely essential and necessary to the administration of justice, if the declaration of the constitution (Sec. 18, Art. 1), that "a speedy remedy shall be afforded for every injury of person, property or character, and right and justice shall be administered without sale, denial, delay, or prejudice," is to be upheld and constantly observed by the courts. This provision of our constitution follows the declaration of Section 40 of Magna Charta, which declared:

> "To none will we sell, to none will we deny or delay, right of justice."

It is generally held that a rule once adopted has the force and effect of a statute, and that it is the duty of the courts to observe and enforce it. (California Gulch P. Min. Co. v. Patrick, 37 Ida. 661, at 667; 23 A. L. R., note at 52.) For this reason care must always be exercised in drafting and adopting rules. A rule which the judge can set aside at will would be of no use at all.

It seems to me that the most desirable and satisfactory method we could pursue, in adopting a uniform set of rules for the state of Idaho, would be to first ask the legislature to pass a general act substantially to the same effect as the Act of Congress of June 19, 1934, (U. S. C. A., Tit. 28, Secs. 723b and 723c) authorizing the Supreme Court of the United States to adopt uniform rules for all federal district courts. That act provides:

> "That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant."

Acting upon the authority of this statute the Supreme Court appointed an Advisory Committee of fourteen practicing lawyers, law school deans and law school instructors, to collaborate with the court in formulating rules to govern the several district courts of the United States, to render the practice uniform throughout all the districts. A third preliminary draft of those rules was published in May of this year and is now in general circulation among the lawyers of the country.

The enactment of such a state statute in Idaho would remove from the realm of debate and controversy all questions as to conflict between the inherent power of the courts on the one hand and the au-

thority of the legislature on the other to prescribe all necessary rules of practice and proceedings in the several courts. The adoption of such a statute might be useful, to the extent that it would eliminate any possibility of conflict between the legislature and the courts in the exercise of this rule-making power. It would disarm any who might otherwise be disposed to contend that the judiciary does not possess the powers which I have contended it does possess.

I think such proposal would have greater weight with the judiciary committees of the legislatures if it could come from the trial judges of the state acting as a unit or through their committee. The legislature would then realize that the judiciary of the state are in favor of the proposed act, whereas, if it came from a committee of the bar, the judiciary committees might hesitate and in the end want to know what the judges thought about it. There would be additional advantage in having such a set of rules approved by the supreme court in this:

That rules could be drafted which would render the presentation and consideration of appeals much easier and simpler. They could also provide the manner and method of entering rulings on motions, and various applications in the trial courts in such a manner as to make their reasons and intent plain and avoid the difficulty which sometimes occurs in the trial court ruling upon a given proposition or state of facts, as he understands the matter, and then having the case go to the supreme court and there be presented and sometimes decided on what is in fact an entirely different issue from what the trial judge thought he had before him. Drafting of such a set of rules, through the collaboration of trial judges and practicing lawyers, would go a long way toward securing general approval of and satisfaction with such rules. When adopted, lawyers and judges would study them and apply them in the regular business of the court.

The great importance of exercising care in the drafting of uniform rules is emphasized by the caution and deliberation with which the Supreme Court of the United States and its Advisory Committee have moved since the adoption of the Act of Congress of June 19, 1934.

The draft of rules published and circulated in May of this year is the third draft prepared by the Advisory Committee and submitted to the court; and they have not yet been finally approved and adopted. I think this should not be considered as a matter of delay but rather as an evidence of the importance these men attach to drafting a set of rules, and the deliberation and care they are giving the matter.

No matter what arguments may be advanced concerning the courts, it still remains a fact that the constitution vests them with the entire judicial power of the state and they are accordingly charged with the obligation of discharging that duty. Power carries with it responsibility. The responsibility resting on the courts can not be shared with either of the other branches of government—it is an independent, inseparable and non-delegable responsibility.

It is the function of the court, and it was evidently so intended, to exercise the supreme judicial power of government and to determine the constitutional limits thereof and to say to each department: "You



go thus far and no farther." If the court does not possess this power then there is no longer in fact three separate departments of government. If the supreme court is not the paramount judicial tribunal and final arbiter of all constitutional questions, then we had as well wipe out the court. Whenever that power is abandoned, democracy will be at an end and the liberty and independence of the citizen, his personal and property rights will no longer be a reality but a mere evanescent dream.

I remember several years ago hearing the first Chief Justice of the German Republic deliver an address in which he discussed the judicial powers of the New Republic and he stated either that at the time of his appointment or after his appointment he was called in conference by the President and his advisors, at which time the judicial powers of their supreme court were discussed and considered. And he said that he told the President that, in his opinion, the only safe way to maintain republican institutions would be to have a judiciary like that of the United States, with an independent supreme judiciary; and he further told them that, so long as he was chief justice, that was the power he proposed the court should exercise. They remonstrated with him and he thereafter resigned. Time has demonstrated the wisdom of his advice and the unwisdom of a servile judiciary. Personal liberty and property rights are no longer protected in that country by judicial decrees. They are dependent solely upon arbitrary executive orders.

Let us hope that we may continue to live under a virile and protecting constitution, where an independent judiciary, supreme in the exercise of judicial functions, may uphold the splendid traditions of the past and achieve for our country a still more brilliant record in the future.

MR. GRAHAM: I must confess the Judge's paper corresponds to my own idea. Are there any remarks or any suggestions? The able discussion which has been given by Judge Ailshie leads me to believe that there is nothing to do now except to appoint a committee for the purpose of having this matter presented to the next session of the legislature.

MR. PAINE: May I make a suggestion on that point? Judge Ailshie has said that committee should consist of the representatives of the judicial section, that if the legislature is asked to pass this act by the trial judges of the state, they are more liable to grant the request than if the request should come from the members of the bar. My own thought is that the legislature would be more inclined to pass the act if the request came from both the judicial section and the members of the Bar, and I suggest to the president that he appoint on that committee representatives of both members of the bench and Bar. The lawyers that are in the legislature when this bill comes before them, some of them will stop and wonder perhaps just what it would mean if the courts assume the right. I agree with everything that Judge Ailshie said. I think the power is there, and I think it should be exercised, but I would think that the members of the legislature would be impressed by the fact that we both joined in asking that this be done, and I do it knowing that the members of the court and I would be in conflict as to the form some of these rules should

take and I am going to fight it out with them. I am going to call the attention of the members of the Bar to the fact when I think that the court has made a rule which makes is unnecessarily hard and difficult for us to have to come before it. I do not fear but that in the end right will prevail, but that, for the reasons cited, I suggest that your committee represent both members of the bench and Bar.

MR. HAWLEY: I would second that suggestion. As a practical matter, I think that the power of the Bar ought to be combined with the dignity and power of the judges in going before the legislature. I doubt if the judges would be as successful in contacting the legislature as would be members of the Bar. So far as giving the Supreme Court the powers concerned, that is where it is apparently, and it should be recognized, and I have no doubt that when the Supreme Court begins to make the rules that it will probably appoint sub-committees in various sections of the state to assist it and advise it.

MR. GRAHAM: Are there any other remarks? The second step will be the drafting of the rules, and that will be left to the members of the Supreme Court and the Supreme Court will adopt such plan, possibly similar to the federal plan, of calling to their assistance lawyers all over the state and asking their opinions. In the absence of any other suggestion of the members of the Bar, I am going to appoint on that committee, for the purpose of drafting legislation, Karl Paine, Jess Hawley and Hugh A. Baker as a lay committee, with full power to call to their assistance any member of the Supreme Court or the District Courts that they may deem necessary. In other words, your committee will have full power to enlarge the size of your committee for the purpose of drafting legislation and determining the manner and method of presenting it to the next session of the legislature to carry into execution the idea in Judge Ailshie's paper.

MR. A. L. MORGAN: It was his belief that the matter should be presented to the legislature by a committee of judges.

MR. GRAHAM: I did not intend to limit it to that extent. I am inclined to believe that a combination of the Bar with the judges might strengthen it, but I am leaving it to this committee to determine the manner and method of presenting it. If they finally come to the conclusion that it would gain advantage to have the judicial committee only present it, then they may do so, but I am leaving the subject open so that this committee itself may use its best judgment and after deep thought and research proceed along the strongest line. Are there any further suggestions?

I wish to thank Judge Aishie most heartily personally and on behalf of the members of the Bar Commission for the able paper that he has presented. These papers all take time. Don't forget. A member of the Bar or judiciary cannot prepare a paper of that kind without giving time and attention to it, and when he does, consideration ought to be given to it by the members of the Bar. If there are no further suggestions on that subject, we will proceed along with the list. "How the Cost of Litigation may be Reduced." A. F. James. This matter was referred to Mr. James by reason of the fact that a year ago he gave a short talk on it. We asked him to put his thoughts in concrete form, and he has failed to do so and is not here. I am going to make



a suggestion myself. A few years ago at the time we revised the statutes the filing fee in the district court was increased from $10 to $12 for the filing of the complaint, and the filing of the answer was increased from $3 to $5. I think that has served its usefulness and that those fees should be reduced to where they were before, that is, $10 for filing the complaint and $3 for filing the answer, and I would suggest that this be referred to the legislative committee.

MR. WARE: There was considerable discussion at Lewiston at our district meeting, and it was thought that the cost of filing a complaint should be reduced to $10 and that the cost of filing the answer should be reduced to $3, as it was prior to the adoption of the present statute, and we felt that the State Bar should recommend to the legislature through the proper committee that that be done, and a resoluion to that effect was passed by the Clearwater Bar Association.

MR. GRAHAM: The matter will be referred to the legislative committee anyway by the State Bar Commission.

MR. A. L. MORGAN: There is one more thing I think should be amended. Under the statute the defendant files an answer and is required to pay $5; if, in connection with that answer, he also files a cross-complaint he is compelled to pay an additional $3. If $3 is sufficient to file the answer, it is sufficient for filing the cross-complaint, because it adds nothing to the expense of the clerk, but only to the cost of the litigant.

MR. GRAHAM: The last thing on the morning session program is an address by a gentleman who is a candidate for the Supreme Court and who has practiced law here for some thirty years, and I know that he will have something potent to communicate to the members of the Bar. Mr. Fraser, we will be pleased to hear from you now.

MR. FRASER: Mr. President, ladies, and members of the Bar: A short time ago I read a book called "State Trials," published in England, giving a history of a great many trial where convictions had been had upon circumstantial evidence, and it afterwards turned out that the defendant was wrongully convicted, that he had never committed the crime. They were very entertaining, and I recalled that the first case of any importance, I think, that I ever tried in the State of Idaho was a criminal case in which the defendant was tried, convicted and sentenced to death wholly on circumstantial evidence. I took an appeal to the Supreme Court of Idaho. The court affirmed the judgment by a divided court. I then appealed to the State Board of Pardons for commutation of sentence of George Levi, the defendant, and by reason of the dissenting opinion I was enabled to persuade the state board to commute that man's sentence from death to life imprisonment. Two years later I made another application to the Board and he was pardoned. I felt absolutely confident myself of the innocence of this man, and I do to this day.

I think the Board was perfectly justified. That was a case of circumstantial evidence. So thinking back over this old case, I thought I might make a few remarks on "Circumstantial Evidence."

## THE THEORY OF PRESUMTIVE PROOF.

There is no branch of legal knowledge which is of more general utility, than that which regards the rules of evidence. The first point in every trial, is to establish the facts of the case; for he who fails in his proof, fails in everything. Although the jurists hold the law to be always fixed and certain, yet the discovery of the fact, may deceive the most skillful. The object of the present address is to inquire into some of the more general principles of legal proof, and particularly into that species of proof which is founded on presumptions, and is known by the name of **circumstantial evidence.**

Evidence and proof are often confounded, as implying the same idea; but they differ, as cause and effect. Proof is the legal credence which the law gives to any statement, by witnesses or writings; evidence is the legal process by which that proof is made.

The principles of evidence are founded on our observations on human conduct, on common life, and living manners; they are not just because they are rules of law: but they are rules be law because they and just and reasonable.

It has been found, from common observation, that certain circumstances warrant certain presumptions. Thus, that a mother shall feel an affection for her child—that a man shall be influenced by his interest —that youth shall be susceptible of the passion of love—are laws of our general nature, and grounds of evidence in every country. Of the two women who contended for their right to the child, she was declared to be the mother who would not consent to its being divided betwixt them.

As the principles of evidence are founded on the observation of what we have seen, or believed to have been passing in real life, they will accordingly be suited to the state of the society in which we live, or to the manners and habits of the times.

The King of Siam gave credence to everything which a European ambassador told him as to the circumstances and condition of Europe until he came to acquaint him that the rivers and sea were occasionally made so hard, by the cold, that people could walk on them; but this story he totally disbelieved and rejected, as entirely repugnant to everything which he had either seen or heard; and the ground of his disbelief was perfectly rational.

A similar principle sways our belief in respect to the acts of individuals, as arising in the society and period in which we live. We always refer the credibility of the case to what has fallen within our own observation and experience of men and things. We readily give credence to acts of common occurrence, and are slow in yielding our assent to the existence of new and unlooked for events. When a wretch, at no distant period, in affluent circumstances, was accused of having stolen some sheets of paper in a shop, the judges admitted him to bail against evidence, because the charge was altogether unlikely in one of his condition in life. From these instances, we may safely infer that the principles for our believing or disbelieving any fact, are rather governed by the manners and habits of society, than by any positive rule.



There are two species of presumptive proof: the first is the presumption of the law, and the second the presumption of fact.

The presumption of the law is that conclusion which the law attaches to a certain species of guilt. Thus, that he who has deliberately and willfully killed another has done so from malice, is a presumption of the law. But how far he who has been found with the sword in his hand by the body of the man just killed, did or did not give the mortal stroke, is a presumption to be made by the jury, and is not determinable by any positive rule of law.

Evidence is divided into positive and presumptive. Positive evidence is where the witness swears distinctly to the commission of the act or crime which forms the subject of the trial. Presumptive evidence is that conclusion which the jury draw for themselves, from circumstances or minor facts, as sworn to hy the witnesses.

Presumptions are consequences drawn from a fact that is known to serve for the discovery of the truth of a fact that is uncertain, and which one seeks to prove. But no presumption can be made but on a fact already known and ascertained. Thus, if the stains of blood on the coat of one tried for murder, are to be presumed as evidence of his guilt, the fact of the stains being occasioned hy blood must be first distinctly ascertained; the one presumption cannot be made to aid the other.

The stains are not to be presumed from blood because he is presumed to have been the murderer; nor, on the other hand, is he to be believed the murderer, because the stains are believed to he from blood; for this is reasoning in a circle, and returning back to the point whence the argument commenced.

The end of a proof is to establish the matter in debate. In every case, whether by direct proof, or by that of circumstantial evidence, the jury ought always to be fully satisfied of the guilt of the prisoner before they return such a verdict. It is immaterial what the proof is, if it is not believed, and brings conviction to the mind of the jury.

It has been of late years a favorite theme to descant upon the certainty of circumstantial evidence. The practice of the law, like other things, has its prejudices; and the name of an eminent man, the success of a particular trial, will sometimes give sanction to a false theory.

Circumstances, it is said, cannot lie. This is very true; but witnesses can. And from whom do you obtain circumstances but from witnesses? Thus you are liable to two deceptions: first, in the tale told by the witness; and, secondly, in your own application of those circumstances. Where a fact is positively sworn to, as seen by the witness, the conclusion or inference to be drawn from it is generally obvious. But where the inference is to be drawn from a long train of circumstances it is a matter of judgment; it is an exercise of the understanding; and as all men do not understand alike, very opposite conclusions are sometimes drawn from the same shades of prohability.

"A presumption, which necessarily arises from circumstances, is very often more convincing, and more satisfactory, than any other kind of evidence; it is not witbin the reach and compass of human abilities to invent a train of circumstances, which shall be so connect-

ed together as to amount to a proof of guilt, without affording opportunities of contradicting a great part, if not all, of these circumstances."

It might appear invidious to carry reference to cases of modern occurrence where fatal mistakes have been discovered of persons too hastily convicted on mere circumstantial evidence; the history of the judicial proceedings in this and every other country will afford too many illustrations.

Various instances occur of the fatal error being too late discovered; but who can say how many instances have occurred where the mistake has never been discovered?

It has often happened that the real murderer has confessed the fact for which the innocent man has suffered; but as real murderers do not always confess when innocent men suffer, it is impossible to say to what length this dangerous doctrine may have been carried.

That facts cannot lie is sound logic, no doubt. Men only lie. But as we only know facts through the medium of witnesses, the truth of the fact depends always upon the truth of the witness; so that although he furnishes us with a thousand facts, it is of no consequence if he himself is unsound.

In questions of science, and above all in those of medical science, the faith to be reposed in any opinion will be regulated by the professional eminence of the person giving it. One man's sight being generally as good as that of another as to a mere matter of fact; as whether he saw, or did not see such a thing, the learned and the ignorant are upon a par, and one witness to a fact is just as good as another. But the case is very different as to a matter of science; for one man's judgment will outweigh that of many.

All proof must begin at a fixed point. The law never admits of an inference from an inference. Two imperfect things cannot make one perfect. That which is weak may be made stronger; but that which has no substance cannot be corroborated. The question is never what a thing is like; but the witness must swear to his belief as to what it is. A simile is no argument.

In circumstantial evidence, the circumstance and the presumption are too often confounded; the circumstance is always a fact; the presumption is the inference drawn from that fact. It is hence called presumptive proof; because it proceeds merely on presumption or opinion. But the circumstance itself is never to be presumed, but must be substantively proved. An argument ought to consist in something that is itself admitted; for who can prove one doubtful thing by another?

"The wisdom and goodness of our law appears in nothing more remarkably than in the perspicuity, certainty and clearness of the evidence it requires to fix a crime upon any man, whereby his life, his liberty, or his property can be concerned. Our law, in such cases, requires evidence so clear and convincing that every bystander, the instant he hears it, must be fully satisfied of the truth and certainty of it. It admits of no surmises, innuendoes, forced consequences, or harsh constructions, nor anything else to be offered as evidence, but



what is real and substantial, according to the rules of natural justice and equity."

Weak men are always the first to assent and to admit of loose analogies, imperfect resemblances, and inferences without proof—whilst men of stronger minds, and more reflection, look out for distinctions; they search for discriminations in subjects nearly similar, and are slow in yielding their assent to first impressions. Judgment consists in distinguisbing things which are nearly alike without exactly being so.

I beg here to dwell, a little more minutely, on the hardship of requiring a prisoner to controvert a train of circumstantial evidence.

For how can a prisoner, altogether innocent of the charge, controvert circumstances, or an account of events with which he is unacquainted. A man charged with the commission of a crime at a period long anterior to the trial, if innocent, and at a distance from the place at the time of its occurrence, can only establish his innocence by one of two methods: first, by showing a contradiction in the circumstances of the proof itself; or, secondly, by establishing an alibi. In regard to the first mode of refuting the charge: if he is ignorant of the facts, if he is unaccustomed to the nature of legal argument, he may not easily confute the chain of circumstances. A premeditated story is always so made up as to bear the appearance of consistency. Men will believe a probable falsehood rather than a singular truth; and, in regard to the proof of alibi, if the prisoner does not happen to recollect the day, or cannot, perhaps, recall to mind where he chanced to be on that day, be is left without a defense. The proof of a negative is always difficult, often impossible.

But what is the situation of a person charged with a capital crime? Suspicions of this sort generally fall upon the needy and unfortunate. He is brought from a jail where he has been perhaps confined, distracted and agitated with his situation. A long train of circumstances are offered by the witnesses, of the whole of which he is ignorant, and, therefore, unprepared to ask the necessary questions, or to point out to the jury the incongruity of the story advanced—his very attempt to do so unsuccessfully will be held an argument of his guilt. But the facts bave been sworn to, and his personal appearance is perhaps against him; and his character, it may be, suffering under prejudice.

It should be always kept in mind that circumstantial evidence is merely supplemental; and is only resorted to from the want of original and direct proof. And it never can be said that what is secondary is equal to that which is original—the thing substituted equal to that which it is meant to supply.

A regard to the peace and order of society certainly requires that crime shall be liable to be proved by circumstantial evidence. But a regard to the well being of society likewise demands that the mode of proof should be regulated by some fixed rules. If the nature of the things admits of but few rules, for that very reason, those few should be the more distinctly observed.

It should always be considered whether the connection betwixt the circumstances and the crime is necessary, or only casual and contingent; and whether, therefore, the circumstances necessarily involve

the guilt of the prisoner, or only probably so; whether these circumstances might not all exist, and yet the accused be innocent.

It seems desirable that some inchoate act, approaching to the crime, should be proved on the prisoner; and that he should not be convicted on general appearances—such as from being found in a certain situation. The improper convictions seem chiefly to have been owing to a neglect of this rule. Strong appearances, but without any act proved against the prisoner, have too often turned out unfounded.

It is sometimes said that the evidence is the best that the nature of the case can be supposed to afford; but this, certainly, is no reason for the jury being satisfied with it. In the first place, the nature of the case is only to be known by the evidence. The case of an innocent man must always be of the nature to afford very little evidence; but the jury, let the case be what it will, must be distinctly persuaded of the guilt of the prisoner before they return such a verdict. Agreeably to the common law, where the facts have gone regularly before a jury, and there is no misdirection from the judge in summing up, the proof is complete. When the jury is satisfied, the law is satisfied. No principle can be at once more calculated to facilitate the detection of crimes to ensure the safety of innocence, and to maintain the general peace of society.

## CASE OF JONATHAN BRADFORD.

Jonathan Bradford, an innkeeper, bore a very unexceptional character. Mr. Hayes, a gentleman of fortune put up at Bradford's. He there joined company with two gentlemen and, in conversation, unguardedly mentioned that he had then about him a sum of money. In due time they retired to their respective chambers. Some hours after they were in bed, one of the gentlemen, being awake, thought he heard a deep groan in an adjoining chamber; and this being repeated, he softly awakened his friend. They listened together, and the groans increasing, as of one dying and in pain, they both instantly arose and proceeded silently to the door of the next chamber, whence they had heard the groans, and, the door being ajar, saw a light in the room. They entered, but it is impossible to paint their consternation, on perceiving a person weltering in his blood in the bed, and a man standing over him with a dark lantern in one hand, and a knife in the other! The man seemed as petrified as themselves, but his terror carried with it all the terror of guilt. The gentlemen soon discovered that the murdered person was the stranger with whom they had that night supped, and that the man who was standing over him was their host. They seized Bradford directly, disarmed him of his knife, and charged him with being the murderer. He assumed, by this time, the air of innocence, positively denied the crime, and asserted that he came there with the same humane intentions as themselves; for that, hearing a noise, which was succeeded by a groaning, he got out of bed, struck a light, armed himself with a knife for his defense, and was but that minute entered the room before them. These assertions were of little avail; he was kept in close custody till the morning, and then taken before a neighboring justice of the peace. Bradford still denied the murder, but, nevertheless, with such apparent indications of guilt, that



the justice hesitated not to make use of this most extraordinary expression, on writing out his mittimus: "Mr. Bradford, either you or myself committed this murder."

This extraordinary affair was the conversation of the whole country. Bradford was tried and condemned, over and over again, in every company. In the midst of all this predetermination, he was brought to trial; pleaded not guilty. Nothing could be stronger than the evidence of the two gentlemen. They testified to finding Mr. Hayes murdered in his bed; Bradford at the side of the body with a light and a knife; that knife, and the hand which held it, bloody; that, on entering the room, he betrayed all the signs of a guilty man; and that, but a few moments preceding, they had heard the groans of the deceased.

Bradford's defense on his trial was that he had heard a noise; suspected some villany, struck a light; snatched the knife, the only weapon near him, to defend himself; and the terrors he discovered were merely the terrors of humanity, the natural effects of innocence as well as guilt, on beholding such a horrid scene.

This defense, however, could not be considered but as weak, contrasted with the several powerful circumstances against him. Never was circumstantial evidence more strong! There was little need of the prejudice of the county against the murderer to strengthen it; there was little need left of comment from the judge in summing up the evidence; no room appeared for extenuation; and the jury brought in the prisoner guilty, even without going out of their box.

Bradford was executed shortly after, still declaring that he was not the murderer of Mr. Hayes; but he died disbelieved by all.

Yet were these assertations not untrue! The murder was actually committed by Mr. Hayes' footman, who, immediately on stabbing his master, rifled his breeches of his money, gold watch and snuff-box, and escaped back to his own room; which could have been, from the after circumstances scarcely two seconds before Bradford's entering the unfortunate gentleman's chamber. The world owes this knowledge to a remorse of conscience in the footman (eighteen months after the execution of Bradford), on a death-bed repentance, and by that death the law lost its victim.

It is much to be wished that this account could close here, but it cannot! Bradford, though innocent, and not privy to the murder, was, nevertheless, the murderer in design: he had heard, as well as the footman, what Mr. Hayes declared at supper, as to the having a sum of money about him; and he went to the chamber of the deceased with the same diabolical intentions as the servant. He was struck with amazement; he could not believe his senses; and, in turning back the bedclothes, to assure himself of the fact, he, in his agitation, dropped his knife on the bleeding body, by which both his hands and the knife became bloody. These circumstances Bradford acknowledged to the clergyman who attended him after his sentence.

## CASE OF A NEGRO MURDERER.

A negro, who had run away from his master, arrived in London. Soon after landing, he became acquainted with a poor, honest laundress in Wapping, who washed his linen. This poor woman usually

wore two gold rings on one of her fingers, and it was said she had saved a little money, which induced this wretch to conceive the design of murdering her and taking her property. She was a widow and lived in an humble dwelling with her nephew. One night her nephew came home much intoxicated and was put to bed. The negro, aware of the circumstances, climbed up to the top of the house, stripped himself naked, and descended through the chimney to the apartment of the laundress, whom he murdered—not until after a severe struggle, the noise of which awoke her drunken nephew in the adjoining room, who got up and hastened to the rescue of his aunt. In the meantime the villain had cut off the finger with the rings; but before he could escape he was grappled with by the nephew, who, being a very powerful man, though much intoxicated, very nearly overpowered him; when, by the light of the moon, which shone through the window, he discovered the complexion of the villain, whom (having seldom seen a negro) he took for the devil. The murderer then disengaged himself from the grasp of the nephew, and succeeded in making his escape through the chimney. But the nephew believed, and ever afterwards declared, that it was the devil with whom he had struggled, and who has subsequently flown into the air and disappeared. The negro, in the course of the struggle, had besmeared the young man's sbirt in many places with the blood of his victim; and this joined with other circumstances, induced his neighbors to consider the nephew the murderer of his aunt. He was arrested, examined, and committed to prison, though he persisted in asserting his innocence, and told his story of the midnight visitor, which appeared not only improbable, but ridiculous in the extreme. He was tried, convicted, and executed, protesting to the last his total ignorance of the murder, and throwing it wholly on his black antagonist, whom he believed to be no otber than Satan. The real murderer was not suspected, and returned to America with his little booty; but he, after ten years, on his death-bed confessed the murder and related the particulars attending it.

## CASE OF ERRONEOUS EXECUTION FOR MURDER

A gentleman having been reveling abroad, was returning home late at night, but overcome with wine he fell down in the street, and lay there in a state of insensibility. Soon after, two persons, who were passing, having quarreled, one of them, observing that the drunkard had a sword by his side, snatched it away, and with it ran his adversary through the body. Leaving the instrument sticking in his wound, he ran off as fast as he could. When the watchman of the night came in the course of his rounds to the scene of the tragedy, and saw one man lying near him in a state of drunkenness, with his scabbard empty, he had no doubt whatever that the crime and the offender were both before him; and seizing the drunkard he conveyed him to prison.

Next morning he was examined before a magistrate, and being unable to remove the strong presumption which circumstances established against him, he was committed for trial. When tried, he was found guilty, and immediately executed for the murder of which he was perfectly innocent.

The real criminal was some time after condemned to death for another offense; and in bis last moments confessed how he had made use of the reveler's sword to execute his own private wrongs.



There are some general and fixed rules observed for the discovery of truth. Of these the following are perhaps the chief:

1. The actual commission of the crime itself shall be clearly establisbed.
2. Each circumstance shall be distinctly proved.
3. The circumstance relied on shall be such as is necessary or usually incident to the fact charged.
4. When the number of circumstances depend on the testimony of one witness, that number shall not increase the strength of the proof. For, as the whole depends on the veracity of the witness, when that fails the whole fails.
5. The judge, in summing up, shall assume no fact or circumstances as proved; but shall state the whole hypothetically and conditionally; leaving it entirely to the jury to determine how far the case is made out to their satisfaction.
6. The difficulty of proving the negative shall in all cases be allowed due weight.
7. The jury sball be as fully convinced of the guilt of the prisoner, from the combination of the circumstances, as if direct proof had been brought.

MR. GRAHAM: Thank you, Mr. Fraser.

There was dropped on the desk a paper by Judge Ailshie, and in it I notice a little article illustrating the responsibility of the three departments of government. It migbt also illustrate circumstantial evidence. I am going to read it:

> "In relation to the powers and responsibilities of the three departments of government, let me tell the story of one of my associates. It concerns Adam and Josephine Kerr and Mrs. Wimple. Adam and his wife Josephine lived together on a road that edged on the Arkansas-Oklaboma line. For many years Mrs. Wimple had worked for them in the household. One day when Adam came home his wife Josephine met him at the door crying and wringing her hands. "Oh, Adam," she cried, "come in here. I want to talk to you. I am worried to death." "Why, what in the world is the matter?" said Adam, to which she replied, "I have got to talk to you about Mrs. Wimple. She is about to become a mother." "Is that so?" said Adam. "Well, that is too bad, but let's not worry ourselves to death about that. That comes under the head of her business." "But, Adam," continued Josephine, "I can't help worrying about it, and she can't stay in my house another day." "Well," said Adam, "if that is the way you feel about it, that is all right, too, but don't worry me about that, because that comes under the head of your business." "But, Adam," said Josephine, "I can't help worrying about it. She says it is your baby." "Well, now," said Adam, "If she does, that is unfortunate, but don't worry yourself about that for that comes under the head of my business."

Judge Ailshie is responsible for that literature.

JUSTICE AILSHIE: I feel some annoyance at his exposing the character of literature that I read. We are about to adjourn, and I am not sure whether I will be here at the hour of adjournment. The Bar Commission Act of Idaho was adopted some years ago and I have

always felt a personal responsibility for it and a personal interest in it. I was a member of the committee which drafted a uniform act that was sent out and broadcast over the country, and I remember in '23 when I presented it to the State Bar Association, of which I was then president, many of them just laughed at the idea of organizing the Bar on that theory. It has been accomplished and I feel that it has been a forward step in Idaho.

I want to move a vote of thanks to the retiring president, Mr. Graham. It was my pleasure to work with him a year on the Commission, the first year of his service, and I know what it means in time and labor. It is not just an honorary job. It is an onery job. It is a job that requires a lot of work. No man bas a right to accept the position unless he is willing to do a lot of work and give a lot time, and if he is willing to do so he can accomplish a great deal of good for the Bar. I remember trying to disbar one of the most disreputable lawyers in the state, and I succeeded. We knew that he ought to be out and we got him out, but before we could keep him out he wired down to someone in Boise who had him reinstated. We never got anywhere in disbarring disreputable attorneys until we got the Bar organized. Now, we are on the way to accomplishing something. We have done a great deal along various lines for the attorney, and I say during the last three years there is no man in Idaho to whom more credit is due than to John W. Graham, and I want on the record a vote of thanks by this Association to Mr. Graham, who is retiring from the Commission. I regret very much, with all due respect to his successor, who has been elected, that he was not willing to serve another term and was not elected to another term. Everyone in favor of that motion rise. (All present arose.) The motion is adopted.

MR. PAINE: I want to have the pleasure of seconding that, particularly on the ground that I was once President of the Voluntary Association and I found it utterly impossible to get lawyers to come to the meetings, and I know personally therefore of the work and labor and travail that Mr. Graham has experienced in this position, and I want to heartily thank him and to second everything that has been said.

MR. GRAHAM: Members of the Bar: I certainly appreciate the honor which which you have conferred upon me by adopting this resolution. When I went on the Commission I felt that something should be done to strengthen the State Bar and I feel that in the last three years we have accomplished something; I feel that the Bar is stronger now than it was three years ago; I know it is much stronger now than it was six years ago, but there is a field open yet for labor in this organization and this is no time for us to slacken down on our speed and on our labors. We are on a fair way to progress and if we can get such progress and such interest manifested in the members of the Bar, so that we can get 250 members present at our annual meetings instead of 80 to 100, we can accomplish anything we desire for the advancement of the profession and the administration of justice. I wish to thank you most heartily, Judge Ailshie.

MR. HAWLEY: Mr. President and gentlemen: A venerable gentleman now lies on what may be, in view of his advanced age, his last



and final sickbed. He has served the people of this state with distinction and honor as a Supreme Court justice. He has been active in civic matters. He has borne an honorable name in the community. He has been a splendid, worthy member of the Idaho Bar. When he passes away a great many of the old traditions will pass with him, and with his life are linked so many things treasured by some of us, by the Bar, so many memories of those incidents in early Idaho, and so many incidents connected with the lives of those who have passed away who are dear to some of us, that I feel that it is quite fitting and near to ourselves to recognize this wonderful gentleman by some appropriate word of affection, which may go to him by his son. Personally I recall him with so much affection. An incident happened that very seldom comes into the life of a young man, and I was much younger than I am now. I lost the case of Bliss vs. Bliss by a two to one decision. We all lose cases and we all feel badly about them, but seldom is there an official expression printed indelibly in the records of the court, of the proper expression or the proper opinion we have of the judges who decide against us. In this particular instance this justice in his dissenting opinion excoriated the two members of the court and said things about them that are beyond what even I thought and it brought to me such personal satisfaction as an expression of a proper opinion of the stupidity and the injustice of the other two that he endeared himself to my mind and memory. Gentlemen, I ask your unanimous consent to appropriately tender our affection to Justice I. N. Sullivan.

MR. GRAHAM: There is unanimous consent. The matter will be referred to the resolutions committee, and you are added as a member of that committee for the special purpose of drafting a resolution.

AFTERNOON SESSION, SATURDAY, JULY 25, 1936—2:30 P. M.

MR. GRAHAM: I am going to ask Carey Nixon to report on his resolutions at this time.

MR. NIXON: Mr. President, members of the Bar: I have here some resolutions presented by the resolutions committee, consisting of Judge Varian, Mr. Bougbton and myself. The first one is a memorial resolution.

RESOLUTION NO. 1.

"It is with profound regret that we are again called upon to here record the passing of the following members of the Idaho State Bar:

T. K. Hackman ..... Twin Falls, Idaho
Wm. J. Hannah ..... Orofino, Idaho
Chas. W. Sandles ..... Idaho Falls, Idaho
Samuel O. Tannahill ..... Lewiston, Idaho
Warren Truitt .....Moscow, Idaho
Frank T. Wyman ..... Boise, Idaho

and of a retired member of tbe Bar, James H. Richards, Boise, Idaho.

"We therefore pause in our deliberations to pay due respect to these men who labored with us and who gave unstintingly of their time to assist in the betterment of their and our profession."

Your committee on resolutions wishes to submit the following with respect to rules of the Supreme Court relative to the admission to the practice of law in the State of Idaho:

RESOLUTION NO. 2.

"Rule 13. The action of the Board of Bar Commissioners on any application shall be final except that any applicant may have such action reviewed by the Supreme Court by filing with the Clerk of said Court a verified petition alleging fraud on the part of said Board in rejecting such application. Such petition shall clearly specify the facts upon which said fraud is alleged to exist. The petitioner may appear before the Court in person, or by attorney, or both, if the Court shall order hearing on the said petition. In case hearing is ordered, the Board of Commissioners shall be given such notice of such hearing as the Court shall direct, and said Commission may appear and defend against said petition in person, or by attorney, or both. In the event Court shall find there has been fraud practiced in rejection of said applicant, or in the grading of said applicant's examination, the Court shall regrade said paper and such regrading shall be by the Court as a whole or a majority thereof, and not by the individual members separately."

Your committee on resolutions submits the following resolution:

RESOLUTION NO. 3.

"Whereas, the recent trend in our national life has emphasized the necessity of the proper education of our youth in the principles of American citizenship and the proper understanding of the Constitution of the United States:

"Now, therefore, be it resolved that the Idaho State Bar in regular convention assembled recommend to the State Board of Education the promulgation of such rules and regulations and the establishment of such curriculum throughout the public schools of the State of Idaho as will adequately provide for the proper education of all school children in the principles of American citizensbip and a proper understanding of the Constitution of the United States."

The next two resolutions which will be presented touch the same subject. I will read both of them, however.

RESOLUTION NO. 4

"Non-resident attorneys shall be permitted to appear in the courts and before the boards and commissions of this state on the same terms and conditions, with the same rights and privileges and subject to the same restrictions, if any, which the state wherein said non-resident attorney resides now imposes, or may hereafter impose, upon attorneys resident in this state appearing before its courts, boards, or commissions, provided, however, that every such non-resident attorney shall have associated with him an attorney residing in and engaged in the practice of law in the State of Idaho, who sball personally be present at all stages of any proceeding before any court, board or commission of this state, and provided further that sucb resident attorney shall comply with the fee schedule, in connection with said case, of



the local bar association in force at the point where such appearance is made, and that failure on the part of such local attorney to so comply shall be grounds for discipline by the Supreme Court in such manner and to such extent as shall be determined by the court in each particular case."

RESOLUTION NO. 5.

The second resolution on this subject is:

"Attorneys residing in another State or territory and admitted to the highest court of the state or territory in which they reside, shall be permitted to appear in the courts of record in this state upon the following conditions, and not otherwise:

"The non-resident attorney shall appear only as an associate of a member of the Idaho State Bar residing in this state, and who is engaged in the practice of law in this state, wbo shall have control of and be responsible for the conduct of the case in whicb such attorneys appear, and shall actively participate in all proceedings therein.

"No court of record in this state shall permit a non-resident attorney to appear in any case pending in such court or participate in the trial thereof, without first requiring such non-resident attorney to make and file an affidavit in the cause, to the effect that he is appearing therein as an associate of the resident attorney of record in the case; that such resident attorney shall have the control of and be responsible for the conduct of the case; and that such resident attorney is to receive a fair division of the fees in the case."

Also the following resolution:

RESOLUTION NO. 6.

"The officers and members of the Idaho State Bar regret the absence of the Hon. Isaac N. Sullivan. Individually and collectively, we miss him, regretting the illness which keeps him away. We hope that he soon will be well and that he will grace and honor us with his presence next year and many years to come. We send him our respectful and affectionate regards."

MR. PAINE: Will you read that resolution again about instruction regarding the Constitution? (Mr. Nixon re-read said resolution.) I wanted that read to give Mr. Hawley opportunity to add the parochial school."

MR. HAWLEY: I think it should be in, but I know that is already taught.

MR. GRAHAM: I wanted these resolutions read so that the members can give them some thought before adopting them. Without any discussion we adopt resolution No. 1 with regard to the deceased members and resolution No. 6 regarding Judge Sullivan.

We will go back to the regular order of business. The next subject is "Should Automobile Insurance Be Compulsory?" Mr. Roy L. Black is not here and Mr. Swanstrom will take his place. Mr. Swanstrom was only submitted the material yesterday afternoon and he has had only a short time to prepare.

MR. SWANSTROM: I want to thank the Chairman for apologizing to the Bar for the talk I am about to give. It saves me the trouble

of doing that very thing. As stated by the Chairman, this topic was assigned to Mr. Roy L. Black and apparently he intended to give you a very fine resume of the compulsory insurance acts. I say that for the reason that Mr. Griffin gave me yesterday a package containing about ten pounds of newspaper articles, comments, and copies of various acts, and proposed acts. I thought it was necessary to attend the two sessions yesterday and the banquet, and after that I bad a sore throat which I had to treat, and you can imagine how much time I had to apply to this mass of material. The very best I could do was to hit the high points in the little time I had and trust that some information which I was able to dig out will be of interest to you.

I think we have all heard a rather popular demand, at least at times, for compulsory automobile liability insurance. I think perhaps there are none of us who have not contacted at one time or another the situation where some friend, relative, client, neighbor or acquaintance has been injured by some driver of an automobile and suffered bodily injury, or property damage, and possibly death of bimself or some member of his family, where the accident was purely the fault of someone else and was purely a compensable matter, and we found the aggravating situation that the owner and responsible party was absolutely judgment proof. We were very apt to rear up on our hind legs and say every driver should have compulsory liability insurance. So the demand has been general for such action, with very little understanding of the actual effect when the thing is brought about.

It happens that a situation of the kind I have just mentioned will get to our attention, while we may have many, many similar accidents in which the responsible party quietly assumes his liability and makes some monetary compensation for the damage. Statistics show that considerably in excess of 20 per cent of the drivers who are at fault in automobile accidents have compensation or least have such financial ability that they can make a monetary compensation for their wrong. So it is with the other party that we are dealing.

This demand over the country for compulaory liability insurance grew out of the tremendous increase in automobile accidents and automobile fatalities, and a part of that demand was predicated upon the supposed financial non-responsibility of the offending parties. The fact that a driver of an automobile kills the bread-winner of a family creates a tremendous demand in the locality for curing a situation of that kind, particularly if he is not able to compensate the wife and children for loss of that support. It grew also out of the fact tbat we have quite a percentage of wanton and reckless drivers who seemingly have no very high regard for rules or laws governing safety and the rights of others on the highway. It is further augmented by the fact that many of the drivers involved in these accidents have very faulty car equipment, old out-moded cars and faulty brakes and lights and signal devices and various other things, and the poor attitude shown by the guilty party toward the welfare of the injured party. The final thing that I have found motivating the general popular request for this insurance was the insurance agent himself, who visualizes a tremendous harvest of profits and commissions both for himself and his company if the thing was made universal.



Much to my surprise and, in fact, I can safely say probably to the surprise of most of us here, there is only one state in the Union which has compulsory automobile liability insurance, and that state is Massachusetts, which in 1927 adopted a compulsory automobile liability insurance act, requiring as a prerequisite to securing a license for a car, a liability insurance policy with limits of $5,000 and $10,000 or a surety bond of a like liability or a deposit of certain specified bonds or money. There had been several years agitation in the state of Massachusetts for tbat act, and it might be said that the act was written and re-written and revised and studied over a period of six years before it finally came on the books, and it is regarded as a model in language and in intent and in the scope of the act. It was thought to be the finest draft of legislation of that type that could be prepared by the best talent in the state of Massachusetts.

As an inducement for the passage of that act it was argued and generally believed that compulsory automobile liability insurance would lessen the number of accidents; it would compensate the injured parties; it would greatly reduce the litigation over automobile accidents and generally make a more bearable situation than had been experienced without the coverage.

Now, the actual results which were experienced in the state of Massachusetts may be summarized just very briefly by a few remarks concerning statistics which have been published in various of these magazine articles and comments whicb Mr. Black had gotten together for the purpose of his address. It was found that in the first year under the act accidents involving motor vehicles in Massachusetts increased 19 per cent. The litigation which bad been expected to be entirely eliminated as a result of this compulsory coverage produced 4,201 more cases in the trial courts of Massachusetts than the year before and 97.4 per cent of these cases involved automobile accidents. The result was that the courts became completely congested with this one particular type of litigation. The next thing that developed was the fact that the insurance rates very promptly hiked materially. Following that, even within the first year of the operation of this act, there was a very decided development in what is termed "fake claims" and "fake litigation" in the state of Massachusetts. Commentators on the situation have arrived at the conclusion that the scraped fender and the slight jar and anything else involving either the car or the occupant are immediately the source of litigation. The most serious thing, however, that I gathered appeared to be in the mental attitude of the car operator. Immediately upon the going into effect of the act there was a decided increase in this attitude: "Well, I am insured and it is no concern of mine now. The insurance company has got to pay it." There was an increase in the number of people that caused accidents and went on their way without attending to the victim or making any attempt to lessen the damage occasioned by their own act. There was a very great inclination on the part of the motoring public as a whole to rather boost tbe amount of damages sustained by the other fellow than to mitigate it, and there was no mass inclination to fairly attempt to determine the damage on the basis of a reasonable compensation for the damage done; in other words, "Let the insur-

ance company pay it because I have paid for that protection." Necessarily in the larger towns like Boston "rackets" developed immediately as a result of this act. That was the alliance between the crooked lawyers and doctors and adjusters—even among the insurance agents themselves, when they could find the client of another company hurt in an accident, they went out of their way to bolster up a large claim or litigation if they could, and the whole thing wound up in a mess of uncalled for and unneeded litigation.

One writer sums up the situation in this way: That at the present time, as I said before, only about 30 per cent of the accident-causing drivers are now financially responsible, and thus in comparison with the number of cases involving motor vehicle accidents and injuries we find that about 10,000 drivers per year are at fault, and for the fault of those people the other motoring public, which consists of about 14,900,000 car owners and operators, are being called upon to assume the same burden and same cost and expense that these same guilty operators are called upon, and all for the benefit of about 60,000 of the public, that being the figure representing the seriously injured and fatal cases.

MR. GRAHAM: Have you got any statistics showing the number of licenses that were refused on account of the inability of the applicant to furnish a bond?

MR. SWANSTROM: Perhaps there are some comparative figures here. In 1926 in Massachusetts the total motor registration were 838,111; in 1927, when the act became effective, there were 828,795, or less than 10,000 reduction. However, that immediately began to pick up, and in 1929, the following year, it had jumped to 1,125,000 and has hung in that neighborhood ever since.

The other phase has to do with the solution that has been worked out in other states and which most of us have understood was compulsory automobile liability insurance, but wasn't.

I have here two codes, one proposed by the American Automobile Association and one which has been fostered by the Bureau of Public Roads of the United States, and both of these acts are nearly identical in effect. The distinction between the two last acts mentioned and the Massachusetts law is this: That under the uniform act the motorist is not required to procure liability or property damage insurance until he has become a violator of the motor vehicle law or until he is the responsible factor in an automobile accident and has refused to satisfy a final judgment of damages which has been assessed against him. I think there are one of two pertinent paragraphs here that, if the members will bear with me, will be worth reading to you. Under both the federal recommendation and the A. A. A. proposal, the essence of the act is this: That an operator's license is taken from him for final conviction in his own state or another state on a charge for which it could be taken in his own state for offenses involving the violation of the state motor vehicle act and which by the acts themselves are grounds for revocation of the license. That having been done, the only way by which that license can be reinstated is by payment of the fine, if there be one, and also by then coming in before the commissioner of the automobile bureau, or whatever title he may have, and



post evidence of financial responsibility for future operation of the car. The more usual way is by a policy of insurance; and in the event that a licensed operator has an accident out of which civil litigation results and a judgment is taken against him and goes to a final judgment, unless he satisfies that judgment to the extent of $5,000 for one death or one injury, or to the extent of $10,000 for the total of a group, or to the extent of $1,000 property damage, within thirty days after that judgment becomes final, his license is revoked until such time as he takes care of the judgment.

Now, that has the effect, of course, of taking off the road the man who has offended a criminal statute or incurred civil liability. It does not relieve, of course, the potential danger of the man who has his first offense to commit, and it doesn't give any redress, if he is not financially responsible, to the man or property he might injure as a result of that accident, but I think the thing is a hopeful law in this: It has been shown by the experience of large industrial companies employing two to five thousand automobile operators that 2 per cent of their drivers are responsible for 25 per cent of their accidents and 7 per cent are responsible for 65 to 75 per cent of the total. Now, it is hopeful in this respect: That having had accidents, those fellows can generally be eliminated and removed as a source of potential danger in the future. That is one thing.

I think it would be perhaps a little out of line for me to offer any conclusions or opinions of my own because, in the first place, this is my first contact with the subject matter and many, if not all of you men in the meeting have had much more experience in the subject of motor accidents and compensation insurance and liability insurance in connection with them than I have, so you have probably much better opinions on that than I. However, the Massachusetts act has proved so wholly unworkable, and is unpopular both with the public and the officers who are required to enforce it and with the people who really promoted the Massachusetts act, the insurance companies. They have gone broke by wholesale in Massachusetts writing these policies. So apparently that type of act will not work. I think the next best solution is the uniform act which I mentioned and which now is in effect in one or more forms in Oregon, Wisconsin, West Virginia, Colorado, California, Connecticut, Indiana, Nebraska, New York, Maryland, New Jersey, Vermont and Michigan, and in the following states, which have a modified form of that act, namely, Ohio, Iowa, Maine, New Hampshire, North Carolina, Rhode Island, South Dakota, Pennsylvania and Virginia, and one or two states have a law of their own relating to the same matters. I think it may be concluded that the latter act, the uniform act, mentioned is the more workable of the two and with perhaps that act in connection with a more rigid examination of the applicant for a motor license to eliminate the past offender, who, statistics show, is a potential offender in the future, and eliminate that man or woman who through physical and mental disabilities is not capable of driving a car, I think we would have gone a long, long way toward reducing the hazards which come from the uninsured motorist and the motorist generally upon the public highways.

MR. GRAHAM: Mr. Swanstrom, from the investigation you have

made are there any recommendations that you desire to bring before the body as to the adoption of any compulsory liability insurance act or law, and, if so, what kind?

MR. SWANSTROM: I hardly feel qualified to urge at this time a resolution favoring the adoption of any particular type of either insurance or legislation affecting this matter, but I do feel that it is a subject that has become so inter-connected with the present civilization that it is worthy of real study by the Bar and that study will show some suggestions and produce results that will be worthy of going to the legislature, and for consideration by this body, and I think that should be made a part of the program in working out the most equitable and workable bill to meet this situation.

MR. GRAHAM: By the suggestion of the speaker the matter will be deferred and kept on the docket for further consideration, either next year or some time in the future. Are there any other remarks on the subject? If not, we will proceed with the next subject, "The History of the Idaho State Bar." Hon. Alfred Budge, Justice of the Supreme Court. He has forwarded his paper, being necessarily absent, and Judge Hugh A. Baker of Rupert has consented to read the same.

JUDGE BAKER: Mr. Chairman, members of the Idaho State Bar:

The paper prepared by Justice Budge is as follows:

Mr. President and Members of the Idaho State Bar:

We are now in midstream of a movement which has rapidly created strong bar associations throughout the United States. All things must have a beginning. The Idaho State Bar now in session is no exception. While it may be said that this organization dates back in its inception to the first lawyer or at least to the first gathering of lawyers, I deal with the "History of the Idaho State Bar" as organized by legislative enactment of our state legislature in 1923. For many years bar associations existed in the United States generally and likewise in Idaho. Such organizations were purely voluntary and with limited, if any, powers of self-government. I deal with the movement which is and has heen known as bar integration. Noah Webster defines integrate as "To form into one whole; to make entire, to complete; to renew; to restore; to perfect."

## THE FOUNDATION.

It may well be said that the history of the organization of the Idaho State Bar, an integrated bar, as well as all incorporated bars in the United States, organized by legislative enactment as bodies politic and with self-governing powers date back only to the time of the first issue, Volume 1, of the "Journal of the American Judicature Society" in June 1917.

## THE AMERICAN JUDICATURE SOCIETY

The American Judicature Society was chartered by the state of Illinois in July 1913, its membership and aims being national in scope from its beginning. Membership was free and any person interested in improvements in the administration of justice was invited to become a member by the simple process of sending in his name to the society. The fundamental aim of the Society was the better administration of justice. The attitude of the Society was that integration of the bar was one of the foremost methods by which this aim could be reached.



The first issue of the Journal contained this reference to the matter of Bar Organization:

> "Not least among the matters coming within the province of the American Judicature Society is the big question of bar organization, especially with respect to the part it plays in the administration of justice.
>
> Until recent years the bar of the typical state has been inchoate. Now we are observing a growing class-consciousness among lawyers, a disposition to realize the peculiar powers and obligations of the profession. A movement to integrate the profession is apparent in many quarters. . . . Concerning features of the present highly interesting and rapidly developing situation, this Journal will have considerable to say in future issues."

The Journal issue of December 1917, again refers to the subject and indicates that the seeds implanted had in some instances already fallen upon fertile ground, the Journal stating:

> "State bar association committees are at work in several states on the problem of efficiency organization of the bar. In Nebraska and California the movement looks to the integration of the entire bar and a similar movement is expected in Alabama."

In the February, 1919, issue of the Journal the word was put forth that a proposed law had been drafted by the Society:

> "With respect to the bar as one of the important facts in administering justice, the Society has published a draft act for incorporating a state bar association with powers of self government and self-discipline."

The proposal then seems to have gone through a period of incubation until September 2, 1919 at the conference of Bar Association Delegates at the American Bar Association meeting held in Boston the belief was expressed that the first necessary step in making the administration of justice effective, was to have both bench and bar self-governing. And at this conference the plan embodied in the American Judicature Society's draft act to incorporate state bar associations was informally submitted. The plan in brief, being like that later adopted in Idaho, providing democratic control of the state bar associations through a system of mail voting for representatives, these representatives, called a board of Commissioners or Governors, to be given large executive powers, especially with respect to admission to practice, discipline and disbarment, and also looking to the inclusion of every practicing attorney as a member of the organization. The attitude was that the bar should have power to determine who is fit to be admitted to the profession and to exclude those whose conduct proves them unfit. These powers have been made the north and south poles of all bar acts, and all that lies between is, in a considerable measure, made subsidary.

Mr. Elihu Root, Chairman of the Conference, was the first to discuss the proposals and he found considerable merit in them. Several speakers followed Chairman Root, nearly all finding some good ideas had been submitted. A motion was then voted to create a committee of five, with power to increase its membership by adding one member from each of the States, the duty of whicb committee was to submit the plan widely to bar associations during the following year and to obtain an opinion for a report to be submitted to the 1920 Conference.

Clarence N. Goodwin, of Chicago, a former judge of the Illinois Appellate Court, was made chairman of the central committee of five. The other members were W. H. H. Piatt, Kansas City, Missouri; Clement Manly, Winston-Salem, North Carolina; Thomas W. Shelton, Norfolk, Virginia, and James Byrne, New York City. Presidents of state bar associations were requested to select one member each of the sub-committee.

## PROGRESS OF THE IDEA.

After the meeting of the American Bar Association in Boston, 1919, the idea gained rapid headway within a year and much support from the lawyers in various sections of the United States immediately appeared.

Tbe first draft act to incorporate the entire bar of a state, with self-governing powers, was produced by a committee of the Nebraska State Bar Association early in 1920.

Approval was given the idea by the Michigan State Bar Association at its meeting held in Detroit in June, 1920. A committee was authorized to draft a bill and have it introduced at the next legislature. This bill passed the senate, but further progress was delayed with the consent of its friends in order that the whole bar might become familiar with it before it became a law.

The Kansas State Bar Association, assembled in March 1920, and authorized a committee to investigate and report a draft bill.

A similar resolution prevailed at the meeting of the Iowa State Bar Association held in June 1920.

The fact that the idea had gained much headway appears from the report of the Committee on State Bar Organization of the Conference of Delegates, headed by Judge Goodwin, submitted at the meeting held at St. Louis, August 24, 1920. At that time the committee reported favorable action had been taken on such an act in Nebraska, Michigan, Iowa, Kansas, Maryland, Florida and Minnesota, and numerous local bar associations. These pioneers in the movement however, as is very often the case, were not tbe first to gain the desired end. Some of them still are reaching for the same goal.

## SUBMISSION TO LEGISLATURES.

While such an act had been approved by the Bar Association of several states it was as yet only an idea and had not yet been presented to a state legislature to test the reaction of such a body.

In the December, 1920, issue of the "Journal of the American Judicature Society" a model bar organization act drafted by Judge Goodwin, was published. This model act served as tbe basis or guiding



principle of acts which were to be thereafter submitted to legislatures of various states.

The Ohio State Bar Association, a state destined to make a long fight thereafter for intergration of its bar, was the first state to carry its ideals for constructive growth to the legislature, this early in 1921. The bill was introduced in the senate, favorably reported to the judiciary committee, but failed passage by reason of an early prorogueing of the legislature by tbe Governor.

Florida likewise submitted such a bill to its legislature of 1921, also unsuccessfully.

Idaho was not far behind. The program for the meeting of the Idaho State Bar Association, at Boise, January 13, 14, and 15th, 1921, included a report of a special committee on incorporation of the bar. The officers of the association were President Willis E. Sullivan; Treasurer N. Eugene Brasie; and Secretary Sam. S. Griffin, all of Boise. Exactly who the members of tbe committee were appears to have been lost in the unwritten pages of history. At that time the Idaho Bar Association was a purely voluntary organization with a small membership, holding meetings every two years during the session of the legislature and some of the records are incomplete or not available. It is safe to say that the idea probably first took root in the brain of the perennial secretary of the organization, Sam S. Griffin. Jess Hawley and President Sullivan and no doubt others were on this committee or worked with it.

The proposal to organize the bar for self-government was presented to the Idaho State Bar Association at this meeting in 1921 by President Willis E. Sullivan, who had previously appointed a committee, who were ready with a report and a draft act. The strong reasons advanced by President Sullivan availed to win the approval of the draft. The report of the committee followed closely the lines and recommendations of a report made to the Conference of State and Local Bar Association, the matter was carried over to a subsequent session and thoroughly discussed, approval was given to the plan embodied in the model draft act written by Judge Goodwin, a proposed bill was approved and a committee was created to see that the measure be introduced in tbe Idaho legislature. Shortly afterward the bill was introduced in the 1921 legislature and met with generally favorable approval by the judiciary committee but was submitted too late for action at the session and did not leave tbe hands of the judiciary committee.

## PROGRESS IN ACTUAL PASSAGE OF ACTS.

Tbe State Bar Association of North Dakota stole a march upon other states in 1921 and was the first in the country to attain that degree of bar organization providing for self-government. However, the movement for integration in North Dakota took a legislative shortcut to its objective. It secured the passage of an act making all licensed lawyers of the state members of an association and this association was given power to evolve such organization as it saw fit. The act became effective July 1, 1921.

During 1921 the plan embodied in the Goodwin draft act was pre-

sented to bar associations in many states, including, Kentucky, California, Wisconsin, New Mexico, Georgia, North Carolina, Colorado, Alabama, South Dakota, Oklahoma, New York, Tennessee, Lousiana, as well as those already mentioned.

## ALABAMA AND IDAHO TIE FOR FIRST HONORS

While North Dakota was the first to attain a self-governing bar under statute its act was not of the character of that proposed by the draft act of Judge Goodwin. In the passage of such an act the states of Alabama and Idaho ran neck and neck. Idaho secured first approval of an act passed by the legislature, the 1923 legislature passing the act and it being approved on March 20, 1923. Alabama however appears to have reaped the honor. Its act passed hy the 1923 legislature, while not approved until August 9, 1923, after approval of the Idaho act, still Alabama was the first state to secure the adoption of the act worked out by the conference and to put it in force. While Idaho secured the passage of an act similar to that of Alahama, and prior to Alabama, its functioning was impeded.

At the 1921 meeting of the Idaho State Bar Association the officers elected for the next two years were as follows:

President James F. Ailshie; Vice Presidents, one for each of the judicial districts—Donald H. Callahan, Wm. E. Lee, Dana E. Brinck, M. J. Sweely, J. R. S. Budge, R. W. Adair, Alfred F. Stone, C. H. Potts, G. W. Talbott, and F. S. Randall.

Secretary-Treasurer, Sam S. Griffin, and the executive committee: D. L. Rhodes, Nampa; E. A. Walters, Twin Falls; J. T. Pence, Boise.

At the biennial meeting of the Idaho State Bar Association, convened at the Federal Court Room in Boise, January 3, 1923, the bill for organization of the bar, with slight changes was again presented, discussed and approved. It was then referred to the legislative committee for introduction in the legislature then in session. Again the record is from memory but this legislative committee consisted of Jess Hawley, Chairman, General Frank Martin, Frank T. Wyman, Ben W. Oppenheim and very likely otbers. The efforts of the committee met with success and the act was passed that year by the legislature, Session Laws, 1923, Chapter 11, and received approval March 20, 1923.

Pursuant to the act the Clerk of the Supreme Court appointed Karl Paine and Sam S. Griffin, members of the Boise Bar, to assist in conducting an election for commissioners. Notices calling for nomination were sent to the bar, and thereafter ballots were prepared and sent to the bar. Upon canvass of the vote John C. Rice, Caldwell, was elected Commissioner for the Western Division; N. D. Jackson of St. Anthony, for the Eastern Division, and Robert D. Leeper, Lewiston, for the Northern Division.

The board met and organized August 7, 1923, at Boise and drew lots for length of terms, resulting in a term of one year for Judge Rice, two years for N. D. Jackson, and three years for Judge Leeper. Rice was elected president, Jackson, vice-president, and Sam S. Griffin, who had been secretary of the voluntary association and who had given strong support to the idea of inclusive organization, under statute, was chosen secretary.



At this first meeting of the commission discussion was had of rules to he formulated for admission, ethics, discipline and general rules, and the work of drafting such rules apportioned.

Prior to the meeting of the Board in 1923 the State Auditor, E. H. Gallett, had announced that he did not consider that the act carried an appropriation. Question had also been raised as to the constitutionality of the act. In order to have the matter passed upon Commissioner Jackson presented his claim against the state for expenses in attending the board meeting. The claim was refused by the State Auditor, and an original application was made to the Supreme Court for Writ of Mandate. Mr. Jackson was represented by Frank T. Wyman, B. W. Oppenheim and Sam. S. Griffin, of Boise, and H. B. Thompson, of Pocatello. The attorney general represented the auditor. A brief was also filed hy Judge Goodwin, chairman of the Bar Organization committee, as Amicus Curiae.

In the opinion of the Supreme Court rendered July 3, 1924, (Jackson v. Gallett, 39 Idaho 382, 228 P. 1068) the decision of the court was that there was no appropriation in that an appropriation was not indicated in the title, in fact it negatived the idea of an appropriation. In this respect the opinion recited:

> "In the title of the act it is distinctly stated that the state is to be relieved from the cost of holding examinations for admission to the bar, entirely negativing the idea of any appropriation of state moneys for such purposes. In the body of the law no mention is made of how or in what manner the state is to be relieved from the cost of holding examinations for admission to the bar. On the contrary, sections 9 and 10 purport to appropriate state moneys, a major portion of which will be used for purposes which according to the title, the state was to have been relieved of any burden of expense. The least we can say for the language used in the title of the act when read in conjunction with sections 9 and 10 of the act is that it is delusive. . . . Hence, so far as an appropriation is concerned, since the title does not suggest an appropriation of state moneys but negative the idea, those portions of the act which attempt to appropriate moneys must fail."

Three justices were in agreement that there was no appropriation in the act. Two justices held there was an appropriation. That there was no appropriation in the act was the only question upon which a majority decision was rendered. The question of constitutionality of the act in various respects was considered and opinions were written pro and con but no majority decision was reached. Two justices held the act unconstitutional, two held it constitutional and one judge expressed no opinion. Final determination of the case came in September, 1924.

The Board of Commissioners again met in Boise, November 24th, 1924, and formulated tentative rules for presentation to the Supreme Court, and discussion was also had of the necessity and desirability of amendments of the statutes to eliminate inconsistencies, provide for an appropriation, and clarify the provisions and obviate the objections raised in the litigation in the Jackson vs. Gallett suit with reference to the constitutionality of the act. The activities of the Commission were for a time thus confined to getting the consensus of opinion of

lawyers and framing amendments. The amendments were presented to the 1925 legislature and were passed, being Chapter 89 and 90, Session Laws of 1925. For the most part the amendments consisted of slight changes in the language, additions and alterations in the various sections of the act it being kept practically in the form in which originally adopted. Two new sections were added, one providing for the payment of a license fee of five dollars from every attorney to be placed in a fund to be paid out by the State Treasurer upon warrants drawn by the State Auditor upon such fund and providing that the Auditor was authorized to draw his warrant upon the fund for the payment of proper vouchers or claims against the State approved by the Board of Commissioners of the Idaho State Bar and the State Board of Examiners. And further providing that all money in the fund was appropriated for the purpose of carrying out the objects of the act. Another new section provided for the issuance of duplicate receipts by the State Treasurer to persons paying license fee to be transmitted to the Secretary of the Board for the purpose of issuance of license.

As soon as the amendatory acts were passed and approved by the Governor the board adopted rules governing questions of admission to practice, conduct of attorneys, discipline and general rules for meetings of the Bar and conduct of the board's business. The Board then proceeded to give bar examinations and to make preliminary investigation of complaints against attorneys. The board met on June 1st, disposed of a number of complaints and prepared to prosecute others, and also made recommendations to the court with respect of admissions and rejections of applications.

## THE FIRST ANNUAL MEETING

The first annual meeting of the Idaho State Bar, under its corporate form, was held at the Lewis-Clark Hotel, Lewiston, Idaho, September 3, 4 and 5th, 1925, and was called to order by R. D. Leeper, of Lewiston, Vice-President, in the absence of Judge John C. Rice, President, who was unable to attend. In 1925 the personnel of the board changed, A. L. Merrill of Pocatello succeeding Mr. Jackson, and Mr. Frank Martin of Boise succeeding John C. Rice. R. D. Leeper was elected president, Frank Martin, vice-president and Sam S. Griffin, secretary. On June 25, 1926, the board met in Boise, among other things considering numerous complaints relative to attorneys, one of which finally resulted in the determination that the bar act was constitutional. The board appointed a committee to investigate the professional conduct of an attorney of this court. At the conclusion of the investigation the committee reported to the Board of Commissioners and on or about August 16, 1926, the board made an order directing that the attorney be proceeded against for such alleged professional misconduct as was disclosed in the committee report, a trial committee was appointed and a formal complaint lodged. As a result of the findings of the trial committee and the review thereof by the board, the Board of Commissioners entered its judgment that the attorney be suspended from the practice of law within this state for a period of one year, the order of suspension to become effective upon the approval by the supreme court of the judgment of suspension



entered. The attorney filed a petition in the supreme court asking that the proceedings of the commissioners be reviewed and that the same be disapproved. In the resulting decision by the Supreme Court the Bar Act was held constitutional in all respects which had been questioned, four judges being in agreement. In Re. Edwards, 45 Idaho 676.

Since its organization the Idaho State Bar has continued to conduct examinations of applicants, considered complaints against attorneys, delinquencies and has operated to the fullest extent. The Commissioners of the Idaho State Bar have been as follows:

| | |
|---|---|
| John C. Rice | 1923-25 |
| N. D. Jackson | 1923-25 |
| Robert D. Leeper | 1923-26 |
| Frank Martin | 1925-27 |
| A. L. Merrill | 1925-28 |
| C. H. Potts | 1926-29 |
| Jess Hawley | 1927-30 |
| E. A. Owen | 1928-34 |
| Warren Truitt | 1929-32 |
| Wm. Healy | 1930-33 |
| James F. Ailshie | 1932-35 |
| John W. Graham | 1933-36 |
| Walter H. Anderson | 1934- |
| A. L. Morgan | 1935- |

The Secretary, Sam S. Griffin.

## ADDITIONS TO INCORPORATED BARS.

As bearing upon the History of the Idaho State Bar some mention should be made of the progress of the movement throughout the United States. Following the lead of North Dakota, Alabama and Idabo, various other states continued or commenced their programs looking to incorporation of their state bars and one by one the list bas grown. In many instances proximity to an already incorporated state has aided in the advancement.

The fourth state to adopt a self-governing bar bill after six or seven years struggle was the state of California, the bill becoming a law by the governor's signature March 31, 1927. A previous effort of California was balked in 1925, when the governor vetoed the measure.

The movement apparently had received greatest impetus in the west for fifth on the list was the State of New Mexico.

At the instance of the Nevada State Bar Association a bill was introduced in the legislature and speedily enacted. The Nevada act modeled after that secured in California and similar to that of Idaho goes the whole length of creating a self-governing bar. The "Journal of the American Judicature Society," of April, 1928, speaking of the fact of the passage of the Nevada Act, says:

> "Lying between Idaho and California it was but natural that the bar of Nevada should have become infected with the idea of statutory organization. From Idaho they learned how a very

> weak bar in a very large state had in a brief time become a powerful agency for good. In Arizona also proximity to experience must be a factor, for the state Bar Association of that state, lying between California and New Mexico, has voted to press for a bar organization act."

Oklahoma was the seventh state to approach integration, its act closely resembling the California Act passing in June, 1929.

Utah twice previously failed to secure passage for its bill, like that of California, Nevada and Oklahoma, but in 1931 met with glorious success and acquired eighth place.

Ninth and tenth on the list were South Dakota and Mississippi.

The Supreme Court of Illinois some 38 years ago in In re Day repudiated the idea that the legislature had any power to regulate admission to practice. It was thus considered very doubtful that the bar in that state could organize under legislative sanction. Under date of April 21, 1933, the Supreme Court of Illinois adopted a rule conferring on the Illinois State Bar Association and the Chicago Bar Association virtually the same powers, and all of them, conferred upon state bars in the several states in which organization acts have been adopted.

Senator Huey P. Long catapulted the lawyers of Louisiana in an inclusive statutory state bar at a brief session of the Louisiana Legislature ending November 17th, 1934.

Kentucky after seven years effort enacted a bill along original lines in 1934, directing the supreme court to take steps incidental to organization of the bar and to draft rules providing for its operation. It is an organic structure substantially like those in other states.

In 1935 Oregon, originally having an affiliation plan incorporated its bar.

In Michigan an act like that of California was first attempted, in the house a majority of two votes was against the bill, following custom there was a vote to reconsider, they then followed the example of Kentucky conferring power on the supreme court to provide for inclusive organization of the profession, and this bill passed both houses and was signed by the governor.

Washington, Arizona and North Caroline likewise have adopted integration under statute. Thus in October, 1935, eighteen states had all inclusive statutory bars. Technically New York belongs to this list. In fact it appears that every state in the Union either already has an organization of similar character in operation, however not under statute, or formal approval has been given the idea by State Bar Associations. In the west a block of six adjoining states have all inclusive statutory bars, Idaho, Washington, Oregon, California, Nevada, Utah, Arizona and New Mexico, Idaho having the honor of being the first of these.

## THE ACTS GENERALLY.

The power to admit to practice is not made absolute in any bar act. The bar is given power to "determine the qualification of admission to practice" and to conduct examinations, while the approval of the supreme court is necessary to actual admission. As to disbarment



the acts purport to give the bar ample, but not exclusive power. In two or more states the supreme courts have held that they receive the decisions of the bar and treat them only as advisory.

In only one state, Idaho, has the act been held void. And after amendment the act was sustained. The question of validity of the acts has been up and upheld in many states.

The History of the Idaho State Bar is a history of modern growth within only the past few years. We need only return to 1919 to find no inclusive bar within the confines of the United States but the idea then only an idea. From this beginning of the very groundwork of the idea the Idaho State Bar has grown from a purely voluntary organization with but a small membership to an established, smooth working, all inclusive statutory bar with powers of self government, one among many all inclusive bars throughout the United States, and in this history of all inclusive bars Idaho has the honor of being one of the pioneers.

MR. GRAHAM: This paper, being of a historical nature, will not call for comment, and therefore will be placed on file and put in the record. The next subject under discussion is by Mr. Nixon, "Suggestions for Increase of Lawyer's Annual License Fee." Mr. Nixon.

MR. NIXON: Mr. President, and members of the Bar: Two years ago when the meeting was held there was considerable comment as to why there wasn't more attendance of the members of the Idaho Bar at these annual meetings and it was suggested that a committee on recommendations should be appointed, the purpose of that committee being to act as a laison group between the Bar Commission and members of the Bar in an effort to ascertain, if possible, what the reason was for lack of attendance at these meetings. Questions were asked among those that were not in attendance as to the lack of interest, and among those reasons there was one principal one—that there was nothing of interest there to me. That seemed to be the principal reason given. Another reason that the matters selected for the program and the speakers were ofttimes from far away and the subject would be foreign; in other words, they were more interested in having subjects discussed that were a little closer to their everyday business. So this committee started out to function; it consisted of myself, Mr. Oversmith and Mr. Bentley of Pocatello. Well, the lack of interest was immediately evident because Mr. Bentley never did function; so Mr. Oversmith and I have been the recommendations committee since. Then Roy Black was substituted in Mr. Bentley's place and has been co-operating with us. It has been very difficult to ascertain these things that we started out to learn. We first sent out a letter several months before the last meeting, to ascertain what the members of the Bar were interested in, and, as most of you who prabably read the report of the proceedings at Hailey know, out of some 550 yetters I believe we got nine replies, and so far as I know this year when Mr. Oversmith was the chairman (he hasn't advised me to the contrary) we only received one reply. So, if the lawyers are in that state of apathy, I don't know what can be done about it. However, out of these nine replies certain subjects were suggested for discussion. After discussing the matter with the members of the

Bar Commission, we thought the proper thing would be to submit these subjects to those members who had suggested them, they being particularly interested and probably to the extent that they would be willing to discuss them. So we put them on the program last year and, as I recall, only one or two of them showed up or made any preparation for anyone to give a paper prepared by them, and consequently there was practically no response and, as I said, there has been less this year.

Now, another matter was suggested last year, and that was formation of official self governing local Bar associations and, as you all know, that has been carried out. Among the other purposes was that representatives of these local associations could be present at the state meeting and at least take back to these local associations what had transpired, in an effort to try and induce interest in the annual meeting, and I think perhaps that has commenced the accomplishment of that purpose.

Another thing I want to comment on briefly is, that at this meeting this year there are a large number of the younger members of the Bar present, and to me that is a very wholesome picture for the reason that gradually these younger members who come into the Bar and attend these meetings will undoubtedly be able to perfect in the future a better integrated Bar.

Now, another idea was this: It was suggested that a survey committee be appointed before the meeting at Hailey. Mr. Eberle was chairman last year, and having very little time within which to work, he did secure some facts and statistics from the income tax department of the State of Idaho relating to the income of lawyers. That survey was continued again this year, and Mr. Eberle's committee got together some statistics. I don't know whether it strikes home or not, but I was just looking at Mr. Eberle's report this morning and I noticed that 70 per cent of the members of the Bar (now, gentlemen, that is about 400 out of 550) have incomes, according to the statistical information, of less than $2,000.00.

Certainly the Bar should be interested to the extent of building up the income of the lawyer because after all that is what he is interested in, and it would be my suggestion as a member of this recommendations committee that the survey committee be continued because I think eventually, if this is jammed home once in a while, it will have a wholesome effect. It should at least, And if that committee, the recommendations committee, is to be continued, it should have the co-operation of the members of the Bar at least to assist them in getting up some definite information that they can take back to the members of the Bar in an effort to improve the status of the Bar members and the members' financial position. As Mr. Eberle stated, there were only 15 per cent replies. That is a very, very small percentage.

When the Bar Commission met in Boise in January this recommendations committee sat with them and with Mr. Eberle and this recommendation was made: Suggestion for raising the annual license fee from $5.00 to $7.50, which would produce an additional sum of approximately $1100.00, the proceeds of which additional sum would



be used for the purpose of employing some young, keen attorney at a nominal salary and paying his traveling expenses, to go around the state and make investigations of the practice of law by others than attorneys as well as to contact the members of the Bar personally and ascertain local practices and complaints and so forth and make reports and recommendations concerning the same and take the necessary corrective steps therefor. Now, of course, for reasons which will be obvious to all of you, I would not be willing to have that a legislative enactment raising the fee from $5.00 to $7.50. I should think that could be done by voluntary subscription from the members of the Bar, if it were thought advisable. The purpose was this: Considerable complaints are heard when you talk to members of the Bar here and there over the state and especially at these meetings, or when you contact them at their respective home places, that so and so is doing this and if I go there they don't pay any attention to me, and somebody usurps the floor, and that sort of thing. It was thought perhaps that by making personal contact as suggested in this recommendation, perhaps some of these opinions could be brought to light and something be done, and let these gentlemen who have these complaints finally get them to this body, as it were, and get to these meetings, and perhaps make their complaint known. These are merely recommendations, as I say, with a view of getting more attendance at the Bar meetings and making the programs at the Bar meetings of sufficient interest (if that is the thing that is the matter) to bring out more members of the Bar to these meetings.

MR. SWANSTROM: I understand this 70 per cent of our attorneys reporting showed an income of under $2,000.00, but only 15 per cent reported. I am extremely hopeful that the 85 per cent who did not report are all in the higher branch because, if that is not the case, then I have got to change my understanding of an abbreviation which has long been in use among lawyers, namely, that L. R. A. instead of being a designation of a set of law books, must necessarily in the future stand for "Lawyers' Relief Association." We will have to have a new agency now set up. The lawyers in Idaho must as a whole be either the biggest bunch of liars that ever lived or the most modest group I have ever encountered, because I have talked to them for a good many years and with no exception they have assured me they are doing fine, and if they only take in their $2,000 I think they will have to reduce the Bar fees. "To-day" magazine carried a little while ago an article to the effect that in the state of New York the average attorney's income for the year was $300.00.

MR. D. L. CARTER: Relative to one matter discussed in the paper awhile ago as to how to increase interest, I am suggesting that the proceedings of this meeting be gotten out sooner. I don't know when they come along, but, as I remember, it is along some time about Christmas time. In that time we have forgotten everything that has taken place, for when I listen to the papers here at the time I think I want to read that in the printed proceedings when they come out, but they are generally so long in coming out I will lose all interest when I get it. I suppose there are reasons.

MR. GRIFFIN: Perhaps I can explain. What happens is that

when the transcript is received some time after the meeting, it has to be edited and then has to go through the State Purchasing Department to be printed. I could get it printed much faster if I could contract it myself, but we get the transcript out and edited and pass it through the State Purchasing Department in good time and then frequently the printer apparently lays it to one side because it is state business and he has got it anyway. I have had it stay in the printer's hands longer than thirty days before I could get even the proof to correct notwithstanding the urging of the State Purchasing Department. This year you may have even more difficulty because this year the state auditor has raised a question on our appropriation and if we cannot get that ironed out very, very shortly we won't have any money to print the proceedings with. That is the reason why you don't get it sooner. I think myself it should be out within thirty or thirty-five days and I think it could be gotten out if we didn't have to go through the State Purchasing Department.

MR. CARTER: Couldn't you contract with the printer? You are not limited to any particular printer.

MR. GRIFFIN. I can't make a contract with anybody. The State Purchasing Department must do it; send it out to the various places to get bids on it and finally it lands in somebody's hands, it may be in Coeur d'Alene and it may be in Boise.

MR. GRAHAM: Mr. Nixon, will you step forward and give us these resolutions?

MR. NIXON: No. 1 was the memorial resolution, which I understand was adopted. The second one has to do with the rule relating to the admission to the practice of law in the State of Idabo.

(Mr. Nixon read second resolution.) Any comment on this?

JUSTICE GIVENS: I hesitate a little to speak about the matter since I appear to be the only member of the Court here. I would like to ask whether the Commission wants this rule.

MR. A. L. MORGAN: The Commission realizes that any rule has finally got to be accepted by the court. We find this to be the case; I have been accused, and I think correctly, by other members of the Commission and by other individuals, of being altogether too liberal in the matter of grades, and our grades have been exceedingly liberal. We feel that the time has come when we should tighten up the matter of admitting attorneys to practice in Idaho. As a matter of fairness to the man who goes into an institution to learn the law and equips himself for practicing law, he should be protected against the individual who is not so equipped to practice law.

Our troubles with attorneys have usually arisen in Idaho because individuals have been admitted to practice who were not equipped to practice. You don't have your trouble with the attorney who is able to conduct his affairs properly. Ordinarily it is with somebody that ought never to have been admitted in the first place. Now, with that idea in mind, we feel that we should tighten down on the matter of grading. I think both Mr. President and my associates will concur with me in saying that if we had graded the papers of the ones that presented themselves for the last examination as we should have graded them, it is doubtful if more than five members of that body would



have been admitted to the Bar. Now, if we do tighten up, with the flood of applications we are having, the Supreme Court will have nothing to do from now on except review examinations that come up to them. This is a protection to the court and a protection to the Bar, and we feel this: That a Commission selected by the Bar of Idaho to pass upon who should be admitted to the Bar will be honest about it, will grade to the very best of that Commission's ability. Having done that, there is no reason why the Supreme Court should be burdened with all of these appeals except where the individual can show that he has been actually abused.

Another thing is, that if an individual has been given a fair examination and has failed in that examination, the Commission does not feel that the Supreme Court ought to reverse those grades unless there is a showing that the Commission is at fault in the matter, and I think I speak for the other member of the Commission that is here. I don't know how Mr. Eberle, the newly elected Commissioner, would feel about it, but I think that is a rule we should have.

MR. WALTER H. ANDERSON: I heartily agree with every word that Commissioner Morgan has said. Since I have been on the Commission, two years ago, there has been but one appeal. That applicant had taken the examination and was failed. He took it again and was failed. He then appealed to the court and was passed and admitted. Then the examination was held at Pocatello, it having gone around that this applicant was admitted simply on a regrading, there were three who failed and two of them have appealed. So it is manifest if the Commission begins to grade as we understand they grade in other states, there is probably going to be an increased number of failures, and if it is generally understood that the failing by the Commission does not mean anything and the court will admit them regardless of how honestly that has been done, or if there are successful appeals in each and every case, then the impression must necessarily go out that all they have to do if they fail is to appeal to the court and they will get admitted, and some such rule, as Mr. Morgan says, certainly ought to be promulgated and adopted to protect the court, or the Commission should be abolished, one or the other, and the court should hold the examination in the first place and save a lot of lost motion. We think this rule should be recommended and adopted if for no other reason than to protect the court, which it seems has enough to do without being another examining board.

MR. MORROW: Mr. Chairman, it seems to me, just off-hand, that this rule is extremely rigid. I think no member of the Bar will go any farther than myself in upholding the honesty and ability of the present and past members of the Idaho State Bar Commission, or the present and past members of the Supreme Court of Idaho, but the question of grading papers, it seems to me, is much wider than the question of mere fraud. It is a question of judgment, and it does seem to me in view of the fact, as I understand it, under the constitution and state Bar law and decisions of the Supreme Court in relation to that, that the Supreme Court has the final say on a question of admitting applicants to the Bar as well as on the question of disbarment. A number of years ago there were examining committees appointed. I had

the misfortune to serve on one of those examining committees with one of our most highly respected members of the Idaho State Bar, the Honorable Frank T. Wyman, and we didn't know, of course, who the applicants were, and Frank Wyman and I agreed absolutely that if it were a question of a spelling examination, one applicant should be flunked outright, but, on the other hand, his legal knowledge, if you could disassociate it from his spelling, which we felt we could, showed not only a grasp of legal problems, but the way of handling them, as a lawyer would have to do. The rule proposed limits review to a question of fraud. That accuses our State Bar Commission, every time there is an appeal, of fraudulent action. In passing on a Bar examination, obviously there are two things to consider: One is whether or not the applicant gives the correct answer, and another is how his legal reasoning is on questions involving hypothetical cases. Every one of us knows that if there were not two sides to almost every legal proposition we would have neither lawyers nor courts, and I have enough confidence in the Supreme Court of Idaho and in the State Bar Commission, that there will not be any very grave difference, any serious difference, upon the matter of grading papers. I must express myself, therefore, as not in favor of the resolution. I think that it is drawing it too fine to limit the field to a question of fraud. Now, any lawyer knows, who has practiced law for five or ten years, that time after time questions are put up to him that he cannot answer off-hand and answer them right. This came up when Mr. Wyman and I were on the examining committee. We went back and checked up and found in some of these cases that if we had applied our first answer, the same answer that we would have given at that time without reference to the book, that we would not have answered that question correctly. That may be a very serious admission for me to make, but that was the fact. This can go to the point that, not necessarily now, but some time in the future, our whole Bar may be subjected to criticism because our Board of Commissioners may put too high a standard—100 per cent perfect standard would be possible under this rule—and there would be no remedy. I have no question but what with the present Bar Commission, or any that we have had in the past, that that sort of thing wouldn't happen. We all want to have the Bar standard high, but I don't think that the appeal to the Supreme Court should be limited to a question of fraud.

MR. GRAHAM: Mr. Morrow, is it your idea that the standards should be raised or kept where they are or lowered?

MR. MORROW: I think the standards should be raised; I have no question about that.

MR. GRAHAM: How are you going to raise that standard unless you make more severe questions and closer grading?

MR. MORROW: On that question I think it necessarily requires an element of co-operation between the State Board of Bar Commissioners and the Supreme Court. I think the Chief Justice and the other members of the court will be able to co-operate to the extent necessary to protect the Idaho State Bar.

MR. WALTER H. ANDERSON: At the present time there isn't any rule, as I understand, covering any question of co-operation, and



just how you could have co-operation in the absence of some rule definitely defining when a review would be taken and when it wouldn't, is one of the things I don't understand. To use, for illustration, the case where the Board was overruled and the applicant admitted, we were in no way contacted in respect to the matter and were not advised of it until some time long after he had been sworn in. We apply the same standard to every one; we grade them all alike and all together. There were other applicants at the same examination who were rejected, who made a better grade than this man who was admitted by the court. If that same rule is applied and there is only one way for the applicants to protect themselves, if everyone should fail, then that is the standard by which we should go. It seems to me that if this rule, or some other, is adopted that there ought to be some rule adopted when these grades will be reviewed and when they will not, and not leave it entirely open to whether or not the particular applicant that happens to fail may appeal.

MR. MORGAN: I am not criticising the court. Don't misunderstand me. But whenever an appeal goes before the Supreme Court when a man has been rejected by the grading of three Commissioners and the Secretary under our system, which as I view it is the most fair system that can be adopted, four men have rejected him, two other members of the court reject him, and then, as and against the grading of six men, three men can admit him. That is one thing that is wrong with the present system. Another one is this: Mr. Morrow's objections would be well taken if they were based upon fact. The fact is that the Commission does not grade an individual with reference to his exact accuracy but with reference to what he knows or his reasoning for the particular answer. I know that this has happened in the past and I think it will always happen, that a board of commissioners in examining a man will give him an excellent and passing grade when he is entirely wrong in the conclusion that he reaches, but if he shows that he has a grasp of the subject and he can analyze and apply his reason, we can take it for granted that later on the man will be able to look up the law and get right. But the trouble is that the several applicants who came before us this last time were exceedingly faulty in reasoning. They indicated that they never did have the slightest conception of what they were talking about. I didn't happen to participate in the grading of the individual who failed twice and was later admitted, but I will venture to say that that same thing was true in that case, that he showed no grasp of the problem, that he never would become a lawyer. It is our theory that if we start out to improve the standards, using the fairest system of grading that we can possibly use, the Supreme Court is going to be swamped with appeals, because I want to say this to you: I happen to live in a University town, and I know that the information of the success of that appeal immediately spread, and out of 17 individuals that came out of there the majority of them expected to appeal in the event of failure and of three who failed two have appealed. Now, if we tighten up, and we have got to do it, I dare say to you that the court is going to be flooded with appeals and, as Mr. Anderson has suggested, if that is going to be permitted, we had just as well take away from the Bar Commission the

grading and put it back on the Supreme Court and let them grade all of them and thereby save this institution a sonsiderable amount of expense. It so happened for the expense of grading those last papers the bill was filed with the institution and I haven't got my money because there was nothing left in there to pay me for the traveling expenses of grading these papers. Why not eliminate that? What is the use of Mr. Anderson or myself or any other member of the Commission wasting our time and your money? Let's either put it where this examination has some force and effect to it, or else remove the Commission from the job of examining and pass it up to the Supreme Court in the first instance.

MR. D. L. CARTER: It seems to me this difference is largely a matter of opinion between the board and the Supreme Court.

MR. A. L. MORGAN: I don't know that there is any difference between the board and the Supreme Court. I think it is exactly the contrary.

MR. CARTER: It so occurs to me. Anyway in this particular instance there was some difference of opinion as to whether the applicant should have been admitted, and rather than make it so that it is practically impossible—I think it would be impossible for any applicant to appeal—would it not be better to change the rules of grading in some way or another, and with that understanding on the part of the court that the commission was going to do that, and thus obviate any necessity of appeals, or if there were appeals they would be treated in the way that the board would like them to be treated? I therefore move a substitute for this, that it is the sense of the meeting that the board of commissioners and the Supreme Court be requested to grade applicants for admission to the Bar more closely than in the past in order that the standards for admission to practice may be raised.

MR. MORROW: I second Mr. Carter's motion.

MR. GRAHAM: It has been moved and seconded that the resolution as offered be amended by instructing the Commission and Court to be more strict in grading examinations.

I don't know what benefit that would serve. If I were on the Commission, I would use my own judgment rather than the judgment of the members of the Bar that don't know anything about it.

MR. CARTER: My purpose of offering that was that if the court and Bar Commission knew that the lawyers of the state were in favor of tightening up that they would tighten up and there would not be any confiict between the board and the Supreme Court. I thought that was the bone of contention.

MR. GRAHAM: If you haven't any confidence in the Commission you elect, why don't you elect other members that you have confidence in. I wouldn't want to be restricted by any resolution of that character. I would use my own judgment. If anyone has an idea that there is any conflict between the board and the Supreme Court, I want to disabuse they minds. I don't know of any such thing, but I am in favor of protecting the Court along with the Commission.

MR. WALTER H. ANDERSON: I want to join in that suggestion. There is certainly no quarrel between myself and any member of the Supreme Court that I know anything about.



JUDGE KOELSCH: This thought arose in my mind as these gentlemen were discussing this question. If we pass this resolution, the power is final within this Commission to admit or to reject, because the incidents in which fraud can be charged would be so rare that I know it will be virtually extending final power to them to settle the question of admission or rejection. Now, the argument made by Mr. Morgan is, that we just as well do away with the Commission. I draw a parallel between that and our system of courts. You might just as well say, "Do away with the trial courts, because every other decision is wrong." There is an appeal to the final court of this state. This question is one that must finally go to the court, whether a man should be a member of the Bar or not, and, as he has stated, it is an elastic question, a discretionary question, vested in those who examine the applicant, whether or not he is fitted to practice; that merely because he has reached a wrong conclusion in an answer to a question does not show that he is not fit to be admitted to the Bar, as Mr. Morgan has well said, and I am satisfied that they do that—they deduce from his answer to the question whether or not in their judgment, even though his answer is wrong to any specific question, he still would be a fit member of the Bar. So I say this is an elastic question, if you understand what I mean, and that question should be one that could be finally taken to the court. Isn't Mr. Morgan somewhat inconsistent?. If I am not mistaken, yesterday he argued that he didn't want the board, or any board, to have the power to render a final decision, that he wanted everybody to have a right to have final recourse to the court, and it seems to me that in this matter an applicant should have the right of recourse to the court, and certainly the Supreme Court should be the final arbiter for this question.

MR. A. L. MORGAN: Why this reference to my inconsistency? Yesterday we were dealing with property rights and human rights and liberties, and in that circumstance I felt that the right of appeal should not be cut off, neither should it be affected by the incompetency of the counsel who happens to be representing the individual, but when it comes to passing a Bar examination, the applicant has no rights until he has passed the qualifications that are set by the court. Now, there is no practical reason why the court should burden itself with a vast number of appeals unless it sees fit to do so. I don't believe that the Commissioners at the present time are going to work any hardship on any applicant. I don't believe that any Commission that will hereafter follow will work any hardship. This matter is not new. I can't name you the states now, but there are a number in which an appeal will not lie from the action of the examining board except upon the ground of fraud, and I don't see any particular reason why Idaho should be afraid of that; and, another thing, if a man appeals from the district court, he must show some reason for appeal. That is all we are asking here. As the thing now stands, the record simply goes up to the Supreme Court. And one other thing—and in this again I am not criticising the court at all—when the Commission grades these papers they don't know whose paper they are grading, and when it goes before the Supreme Court they do know. There ought to be some restriction placed on the court, and I know some members

of the Court favor a rule which will regulate the grading of the Supreme Court. They have got the last act on it, but the only thing we are asking the members of the Idaho State Bar to do is to say whether or not they want this Commission to tighten up on the question of admissions, and I will say to you that if you grade a dozen of the papers selected at random that come before the Commission, you will say, "You ought to tighten up," and if you are going to tighten up there has got to be some rule covering these appeals.

MR. MARCUS: I have only been practicing in Idaho for two years, and I do have a very vivid recollection of the feelings that a fellow has when he takes the Bar examination. I do think there may be one or two situations that could be improved upon in grading these papers. Personally, since the Bar Commission has in their power to determine the fellows that are qualified to practice law in the state, I thinks we should give them the absolute right and take away the right of appeal. I don't think we would be taking any constitutional right away from anybody, but I do believe that when these examinations are given and the fellows write them up, it would be a much better idea rather than to place names on the examinations to give them numbers.

MR. GRIFFIN: We have done that for ten years. You weren't allowed to put your name on your paper.

MR. MARCUS: I will sit down and quit talking then.

MR. PAINE: Personally, I feel that the decision of the Commissioners should be final, and if I knew that such power might be granted to them under the statute, I should move that such power be granted. Now, these gentlemen are appointed to take this work from the Supreme Court, and I don't hesitate at all to say that the Commissioners who are appointed and assume this burden are as well qualified to say who shall practice law as the members of the Supreme Court. This right of appeal, then, if limited to fraud, requires a man who is sore to charge the men who have assumed this burden with fraud, and he doesn't know on what he bases it and cannot possibly know. He just has to assume that somebody has it in for him, and I think that would be an unfortunate situation.

MR. GRIFFIN: The statute is that qualifications for admission shall be laid down by rules established by this court, and I think the court may deny or allow appeal. The present rule does provide that there may be a review.

Mr. Marcus has evidently forgotten how papers are graded; the applicant is given a number at the time he is permitted to take the examination, and that number is the only thing that he is permitted to put on his paper. He is warned on the outside of every cover sheet that he must not put his name or any identifying marks upon his paper. And the board and secretary sit down and each question is read and the answer thereto is read, and each grader uses his own judgment as to the value of the answer, and that is done straight across; when you grade applicant No. 1 on question No. 1, you grade applicant No. 2 on question No. 1, and so on; in other words, you get a comparison straight across. You really compare the answers of all applicants and their grades are comparative with each other, which is the fairest way you can do it, rather than going down through an examination of one



applicant at a time. When the board rejects a man and the appeal goes up, there is no class for the court to compare him with; further, his whole record goes up, so that means he is now an identified single individual rather than an unidentified member of a class. That is one difficulty which the board ran into in the very first examination in 1925, when they had the names on the papers, and if I may be excused, "we had a hell of a time," and we immediately changed the system on that. The difficulty Mr. Morgan speaks of is this: We have had one appeal on grades and the court overruled the board, possibly with entire propriety; now, we reject three and get two appeals, and when we possibly reject five next time we will get five appeals and there will be two bodies with the same burden of grading papers, the second of which, the Court, will not be in a position to grade as to a class, or to grade unidentified individuals.

MR. PAINE: With that understanding, I move as a substitute that it is the sense of this meeting that the court amend that rule and make the decision of the Commission final.

MR. MORROW: In view of the system that the Commission has adopted, it seems to me that entire fairness to everybody could be obtained and possibly, too, appeals limited if we pass a motion recommending the adoption of a rule by the Supreme Court which would substantially adopt that system; in other words, to work it this way—if any man appeals, the paper that has the lowest passing grade and any papers with intervening grades—that would cover a question that was raised here by Mr. Morgan or Mr. Griffin would come before the Supreme Court, and then they would consider them on the same basis, and possibly it might be necessary to have one of the highest papers also, to show what the opinion of the Commission was; in other words, to give the Supreme Court an opportunity in their consideration of passing upon the same question. There is an obvious unfairness if the passing grade is 70 per cent, and a fellow makes 60 per cent according to the Commission and appeals under the present system, and there are two or three others between him and the passing grade, and he gets in and the others are disallowed. It was said the Supreme Court has the whole record before it, but they don't; they haven't the papers of the fellows who passed and they don't have an opportunity of going over it in the same way that the Bar Commission and Secretary do.

MR. GRAHAM: Those in favor of the substitute motion please stand. Those opposed to the motion please stand. The mation is substituted and we will now vote upon the substitute motion.

Those in favor of the passing of the substitute motion please stand. You may be seated. The substitute motion prevails. Now, the next resolution, Mr. Nixon.

MR. NIXON: Resolution No. 3 is: (Reading Resolution No. 3.)

JUDGE KOELSCH: I move adoption of the resolution as read.

MR. PAINE: I second the motion.

MR. GRAHAM: Those in favor of the motion signify by raising your right hands. Those opposed same sign. The motion prevails.

MR. BOUGHTON: May I suggest with reference to the two proposed amendments that have been suggested to the Supreme Court

rules, resolutions 4 and 5, that they have been submitted by different Bar Associations of the state; they refer to the same subject matter but are worded slightly different. I think the principle could be approved by this Association and referred back to the Commission to adopt the principle. The Commission could properly formulate a rule, if it meets with the approval of this Association, embodying all of the present suggestions.

MR. GRAHAM: The resolution will be in the nature of a recommendation to the Bar Commission?

MR. BOUGHTON: That is what I thought.

MR. NIXON: They have to do with the practice of law in the State of Idaho by non-resident attorneys, and there is a slight difference. I will read No. 4 first: (Reading Resolution No. 4). That is the one that contains the reciprocal provision and, however, does not contain a couple of matters embodied in this other resolution. The resident attorney must comply with the fee schedule.

MR. PAINE: He must charge at least the minimum fee—is that it?

MR. NIXON: Yes. That is correct. Now, the other resolution is to this effect: (Reading Resolution No. 5.) You will note in this last one there is no reciprocal provision, and Mr. Broughton has again brought it to the attention of the meeting that the two could probably be combined in some way to include the reciprocal provision.

MR. BOUGHTON: I move that the Idaho State Bar approve the general principles incorporated in these two proposed amendments and that the matter be referred to the Bar Commission with power and authority to propose a proper rule to the Supreme Court.

MR. MORROW: I second the motion.

MR. GRAHAM: Those in favor of the motion signify by saying "Aye." Those opposed "No." The "Ayes" prevail, and it is so ordered. Is there anything that any member would like to bring before the organization?

MR. A. L. MORGAN: Before closing there is one matter that there has been no action upon. I happen to know that a number of locals have passed resolutions in connection with it, and I don't want to discourage these locals in the work they have started. That is with reference to this question of raising the annual State Bar fees to $7.50. Now, the Clearwater Bar has passed a resolution of that kind, and I understand that a number of others have passed resolutions approving it, and I feel we should take some action on that and express our view of it one way or the other, so that word may go back to them and they will know we have either rejected or approved it. I therefore move you that it is the sense of this Idaho State Bar that the annual license fees of the attorneys who are practicing in Idaho should be raised from $5.00 to $7.50 and that the matter be referred to the legislative committee to have such enactment passed.

MR. TAYLOR: I second the motion.

MR. PAINE: I would like to hear from Mr. Nixon in view of the statements that I understood him to make, that it wasn't advisable that the legislature increase the fees but that the $2.50 should be raised voluntarily.



MR. NIXON: I might say in that connection that the matter to which Mr. Morgan's motion is directed, I think, is entirely different than the one I discussed. The matter I discussed was to have each member of the Bar solicited for contribution of $2.50 in an effort to send somebody about the state, some young attorney, to ascertain what was the reason that the members of the Bar were not attending the Bar meetings and—

MR. PAINE: I understand that, but I don't understand now why we are going to increase that fee if the money is not to be used for that purpose. I want to find out what the purpose is.

MR. A. L. MORGAN: There is some misunderstanding between Mr. Nixon and myself. Now, we are running on finances which just barely permit us to get by, and by warning of the State auditor we can't get by now because he says we have got to the money but it has not been appropriated and we can't spend it, but my idea is, if the fees are raised and this additional money can be gotten in, that we might be able to combine the office of secretary with that of an attorney whose duty it will be under the direction of the Board to investigate and, if necessary, prosecute, or at least to prepare for prosecution, certain matters that are constantly coming up. We meet this difficulty: We appoint a committee, say, at Pocatello, to investigate a matter in Blackfoot or in Idaho Falls. That committee is appointed away from home and usually you will find that nine times out of ten you cannot get a minor condition investigated, and you cannot prosecute or carry on any sort of investigation or action by local attorneys. It puts the local attorneys in an embarrassing position. That committee goes out and endeavors to get this action, and we fail. Ever since I have been on this Board, something like two years, we have had matters that are pending and are not able to close up due to the fact that we have got either to use drastic measures or ask the court to inflict punishment on the people who neglect or refuse to do things we ask them to do, and if an individual lawyer is accused of an offense I feel that he is entitled to have that matter speedily adjusted and I also feel that the balance of the Bar are also entitled to have it speedily adjusted, and we believe we can do it better (or at least that is my view; I am not attempting to speak for other members of the Commission) if the duty of investigating and preparing is placed in the hands of an individual drawing some pay for it, not anything elaborate, and we think these two offices can be combined and carried through by increasing the fees in the amount suggested.

Now, it has been suggested to me by Mr. Griffin that it might be better to refer this matter back to all of the locals with instructions to discuss the matter and vote on it and furnish the Commission with the result of that vote, and when we have the result of that vote from the entire state, if that vote is favorable, it will be referred to the legislative committee and, if it is unfavorable, it will have to go over until another time; and, if you will permit me, with the consent of the second, I want to withdraw the original motion and move that the matter of raising the Bar fee be referred back to each local in the state with request that they take it up at their first regular meeting

and vote upon it and advise the Commission as to the result of the vote.

A VOICE: Second the motion.

MR. BOUGHTON: May I inquire as to just one matter? Is the purpose of the motion that an attorney will be employed to investigate any changes and suggestions of illegal practice of law?

MR. A. L. MORGAN: Yes. In any community.

MR. GRAHAM: The purpose, as I understand it, is to give the Commission some money with which to investigate charges against member attorneys and also against members of the laity who are practicing law unlawfully. Those in favor of the motion signify by saying "Aye." Those opposed "No." The "Ayes" prevail. It is so ordered. Is there anything further now

MR. D. L. CARTER: I want to say the 7th Judicial District Bar meeting have discussed this matter twice and I think they have it in their by-laws that the president of this association will designate some member from one county to go into the adjoining county rather than call in any member from that county. We are doing that with our own money.

MR. GRAHAM: We haven't found that very satisfactory without compensation.

MR. GRAHAM: We are about to close, and I wish in behalf of the Commission and myself to thank the members of the Bar most heartily for the co-operation and assistance which they have rendered the Commission during my regime in trying to better conditions, and I also want to thank the members of the Supreme Court for the hearty co-operation which we have received at the hands of the Court in trying to remedy the question of rules and regulations and procedure generally, with the idea in view of raising the standards of the profession, because they have most heartily agreed with us and given us their hearty counsel and advice during their regime. Before adjourning I want to call the new president, Mr. Walter H. Anderson of Pocatello. Will you come forward, please? As you are aware, this terminates my relation with the Board. Mr. Eberle has been elected and the Board is reorganized, and they have selected Mr. Anderson as president for the coming year and Mr. Morgan as vice-president. The older member of the Commission generally acts as president for the next year, and I will now introduce to you Mr. Walter H. Anderson of Pocatello, the president for the next year.

MR. ANDERSON: I am not going to make any speech and I am not going to say anything further than this, that if every member has had his say and if it is agreeable to everybody here, we will stand adjourned until next year.

(Adjournment.)

# PROCEEDINGS

## SECOND ANNUAL MEETING *of the* JUDICIAL SECTION

*of the*

## IDAHO STATE BAR

PAYETTE LAKES INN
McCALL, IDAHO
JULY 23rd, 1936, AT 2:00 P. M.

# PROCEEDINGS HAD AT THE SECOND ANNUAL MEETING *of the* JUDICIAL SECTION *of the* IDAHO STATE BAR

Present: Chas. F. Koelsch, District Judge, Chairman; Raymond L. Givens, Chief Justice, Supreme Court; James F. Ailshie, Justice, Supreme Court; Wm. M. Morgan, Justice, Supreme Court; B. S. Varian, Ex-Justice, Supreme Court; John C. Rice, District Judge; Doren H. Sutphen, District Judge; Charles E. Winstead, District Judge; Adam B. Barclay, District Judge; A. O. Sutton, District Judge.

JUDGE KOELSCH: This session is not going to be formal. Last year at Hailey we started and made some progress in the discussion of uniform rules for the district courts; there was a great divergence of opinion as to whether or not anything practical along that line could be done, but it was determined to continue the discussion at least this year. With that idea in mind, I took up with Judge Hunt of the 8th Judicial District the question of presenting the subject here for discussion and also to submit proposed rules. Judge Hunt's son took suddenly sick and, of course, that made is out of the question for him to be here. He had, however, prepared a very short set of rules, and it may be just as well for us to discuss them and see whether we can make any more progress this year. Judge Ailshie will have a talk on a germane or kindred subject, but his, of course, will not go down to the practical side of the question like these rules will, and Judge Ailshie is not on this program but is on the program of the general meeting. The suggested rules are: (For text of rules see pages 25-28 supra.)

JUDGE SUTPHEN: Last year there was discussion as to whether we would leave that "heard" in Rule 7 or whether it should be "granted." Sometimes emergencies arise where it is necessary to hear the facts and then make the decision later. As I recall, we thought it would be logical to perhaps hear the evidence in some cases where emergencies arise and then hold up the decision until the time had expired.

JUDGE KOELSCH. Yes, we came to the conclusion that it should be heard. Now, does anyone have any one of these rules you would like to have discussed?

JUDGE WINSTEAD: I think Rule 3 conflicts in some districts. It provides that a motion may be called for hearing immediately following the calendar call. In a number of districts there are regular motion days, I think. It would be all right in the small counties where you have two terms a year, and I suggest that in the third line after the words "call of calendar" we insert the words "except where motion days are held pursuant to order and practice of the county." That would cover the 7th District and 3rd District and probably some of the other districts.

JUDGE SUTTON: Instead of saying "except" why not say "and." We call the calendar, of course, on the opening days of all terms in the 7th District and we have motion days in addition.

JUDGE KOELSCH: Do you hear motions on the calendar days?

JUDGE SUTTON: Without any notice, and on other days I require them to give the other man five days notice, and on the opening day of the term we don't give any notice.

JUDGE WINSTEAD: We don't hear motions on calendar days.

JUDGE SUTTON: Your calendar day may be what we call motion day. I don't know. We call our calendar on the opening day of the term.

JUDGE KOELSCH: Our calendar day is really our trial calendar day for the purpose of setting cases for trial, while the other matters are all heard on motion days. Of course, if you want to have a motion heard you have to give notice.

JUSTICE GIVENS: And on Saturdays are heard without notice.

JUDGE WINSTEAD: Every Saturday is motion day.

JUDGE RICE: A question comes up as to notice that a demurrer is to be heard, whether five days or some other notice be required before a demurrer may be called up hy either party. There is confusion among the attorneys in our district, and I have been confused myself about it. I have been requiring five days notice lately.

JUDGE KOELSCH: We have a motion day and have this rule, that all motions, demurrers and ex parte matters are heard on motion day, every Saturday, and if you have a demurrer or ex parte matter that you want heard at any other time, five days notice would have to be given, but any demurrer tbat is on the calendar the Friday before Saturday can be heard the next day, on Saturday, motion day.

JUDGE RICE: Well, then, every once in a while you would have a demurrer up without notice to the opposite attorney, wouldn't you?

JUDGE KOELSCH: Yes, you do that quite frequently and you hear it and pass on it. They all know that it comes up the following Saturday because that is the rule.

JUDGE RICE: And suppose the attorney lived out of Boise and doesn't get the notice.

JUDGE KOELSCH: No notice is required.

JUDGE RICE: That is, if a man lives at Pocatello, he has to be there on your motion day?

JUDGE KOELSCH: Of course the court will regulate tbat. I wouldn't think of passing on a demurrer for a foreign attorney that had only been there perhaps two or three Saturdays, and then I would require notice.

JUDGE WINSTEAD: I think we require them to give notice when any attorney lives outside, but, as far as the local attorneys are concerned, we don't.

JUDGE RICE: I don't see what harm it would be to require that in the court's rules, that five days notice be given. A good many attorneys from autside practice in the 7th District, and I feel that they ought to have notice.

JUDGE SUTTON: I have been requiring it ever since I have been on the job.

JUDGE WINSTEAD: Notice on demurrer or any other question?

JUDGE SUTTON: Yes. Otherwise, every attorney has to be in town or hanging around the court under your rules. It doesn't make any difference to me from the standpoint of my work.

JUDGE KOELSCH: The theory is if you have a demurrer that is worth anything you will be there to argue it, and if it is overruled to get so much time to answer.



JUDGE RICE: There is another thing that is unfortunate in that suggestion. An attorney comes in and files a demurrer; the other side calls it up for argument, and he isn't there and pays no attention to his demurrer. What are you going to do with it? Simply overruling the demurrer may land you in a trap.

JUDGE KOELSCH: I have struck the demurrer on my motion several times.

JUDGE RICE: What did the Supreme Court say?

JUDGE KOELSCH: Happily it has not come up there yet.

JUDGE RICE: That is what has been in my mind. I would like to strike them. I would like to do something about it, and I didn't know whether I had the authority or right to. It is not fair to the court at all.

JUSTICE AILSHIE: I have found in the practice where they require notice of motion or demurrer it furnished the man who wanted to delay the case a terrible leverage over you in delaying the case, because if you bave to give him five days notice calling up his motion and demurrer, some fellows are very fertile in producing these things. It wastes a lot of time.

JUDGE RICE: Yes, that may be.

JUDGE SUTTON: I don't see how you could delay a motion. You could delay it thirty days in the 7th District, but that is all, because we bave motion day in every month and in Canyon County, for instance, twice a month, and you could not possibly delay it for more than a month.

JUSTICE GIVENS: Do you require a notice before your matters are taken up on your motion day or call of the calendar?

JUDGE SUTTON: On motion days I do, not on the opening day of the term.

JUSTICE GIVENS: Everybody is required to be there?

JUDGE SUTTON: Yes.

JUSTICE GIVENS: How is it any worse on them on that day than every Saturday.

JUDGE SUTTON: Because it only comes twice a year and everybody is there on the opening day, or at least the theory is that everybody will be there, but on motion days if he hasn't any business he may not be there.

JUDGE KOELSCH: Then this does not affect you. We have a statute that says you can bring it to a hearing in five days.

JUDGE SUTTON: That is just what I don't want, to bring it up any old day.

JUDGE KOELSCH: You can prevent it. You don't have to hear it at that time.

JUDGE WINSTEAD: The practice in our district is, where the five days notice is required, it must be heard upon a motion day.

JUDGE SUTTON: That is what we do, too, but on Saturday you don't require any notice.

JUDGE WINSTEAD: No. Every Saturday we call the calendar. Of course, if neither counsel is there, it is passed.

JUDGE KOELSCH: Practically, it doesn't work any hardship because the court regulates that thing. Every Saturday Judge Win-

stead and I call the motion calendar, and a great many times the lawyers are not there and we are not going to strike the demurrer, and I generally have the bailiff call up one of the attorneys and advise him that we would like to have the demurrer heard and he will either come up and argue it or say, "Let it go over." Practically it doesn't work any hardship but does expedite matters.

JUDGE SUTPHEN: But your attorneys are mostly in the same town and my attorneys are likely to come over from Twin Falls or Boise or Pocatello, as well as those from the district who come from different towns of our district, and I find it is necessary, while I don't always give five days notice, to request attorneys who are going to call up motions to notify me, and then I call up the other attorney and tell them and find out whether they are going to be prepared to present it. Some of the demurrers require preparation.

JUDGE KOELSCH: What do you do? Suppose you go to Hailey or Gooding and a demurrer has been on file for two or three months, and you call your calendar and the fellow who filed the demurrer is not there.

JUDGE SUTPHEN: I simply have to give notice in regard to that. I give notice that I will hear it at a certain time.

JUDGE KOELSCH: You give the notice?

JUDGE SUTPHEN: I generally give the notice. If he is in town I just call him up and tell him I am there and ready to hear that demurrer.

JUDGE KOELSCH: It seems to me that would make interminable delay, as Judge Ailshie suggested.

JUDGE SUTTON: If somebody files a demurrer where I am holding court, it will stay there a year and I won't do anything with it. If the attorneys in the case don't have something done, why, I don't worry my head about it and I don't put it on any calendar.

JUDGE KOELSCH: Suppose the plaintiff is there and the defendant isn't there. What do you do then? No notice has been given.

JUDGE SUTTON: We don't hear it withont being noticed.

JUDGE KOELSCH: You require notice in all cases even upon the calendar day.

JUDGE SUTTON: It is not what I call the calendar day because I don't call the calendar except on the opening day of the term. If a man wants something set in between, he has got to give notice that he is going to ask to have it set.

JUDGE VARIAN: To be heard on some motion day.

JUDGE SUTTON: This rule has been in the 7th District for years. It has been there long before I came.

JUDGE RICE: I didn't know about that rule for a long time, and I had a little trouble to know what is fair to both sides, and finally I dropped down on the proposition that they would have to give five days notice, and when I got that rule I saw they had been doing it in our district for a long time and I didn't know it.

JUDGE BARCLAY: That Rule 3 couldn't be used in Twin Falls at all. You cannot get the business done if that is the only time you would call the calendar.

JUSTICE GIVENS: Have you rules in the 3rd District?



JUDGE KOELSCH: Yes.

JUDGE VARIAN: You cannot have the rules applicable to the large centers that you have in the outlying districts.

JUDGE KOELSCH: That is the trouble. You can hardly make uniform rules—just a few uniform rules that you can make.

JUSTICE GIVENS: Like, now, from Owyhee County, most everything in the interim between terms you hear on notice or agreement.

JUDGE KOELSCH: Yes.

JUDGE WINSTEAD: This raises a question in my mind about the possibility or the practicability of attempting uniform detailed rules for the districts. Rules that we find entirely satisfactory in Ada County may not be satisfactory in all the districts.

JUDGE VARIAN: They would not be workable.

JUDGE SUTTON: I would add to Rule 3 "That such matters can later be heard after five days notice on any regular motion day, after five days notice to opposing counsel."

JUDGE BARCLAY: That won't do the business in Twin Falls County. It will swamp the judges there if that is required. In the other three counties in our district that will answer. When I took over the work over there I found a set of rules promulgated a good many years ago. Every Friday is motion day unless there is jury work in progress, and all lawyers that have business with motions or demurrers or any kind of ex parte matters are supposed to be there on Friday, and court adjourns and quits every other kind of business to take care of that in that county. I found if I missed one Friday the next week took two days to take care of the work, so that some arrangement of that kind is necessary. We have no difficulty; we serve no notice; we don't call the calendar on the first day of the term; we have four terms in the county during the year, but when the term time opens the Clerk has prepared for the use of the court a complete list of all the cases that are ready for trial and we go right into the trial work without hearing motions or demurrers because we have cleaned those up the Friday before. With reference to notice that is the rule there. The members of the Bar of that district and in that vicinity pretty well understand that, and the Judge handles it this way: Demurrer, for instance, filed by an attorney in Boise, he perhaps wouldn't know of our local rule there, so the Judge sets that down for hearing on the next motion day or the next following Friday and instructs the Clerk to notify that attorney in Boise, so that in at least a week we can clean up everything that the boys want cleaned up, and the next Friday if he is not there, why, it is disposed of. He has had his notice from the Clerk. I am not like Judge Sutphen. I don't 'phone these lawyers about it but I make an order to the Clerk to notify the attorney that it will be heard the next Friday, and when the time arrives that is disposed of, unless the attorney wants it postponed, and we have no difficulty in that county with want of notice.

JUDGE WINSTEAD: That is very similar to our motion day practice in Ada County.

JUDGE VARIAN: Why not make an exception for Twin Falls and Ada counties and those districts, or Pocatello, if it is necessary

down there Each district could adopt rules. Make an exception as to the particular counties.

JUDGE BARCLAY: That might be done. The rule is flexible. It says the court "may" do thus and so.

JUSTICE MORGAN: In a sense the rule is not flexible, if the court does not add that flexibility—it if gives the trial judge the right to do it and it would work an injustice, you may proceed upon the theory that some time some fellow is going to do it and take a snap judgment on someone, in which case it is just too bad for the client. Having rules that are not enforced is not a good practice as a general proposition.

JUDGE BARCLAY: Well, Judge Morgan, in Twin Falls County the rules I have given you are enforced. When I order the Clerk to notify the Boise man, or any other lawyer, to come in next Friday to argue the motion, he must come.

JUSTICE MORGAN: I didn't understand that the rule required you to order the Clerk to do that. Your rules require him to be there on Friday and you, by the grace of God and by reason of being a gentleman, can notify him in advance to the effect if he doesn't come this Friday to come the next.

JUDGE BARCLAY: "Unless otherwise ordered by the court" should be in there. Every judge has got to have some discretion or latitude or these lawyers will run him to death.

JUSTICE MORGAN: The rule should permit the power of discretion.

JUSTICE MORGAN: And God Almighty will indue him with discretionary power. It seems to me that if uniform rules are adopted, they ought to be sufficiently definite and specific that the lawyer practicing there will have a right to rely upon them being enforced, and they ought not to be drawn in such a way that the rule may be relaxed as against "B" but enforced as against "A."

JUDGE BARCLAY: Sometimes that might be the highest type of justice.

JUSTICE MORGAN: Then why do you need the rule? You wouldn't need the rule at all unless it is going to be enforced?

JUDGE BARCLAY: Every Friday the Clerk fixes me up a calendar with everything that is not disposed of. I will start at the top and ask what they want, and if they say, "We want to hear it," I will say, "As soon as we get through the calendar we will hear it," and if the lawyer is out of town and they say they want to hear it I notify the out of town lawyer. The lawyers are always there or just say, "We will withdraw that," but we do get away from that five days notice that Judge Rice has been discussing. Now, whether that is within the law or not, I don't know.

JUSTICE MORGAN: I wonder in regard to that statutory five days notice that Judge Winstead has mentioned whether or not that is absolutely binding on the trial judge or whether the constitution does not contemplate that the court could regulate its own procedure by rules of its own adoption. I doubt it is competent, for I don't believe it is a legislative matter.

JUDGE RICE: I have thought that statute might be interpreted differently on account of another section which says you can ask for judgment on the pleadings without any notice.



JUSTICE AILSHIE: It always struck me as a strange proposition that a notice had to be given to attorneys when they are right in court and the court is calling off its calendar, and that the court couldn't say, "I am going to hear this at two o'clock," and hear it at two o'clock regardless of whether there is any five days notice.

JUDGE RICE: I haven't any doubt about it.

JUSTICE MORGAN: Under our system of government and particularly another section of our constitution which divides the powers of the state into three co-ordinate branches and prohibits one branch, or anything belonging to it, from seeking to function in the other branch, I doubt the power of the legislature to fix rules of procedure for the court.

JUDGE RICE: That is, you doubt, for instance, I take it, the authority of the legislature to say that this statute shall be construed liberally.

JUSTICE MORGAN: And regardless of how many parts of it you find unconstitutional you must hold the act constitutional. Is it competent for the legislature to say five days notice must be given on the hearing of a demurrer or motion?

JUDGE RICE: How far does the other section of the constitution go? Where it says the legislature can provide a proper system of appeals, and regulate by law, when necessary, the methods of proceeding, insofar as it does not conflict with the constitution?

JUSTICE MORGAN: Yes; and it goes on and says that the legislature shall have no power to interfere with the ordinary powers of court. Now, isn't there an implied power which Judge Ailshie refers to sometimes as an "inherent" power of the court? Isn't there an implied power whenever a court is required to perform a duty? Doesn't the law imply a power then to formulate such rules of procedure and regulations as will protect the performance of that duty? Isn't that a matter that pertains strictly and entirely to the judicial department of the government?

JUDGE BARCLAY: How otherwise could the court fully function?

JUSTICE MORGAN: It cannot fully function, and if that statute requiring five days notice is not a judicial but a legislative function, then the courts are powerless to legislate for themselves in a procedural matter.

JUDGE KOELSCH: I have always interpreted that statute as meaning merely that after that they can bring the thing to a hearing; in other words, that statute takes the place of this rule that we have. Here is a demurrer. The attorney files it and he is never ready when I ask him, and so I give him notice and then he gets ready.

JUSTICE MORGAN: There is a question, whether it is competent for the legislature to make that rule, or whether it is one which the court must make; if it is competent for the legislature to make that rule, then rule making for the courts falls within the legislative branch and courts are forbidden to interfere in it.

JUDGE BARCLAY: If that be true, then the order that I make,

perhaps last Friday, for some Boise lawyer to come down next Friday, I have no authority to make?

JUSTICE MORGAN: Apparently not, because it is a legislative matter. The point I made is—I had not intended to start a discussion, but I wish you would consider it—the government of the state now is divided into three co-ordinate branches, and no person belonging to a certain branch is permitted to function in the other. Under the constitution in which branch does the rule making power fall? If it is in the legislative hranch, the courts cannot make a rule at all; if it is in the judicial branch, the legislature cannot make a rule at all, because the constitution does not say "may function in some instances and may not in others." Which is it? Does it naturally fall within the judicial or the legislative branch of the government Now, my own personal opinion is that it is an implied power of the court.

JUDGE KOELSCH: Suppose we pass on to the next one. Is there anyone else who has a rule in these rules submitted by Judge Hunt that he would like to discuss?

JUDGE SUTTON: Rule 7. In the 7th District we don't hear divorces at chambers at all. I think you do hear them in some districts.

JUDGE WINSTEAD: I do in the 3rd District.

JUDGE KOELSCH: Oh, yes, we hear a lot of them, especially from the outlying counties of Boise or Owyhee, when the twenty days are over.

JUDGE SUTTON: We don't hear them out of the county at all. If we did, we would have to go to chambers. I have tried one or two contested matters outside of the county pursuant to stipulation. Of course, that can be done by us when they don't want to come up here to try it hut want it tried in Weiser.

JUDGE KOELSCH: I would suggest this, to make Rule 7 read this way: "No ex parte divorce (cut out the word 'case') will be granted until after the expiration of the full statutory time," for this reason. I had a case of a young lady who was in the consular service in South Africa. She had to leave this country before the twenty days was up. I heard her testimony, and after the expiration of the twenty days I heard the corroborating testimony, and then granted the divorce. The way it read, I could not have done that.

JUDGE SUTPHEN: Yes.

JUSTICE MORGAN: By "ex parte" you mean a divorce which is granted upon a default.

JUDGE KOELSCH: Yes.

JUDGE KOELSCH: Rule 8 is a matter of continuations. I guess we are all pretty well agreed on that. Rule 9. That is one we worked out last year, too.

JUDGE SUTTON: That is another one of these rules that may be necessary in two or three places in the state, but it does not serve any purpose at all anywhere else.

JUDGE BARCLAY: Doesn't the statute fix that—when a demurrer is sustained, ten days? That goes back to what Judge Morgan states. Shall the court make its own time?



JUDGE WINSTEAD: We find that the statute does not provide for it.

JUDGE SUTTON: For instance, a lawsuit is pending at Cascade. We don't try cases but twice a year, and suppose we hear a demurrer in between and there isn't going to be anything heard until October—what difference does it make?

JUDGE SUTPHEN: It is only in case you don't make the order. Now, ordinarily you fix, in rendering your opinion, the time you desire to give them to answer, hut if you don't, if you render your opinion without specifying the date, then it would be five days. I think that is the thought of that.

JUDGE KOELSCH: Suppose you sustain a demurrer to an answer, if you don't fix the time—

JUDGE SUTTON: I do fix a time.

JUDGE KOELSCH: If there is nothing said about it, it is five days.

JUDGE RICE: If you omit fixing the date.

JUDGE SUTPHEN: It is easy to forget to put it in the record. For instance, I will sustain or overrule a pleading and don't mention the time in which they can amend or plead, in which case it is five days.

JUDGE KOELSCH: You don't always know that they want to amend. Sometimes they to want to amend when I don't think they can, but they amend anyway.

JUDGE SUTPHEN: In any case where they clearly need more time or when the attorneys move for it the court can make the order longer or shorter. It says, "Unless the court shall fix a different time."

JUDGE RICE: It would conform to my idea better if it said "ten days unless a shorter time shall be fixed by the court."

JUDGE VARIAN: Or "some other time," not necessarily a shorter time.

JUDGE RICE: That is all right, only five days is pretty short.

JUDGE KOELSCH: If there is no further objection, let's look at No. 10 and go through the whole list that way.

JUDGE SUTTON: It says, "shall serve adverse party," but it does not say when or anything about it. There isn't much use serving a man if he doesn't get some time.

JUDGE KOELSCH: It prevents filing a demurrer just for the sake of appearance.

JUDGE SUTPHEN: That might be immediately before, but there would have to be service made at the time. Sometimes they get up in court and ask for amendment.

JUDGE RICE: The time for hearing ought to conform to the time for hearing demurrers and motions to strike and so on.

JUDGE SUTTON: It excepts motions made during the trial and hasn't any relation to that.

JUDGE KOELSCH: It says at the end that it shall not be heard until that has been done. Now the case itself is hedged about with time.

JUDGE SUTTON: If you serve a man as he goes into the courtroom with written application to amend and that won't be heard that

morning, what is the use of serving notice? You might as well wait for the amendment and then serve the amendment.

JUDGE KOELSCH: Wouldn't the court fix the time for amendment?

JUDGE SUTTON: It doesn't say anything about it.

JUDGE KOELSCH: It is up to the court to fix the time like any other application to the court.

JUDGE RICE: I don't think you will get into any serious difficulties. The court will do as it pleases anyway, but you want to be fair to counsel—that is the only thing I have in mind.

JUDGE SUTTON: It looks to me like these things are going to make it easier for the district judges, but it is going to work a hardship on the attorneys.

JUSTICE MORGAN: You wouldn't want a man who wants to serve an amendment after court hours and the jury is through—you wouldn't want him to have five days notice?

JUDGE KOELSCH: As a matter of fact we can let that one take care of itself. Suppose it is the plaintiff and he asks leave to amend. Well, the defendant will say, "I want to know what this amendment is all about; I want to study it." It cannot be heard that morning and the court will have to give him time or will give him time; and the same thing takes place with the attorney for the defendant.

JUDGE BARCLAY: Will they procure a motion to amend by interlineation?

JUDGE KOELSCH: I wouldn't think so.

JUDGE RICE: We practically all agree that motions should be made during the trial with both attorneys present.

JUDGE SUTPHEN: This question is likely to come up just before you have called your case for trial. You may have it set, but this motion is most likely to come up at that time I find. The attorneys come in just before you start the case and they move to have it amended.

JUDGE RICE: Very frequently, and most generally there is no objection made.

JUDGE KOELSCH: All right. Let's go to Rule 11. I think Judge Winstead considers, for one, that a very important rule, and I don't know but what I agree with him.

JUDGE WINSTEAD: Yes, it is.

JUDGE RICE: But I am telling you there are plenty demurrers where I don't want any authorities or argument or anything else; I am ready to sustain them right now. Maybe it is a good thing to make him file his brief anyway—it is good exercise.

JUDGE BARCLAY: I like proposed Rule 11. So many times a lawyer will present a demurrer and say that the complaint is thus and so, and the other fellow will get up and say, "No, it isn't," and sits down, and neither of them presents any authority.

JUSTICE MORGAN: How many times have you had a fellow file a general demurrer to the complaint and you have no idea what his objection is until he makes his argument?

JUDGE KOELSCH: And then you find it is good?

JUSTICE MORGAN: Usually.



JUDGE BARCLAY: I find it would save me a lot of work if he were required to file authorities.

JUDGE BARCLAY: That is not the one I am talking about. I am talking about the fellow that files a demurrer and then says it should be done this way or the other, and the other fellow cites no authority and says, "Everything I have done is right," and sits down, and what help is that to the court? I would like to have them present their authorities if they are going to argue.

JUDGE KOELSCH: All right. Let's pass on to Rule 12.

JUDGE RICE: With his failure to waive any such motion or demurrer.

JUSTICE MORGAN: Would it be better to use the word "abandon"?

JUDGE RICE: Suppose the demurrer is without doubt good.

JUDGE SUTTON: It is a good way to let yourself get dropped in the hole from the standpoint of the district judge.

JUDGE WINSTEAD: Why not make it "abandon"?

JUDGE BARCLAY: Why not leave out the last paragraph after the words "failure to file"

JUDGE WINSTEAD: Doesn't that destroy the effect of the rule?

JUDGE KOELSCH: The Supreme Court would say, "What authority have you?"

JUDGE SUTTON: If the Supreme Court will agree to enforce the waiver, I have no objection to it.

JUSTICE MORGAN: If that is waived or withdrawn, there is nothing there.

JUDGE SUTTON: You can raise the question that the complaint does not state facts sufficient to constitute a cause of action anyway.

JUSTICE MORGAN: You can raise it by objection also, so you cannot say you waive the question as to the sufficiency of the complaint. You can't force a man to do it. You might force him to take advantage of it by demurrer.

JUDGE RICE: In every case then it is very apparent what will happen to you. The district court says it is waived, and you can force the other fellow to trial on that complaint, and he goes up to the Supreme Court; the complaint doesn't state a cause of action, and it can be raised there—that is what will happen.

JUDGE BARCLAY: I have grave doubts. I have observed in my own practice, and I have seen since, that the lawyer is not always exactly certain whether the complaint states a cause of action.

JUDGE RICE: I am not raising any fault with a large number of demurrers, but I am questioning where it is a help to the court when the complaint is sufficient.

JUSTICE MORGAN: Not only that, but if it is insufficient on any theory. If you have a general demurrer and the complaint states a cause of action upon any theory and you have withdrawn your general demurrer, then when you come to attempt to raise that question, why, the abandonment will be taken against you.

JUDGE RICE: Surely he has something to rest on.

JUSTICE MORGAN: It must have or state a cause of action.

JUDGE BARCLAY: I will have to insist on my other position—

most of the lawyers are not sure whether it does or doesn't and they don't know what to rely on. They are just as uncertain as the judge.

JUDGE RICE: The court might be perfectly certain in his own mind what he is going to do. He might be going to sustain it.

JUDGE BARCLAY: They will file their authorities.

JUDGE RICE: I don't object to that.

JUDGE KOELSCH: What your argument amounts to is merely this: That you cannot waive the objection that a complaint does not state facts sufficient to constitute a cause of action; that can be raised at any stage of the proceedings, but this also pertains to special demurrers and they can be waived.

JUDGE RICE: I am not objecting to the rule, but I raised that point here because I don't think the court ought to be placed in the position where he might say it is waived and go to trial on an insufficient complaint.

JUDGE WINSTEAD: How about changing the word to "abandon"?

JUSTICE MORGAN: Or "withdrawal."

JUDGE RICE: Maybe you can make a rule of that kind.

JUSTICE MORGAN: You would be just as well off if the fellow didn't demur at all.

JUDGE RICE: What is the idea of the rule?

JUDGE VARIAN: The idea of the rule is, if you are to rely on authorities, if you expect to cite them, you must serve them with the demurrer on opposing counsel. He has five days in which to make the list of them and they are filed with the clerk and they come up to the court, both briefs. If the moving party does not intend to rely on authorities when he files his demurrer, he cannot cite authorities to the court. He has to make—

JUSTICE MORGAN: That would be to the trial court, however. You cannot prevent him—or does it purport to prevent him from citing authorities to the Supreme Court?

JUDGE VARIAN: No, just the trial court, but that does away with taking people by surprise and having the court give them time to brief the question. The questions come to the trial judge briefed.

JUSTICE MORGAN: That is the way it should be.

JUDGE RICE: I am perfectly agreeable to that.

JUDGE VARIAN: That is the idea of the rule. It works out very nicely. It is very obvious counsel will not cite authorities, and when he makes his argument he will say that he doesn't for that reason, but if the other side is going to cite any authorities he has to serve them with the brief and you can reply.

JUDGE RICE: The last demurrer I had I thought was fatally defective and sustained it, but the party that filed the demurrer didn't have the idea in his mind at all.

JUDGE KOELSCH: The only difference there is that it is required that the authorities be served at the time you file the demurrer.

JUDGE SUTTON: The failure to cite the authorities does not constitute a waiver of the demurrer.

JUDGE WINSTEAD: I think this Oregon statute has this.

JUDGE SUTPHEN: I think you will find there is considerable



authority, not in this state, but Supreme Courts of other states have so held, and perhaps we will have to give that rule some very careful consideration.

JUDGE KOELSCH: I will delegate Judge Varian to prepare a rule in lieu of Rule 11.

JUDGE SUTPHEN: I think it deprives a party of a substantial right that the statute gives.

JUDGE KOELSCH: Rule 12:

> "No paper, record, or file in any cause shall be taken from the custody of the Clerk, except for the use of the Court, or upon written order of the Court of Judge."

I suppose you all have that rule.

JUDGE BARCLAY: That rule obtains in the 11th District.

JUDGE SUTTON: Yes.

JUDGE KOELSCH: Now, Rule 13. There is a difference of opinion:

> "Arguments in civil jury cases shall precede the giving of instructions to the jury by the Court."

I don't see how they can get around the statute unless they want to attack the constitutionality of it. The statute says that the instructions shall precede the argument, and there is a case from the Supreme Court in which they said in effect that it would have been fatal if objection had been taken to it where the court did not follow that statute. In the face of all that I find there was quite a difference of opinon at Hailey as to whether or not in civil jury practice it was better to instruct before or instruct after the argument.

JUSTICE AILSHIE: Doesn't the statute point out the consideration on which the instructions shall be in advance of the argument and the consideration on which it should be after the argument?

JUDGE SUTPHEN: In criminal cases.

JUDGE KOELSCH: That is merely a preliminary observation in that statute pertaining to the general order of trial—

JUSTICE AILSHIE: No. It is in the sub-section on instructions, a long subdivision on that section on instructions.

JUDGE KOELSCH: I think the statute says that the following shall be the order unless good cause appears that it shall be otherwise.

JUSTICE MORGAN: I thought the statute was that the trial shall proceed in the following order unless the judge for special reasons otherwise directs.

JUDGE KOELSCH: That is right. Instructions come before the argument in the civil cases.

JUSTICE MORGAN: Doesn't that have to do with giving oral instructions?

JUSTICE AILSHIE: That is in there, but this also is in there. I presented the case that Judge Koelsch referred to and I was the fellow that was pointed to, so I well remember it, and I had just put that in as a drag-net. I had not excepted to it, of course, in the trial, but I embodied it in my assignment of errors, and the court disposed of it by intimating that my position was correct but that I did not take my exceptions at the time.

JUSTICE MORGAN: I conspired with Judge Hartson one time in a case where a taxi driver was prosecuted for not having a license and got him to instruct the jury in that criminal case before the argument and told him I was going to assign it as error and get that matter straightened out. I would want the law to be that in all cases the instructions shall come before the argument so I will know what the law of the case is and not be misleading the jury. I told him if he would do that we would appeal it and get the ruling of the Supreme Court, and the Court ignored it.

JUDGE KOELSCH: What do you think of Rule 13?

JUDGE WINSTEAD: Our practice is always contrary.

JUSTICE MORGAN: I say it should be the other way around—that in all cases instructions shall come before the argument. We always want to know what the law is.

JUDGE WINSTEAD: I move that we eliminate Rule 13, to get it before the house.

JUDGE RICE: I second the motion.

JUDGE KOELSCH: It is moved and seconded that Rule 13 be eliminated. Those in favor say "Aye." Those opposed "No." Rule 13 is eliminated. We have come to Rule 14:

> "All requested instructions must be presented at or before the close of the evidence, and accompanied with citations, and a copy thereof served on opposing counsel."

JUSTICE GIVENS: Before the last session of the legislature, and maybe the one before that, I think all of the members of the court, at least enough of them, tried to get the legislature to pass a statute to the effect that this be done and unless it was done no instruction could be considered or assigned as error on appeal to the Supreme Court, and the legislature declined to do that, and it was discussed by the members of the Court—I think probably it was Judge Morgan's suggestion that it perhaps could be done and should be done by rule, and the rule bind the district courts and the Supreme Court then follow it up with a rule to the effect that if this wasn't done it would not be considered as assignment of error, for this reason, because at the present time, if I remember correctly, instructions given by the court on his own motion are deemed excepted to, and I guess that is true of instructions that are requested by either side.

JUSTICE MORGAN: Except by the side seeking to assign it as error.

JUSTICE GIVENS: And, as a consequence, if these instructions are handed up at the last minute, without the other side seeing them, and without the court having time to consider them, in the hurry of the trial they may be given and will be assigned as error, and sometimes they are erroneous and necessitate a new trial and a lot of expense and wasted effort, and if the attorney was required to submit his instructions to the other side, that, of course, would give the other side an opportunity to inspect them and would give the court an opportunity and time to hear argument on the proposition, so that he will be fully advised, and I would think this a good rule.

That brings up, of course, that we get ultimately to the proposition



whether the court, that is, the Supreme Court, under the constitutional provision that it can make rules in aid of its fellow jurisdictions—whether to get the rule in regard to instructions they can make a rule that would be effective without statute, or whether there should be a delay to get the statute, and whether or not the district courts would be willing to join in a rule, because unless it was rather universal all over the state it would be unfair for the Supreme Court to attempt to make it, because in some jurisdictions, of course, the attorneys would not know about it.

I might add that we drew np a proposed bill which amended the necessary and pertinent statutes and, if I remember rightly, the amendments were based upon a rule in Washington. The Supreme Court of Washington promulgated the rules of practice and procedure which, as I understand it, corresponded to our Code of Civil Procedure, and it was contained in Volume 1 of this last Remington Code, and they have a rule or statement which was the basis of the amendment that we suggested. I think Judge Koelsch has a copy of the proposed bill that we submitted to the legislature and which they declined to pass. So that Washington, at least, has this practice, and I think some other states.

JUSTICE AILSHIE: Washington and Colorado both have, and that was based on a statute authorizing the Supreme Court to make rules, general rules.

JUSTICE GIVENS: Yes, I believe that was. I think in Bannock County, as I remember it, or in the Third District, it has been a written or unwritten rule for a great many years that the judges require opposing counsel to serve each other, and ofttimes—at least I remember I did—would hear discussion by them, but, of course, it was clearly a voluntary proposition. It was not binding as far as the Supreme Court was concerned.

JUSTICE MORGAN: The trouble is that the record does not reflect it—doesn't show that you had a conference on it.

JUSTICE GIVENS: I think they had some trouble down in the 11th, if I remember rightly. I don't know what the judges finally did about it.

JUDGE BARCLAY: We seem to be kind of outlaws. The trial judge can observe when they are coming up for air and when they are getting about ready to quit; he can say, "All instructions must be in by tomorrow morning," or this afternoon or any other time that he fixes, and the boys are pretty good about it. They get them in. We do just exactly what you provide here in Rule 14, I believe it is, but we don't go to the extent of requiring them to present them to the other side, but we do say, "You must have your instructions in by tomorrow morning," or some other time, and then we make the record this way, Judge Morgan (I don't whether it has ever reached you fellows or not), but I make the record show, anything coming in afterwards, I make the endorsement on them myself, and they are not considered because they were not presented in time.

JUSTICE MORGAN: That is all right for requested instructions, but suppose you are giving an instruction of your own motion or at the request of the adverse party from the appellant and the first time

he ever hears of that instruction or dreams that you are going to give that instruction is when he hears you read it to the jury. He hasn't had an opportunity to see it and there is no record if he had an opportunity to review it.

JUDGE BARCLAY: On that requirement our court-made rules don't go far enough.

JUSTICE MORGAN: I believe there is a good deal of litigation that comes to the Supreme Court of Idaho which ought to be avoided if a fair opportunity is given to the judge and attorneys to discuss and see the proposed instructions. I recall a case reversed upon an instruction, which if it had been brought to the judge's attention I feel satisfied would not have been given. It was one of those inadvertent little things that slip by. There is a case where the circumstances were something like this: These people were standing on a snow-bank that had been somewhat hollowed out by the action of a rotary snow plow, and as the train started up the wife either attempted to get to the train or get on it, and the place caved off and she slid down by the side of the train, and her husband in his efforts to rescue her fell down and was very seriously hurt. The two cases were consolidated for trial. When the judge instructed the jury on the question of contributory negligence he instructed in the plural rather than the singular to the effect that if you find these plaintiffs are guilty of contributory negligence you must find for the defendant. Well, of course, it presented a very, very serious question and one that never would have been presented if his attention had been called to the peculiar circumstances, that he was likely holding the husband responsible for the contributory negligence of the wife. It wasn't brought to his attention. There is nothing to show how the instructions got into the record or were given in that way.

Now, the purpose of this reform (if such it may he called) is this: To give the trial judge a discretion (which he already, I think, possesses and doesn't exercise) as the judge has pointed out here, in cases where it is deemed proper to do that—you ought not to waste the time in every case—hut in cases where the law of the case is disputable, to require each party asking for instructions to seasonably serve them on adverse counsel, so that each counsel will be fully advised as to what the other fellow is asking for, and then the judge call in his reporter and the attorneys and go over the instructions and read them, and if there is any objection let the objection he made in the record, and if there is none made it be deemed waived. The Supreme Court could adopt a rule very easily to the effect that instructions which have not been objected to, if timely opportunity has been given to the party, will not be reviewed on appeal. Now, that might not be a good law, Judge Rice, but I don't know who is going to raise the question.

JUDGE RICE: I think the Supreme Court will raise it itself. You will get instructions up there that you won't pass whether objections were made or not.

JUSTICE MORGAN: That is taken care of, or expected to be taken care of in that bill, with respect to fundamental errors. Such a case might arise and we might determine that a man had not had a fair trial,



JUDGE RICE: It would happen every once in a while.

JUSTICE MORGAN: Going back a little, we may all remember when no instruction was deemed excepted to. I sat down and made myself cross-eyed trying to watch what the judge was going to say and write down an exception to what he had already said. While I am writing that down he might commit an error, a worse one, or he might give another instruction that would cure what I imagined would be error. It is impracticable. For that reason the legislature went to the other extreme and made all instructions deemed excepted to, and that is the more just rule of the two, unless we can have one where a man has been given a reasonable opportunity to know what that instruction is going to be and have his mouth closed if he does not make objections.

JUDGE RICE: A good attorney will object on every technical ground to the instruction there, but the other fellow—

JUSTICE MORGAN: If the other fellow leads the court into error by asking instructions of that court, all right and good. There would be no more objection to this rule, Judge, than there was back in the days when none of your instructions were deemed excepted to and you had to take each exception. Now, you don't take your exception, and accordingly I figure it could be said at least that that party has not had a fair trial and the constitution requires that he be given one and consequently we are going to remand this for another trial. Then the instruction may not be given. It puts the attorney who has had an adequate opportunity to object in the same position that he was in back in the past if he didn't take it, although he had had no adequate opportunity.

JUDGE RICE: In those old days when you had a political judge, you would go up and ask him if you might not have an understanding that you were objecting to all the instructions and the records might so show, and he said, "Why, certainly," and that is the way I used to do it.

JUDGE KOELSCH: Judge Barclay, the provisions in this rule here that a copy thereof should be served on opposing counsel—you say you have not done that. Would that be any special hardship to require that in your district?

JUDGE RICE: I think it should be done.

JUDGE BARCLAY: I think it should be done, and I think our rule is good as far as it goes, and just now, to get it before the house, I move the adoption of Rule 14.

JUSTICE MORGAN: That doesn't, however, go to the extent of having the trial judge notify the counsel as to what instructions he is going to give. There are three people preparing instructions generally in a lawsuit, the attorney for the plaintiff and the attorney for the defendant, and then the judge goes out on his own and commits error sometimes.

JUSTICE AILSHIE: Doesn't the statute provide a method by which either attorney may obtain a copy of the instructions in advance of the giving of the instructions?

JUSTICE MORGAN: I never heard of it if it does.

JUDGE KOELSCH: It doesn't, and I would like to read in that

connection the proposed amendment that Judge Givens is going to suggest:

> "Counsel shall present to the trial court at the beginning of the trial, or prior to the close of the evidence, such instructions as they may desire. The court shall, at the close of the evidence and not before, afford respective counsel a reasonable time and opportunity to examine proposed instructions, whether requested or to be given by the court of its own motion, and to prepare and present objections and exceptions thereto, out of the presence of the jury, before such instructions are given to the jury. On motion for new trial, or on review by the supreme court, only such exceptions shall be considered."

JUSTICE MORGAN: That last would be taken care of by rule of the Supreme Court if the Supreme Court is so minded, and so far as I am concerned, I will favor doing it.

JUDGE WINSTEAD: I move we substitute this rule down to that point for this Rule 14.

JUDGE KOELSCH: This rule is all right, because that does not conflict, but this statute would supplement it.

JUDGE SUTTON: This says "before the close of the evidence," and that says "before the beginning of the trial."

JUSTICE GIVENS: It would be unfair to the plaintiff or defendant, either way, any time before the evidence was concluded for the other side to have the instructions. The Judge could have them.

JUDGE SUTTON: I understand. Any man that prepares for trial knows 90 per cent of the instructions and there is no reason for him to wait until the trial is over and then hand up a handful of papers to the court.

JUSTICE MORGAN: The plaintiff might want an instruction on something that the defendant has interposed that he did not suppose was in existence.

JUDGE SUTTON: Some provision ought to be made for that; but for his own instructions he will hand you a whole handful of stuff.

JUSTICE MORGAN: The way I picture it in my mind, each counsel would have the other fellow's proposed instructions just as promptly, because the proceeding is past, and the Judge would sort out the instructions he proposed to give and would read them to the attorneys and discuss them, and if some little fool mistake that a ten year old boy would correct occurs, it is brought to the judge's attention and he would correct it, and if it is not brought to the judge's attention the party that raises the exception should not complain. It is only fair dealing to the trial judge as well.

JUDGE SUTPHEN: How many times will your attorneys look at the instructions? I lay my notes down and I cannot get them to look at the instructions.

JUSTICE MORGAN: Assuming that he is earning a fee that he hopes his client is going to pay, he will find out what that instruction is going to be, if he knows the penalty of his not doing it will be that he is after that precluded.

JUDGE SUTPHEN: You would have to have a Supreme Court rule.

JUSTICE MORGAN: Yes.



JUDGE SUTPHEN: And I have tried to get out the instructions and notify the attorneys that they are ready and I wish they would look them over and see if there is anything I have missed, and, of course, I mark those that are given and refused, but there might be some point overlooked, but I find they will never look at them. On the other hand, of course, they are busy with the argument and they are getting ready for the argument, and they say, "That is your problem and not mine."

JUDGE SUTTON: That gets to be their problem.

JUSTICE MORGAN: It is not fair to let them assign error when they have not objected to it.

JUDGE KOELSCH: Rule 14 as written will be considered adopted. It doesn't require any particular motion.

JUDGE WINSTEAD: I suggest an amendment to Rule No. 14, as follows:

> "8. The court shall at the close of the evidence, and not before, afford respective counsel a reasonable time and opportunity to examine proposed instructions, whether requested or to be given by the court of its own motion, and to prepare and present objections and exceptions thereto, out of the presence of the jury, before such instructions are given to the jury."

JUSTICE MORGAN: Have you got something to make the record, to show that that has been done, so that when the Supreme Court gets it they will know?

JUDGE RICE: That would lengthen the trial about a half a day, but I don't know but what tbe time is well spent.

JUSTICE MORGAN: When you finally adopt the rule you ought not to require the judge to go through that process in every promissory note case.

JUDGE RICE: No, there is no need of it.

JUSTICE MORGAN: Bring it within his discretion, where the law is going to be disputed or anything that is novel and you might overlook something that is absolutely necessary to give in the instructions, then if you will follow this practice and we adopt a rule that unless an exception has been made it will be just exactly like back in the old days when you had to get up on your hind legs and make an exception or it will be too late to go to the Supreme Court.

JUDGE WINSTEAD: I suggest an additional line at the bottom of that amendment:

> "Any objections or exceptions to any instruction must be taken down by the reporter and made a matter of record in the trial."

Does that cover it?

JUSTICE MORGAN: Yes, that would. Unless you want to make this change: You say the "judge shall" in the rule. That requires the judge in every case to go through quite a lot more detail than is necessary in many cases. In cases where the law is seriously in dispute and there is some great likelyhood of error creeping in the instructions, it might be necessary to do it.

JUDGE BARCLAY: Why not use the word "may"?

JUSTICE MORGAN: And then if you want to protect yourself in that fashion, I should think the Supreme Court would adopt a rule that it will not review any assignments of error that are not based upon exceptions taken at the trial.

JUDGE WINSTEAD: I will accept the "may."

JUDGE KOELSCH: Very well. Change the word "shall" to "may." Now, what about the rest of this rule 14? That is merely the detailed method of presenting—I don't think we need to discuss that.

JUSTICE GIVENS: Do I understand, then, that you adopt the substance of what was in that statute as a rule?

JUSTICE MORGAN: Yes.

JUSTICE GIVENS: For the district judges?

JUDGE WINSTEAD: Will that be the action of the Supreme Court?

JUSTICE GIVENS: To be effective that would have to be adopted by all of the judges in every district. How are you going to bring that about?

JUDGE KOELSCH: That is the purport of this meeting, and these that are adopted are supposed to be adopted by all the judges.

JUSTICE GIVENS: How are you going to get them to adopt them?

JUDGE BARCLAY: Send them copies and tell them that is the law.

JUDGE KOELSCH: Most of them will adopt them.

JUSTICE MORGAN: Unless a trial judge adopts this and shows in his record that the thing was done—

JUSTICE GIVENS: That would have to be a variable rule—that if it had been done we would consider it and if not we wouldn't consider it.

JUSTICE AILSHIE: You would have to get it in the record some way, and where is the record?

JUSTICE MORGAN: I don't know that we would have to have a rule in the record. If there is mention in the record to the effect that there has been an opportunity had to take these exceptions and no exception has been taken, we will not review error based upon instructions. Let's suppose that Judge Koelsch, we will say, has called his attorneys together and purposes to avail himself of this rule, and his record comes up and somebody has assigned error in the giving of an instruction; and in the same term of court Judge Winstead has not availed himself of it, and his record is simply void of any exception.

JUDGE KOELSCH: Then with me they are confined to the objections taken, and he isn't.

JUSTICE MORGAN: We will say, "Young man, it is too bad; you had your opportunity in the district court and yon didn't object to that and you will be deemed to have lent your influence to have this error committed, because you were given an opportunity to object and didn't," and in Judge Winstead's case you didn't have an opportunity, and so it will be considered, and any time a judge doesn't adopt this record, he hasn't got the benefit of it.

JUDGE WINSTEAD: I haven't got the benefit of it.

JUSTICE MORGAN: We review no error upon instruction where



the record shows that the attorney has had an opportunity to make objections and didn't.

JUSTICE AILSHIE: It is not a question of the district judge; it is a question of the client.

JUDGE KOELSCH: The district judge doesn't want to be reversed up there.

JUSTICE AILSHIE: You will have one rule for one sort of litigant and another rule for another litigant.

JUDGE SUTTON: You have to.

JUSTICE AILSHIE: It is a very different thing after a man gets out a transcript and then has two or three months to mull over it and hunt up the error that he wants to assign and that is where the district judge gets pinched, and I see it again and again, and the trial attorneys when they get pinched they begin to hunt something to reverse the case on.

JUSTICE GIVENS: Doesn't it bring up the question of the power of the Supreme Court to make a rule that that Court wouldn't consider it and thus force every district judge to adopt this rule?

JUSTICE MORGAN: If the district judge doesn't want to let the attorney know in time so that he could make an intelligent objection, the district judge ought to be bound by his error, and if he had taken the attorney into his confidence and says, "This is the way I am going to instruct them," and suppose it is just erroneous—I sit back and say, "If the son of a gun gives that instruction, I will get him reversed," and he should not be allowed to give it.

JUSTICE AILSHIE: Suppose you don't know, and you had two or three months to go over the record and find out; then you could present it.

JUDGE WINSTEAD: Shouldn't the lawyer in this case be able to determine whether or not there is an erroneous instruction if he has examined the law regarding his position or theory of the case?

JUSTICE AILSHIE: He hasn't always examined the law on the turn that the lawsuit takes afterward. He has got some new proposition. Invariably it presents something that is a surprise to the other side, and is outside of the scope of his having briefed his case, too.

JUDGE WINSTEAD: The trouble with a lot of attorneys is they don't study their case until after they go through the transcript.

JUDGE RICE: And then he doesn't know what refinements the Supreme Court is going to give different words.

JUDGE BARCLAY: That is a good general statement anyway, Judge Rice. I think this is a move in the right direction. We may not get it exactly right, but I think something like this should be done.

JUDGE WINSTEAD: No. 15 is just a matter of form. I move the adoption of Rule 15.

JUDGE VARIAN: Second the motion.

JUDGE KOELSCH: It is so ordered. I presume No. 16 is the same way.

JUDGE WINSTEAD: All right. Same motion.

JUDGE KOELSCH: In fact, all the rest of them, I believe. We have statutes on some and on some we don't. Unless there is objection

to any of the other rules or you want to discuss them, I think the rest of them are all ABC rules that we could pass over.

JUSTICE GIVENS: In number 7 under Rule 14. It is probably of little importance, but shouldn't there be a change there? There are some words that generally have to be capitalized.

JUSTICE MORGAN: Doesn't "otherwise emphasized" take care of that?

JUSTICE GIVENS: You would have to capitalize proper names.

JUSTICE MORGAN: That means the entire word, I think.

JUSTICE GIVENS: Oh, if it means that, that is all right.

JUDGE WINSTEAD: What are we going to do with No. 3?

JUDGE RICE: I think No. 3 ought to be eliminated.

JUDGE WINSTEAD: I move the elimination.

JUDGE KOELSCH: All those in favor of elimination say "Aye." Those opposed "No." It is eliminated.

JUDGE RICE: I don't think most of the judges would want these arguments following the calendar.

JUDGE KOELSCH: Well, these rules as now passed on and as amended will come before the general convention when the time is opportune.

JUSTICE MORGAN: It has been suggested that the judges adopt their rules as they see fit. While it is a matter for the judges to adopt their rules and not for the Bar, certainly the Bar should be consulted. In the final analysis, it is the judges who make the rules.

JUDGE BARCLAY: It depends on the boys. If they are feeling right, they will enter into an interminable argument, and at the end they will be up in the air.

JUDGE KOELSCH: I had suggested to the secretary and also to some of the commissioners that wanted me to prepare a program for this judicial section, that besides discussion of the rules I would get some judge to present proposed changes in substantive crime statutes and also in procedural crime statutes. I tried several who couldn't come. So I went to work and prepared a little topic on it myself, and I would like to present that, not only to the judges, but I would like to present it when the prosecuting attorneys may be here, and I suggest a joint session, and I would like to have you gentlemen here because I think I have a point or two that will interest you and I know it will interest the prosecuting attorneys.

JUSTICE MORGAN: Anything that will make it necessary for prosecuting attorneys to prepare an information that advises the individual of the charges against him.

JUDGE KOELSCH: That is what it is.

JUDGE WINSTEAD: I have run into one question. I think there should be a change in the statute regarding assault with a deadly weapon. I have had two men in the last six months that were cut to pieces, and the minimum is not less than one, or more than two years. I think that is not a sufficient penalty.

JUSTICE MORGAN: That is not enough unless, of course, if the man might be guilty of assault with a deadly weapon with intent to commit murder.

JUDGE WINSTEAD: Another statute I run into, as to why in



ordinary embezzlement the penalty should be one to fourteen years and for a state officer it is only one to ten years.

JUSTICE MORGAN: Well, being a state officer, you ought to know.

JUSTICE GIVENS: Isn't there also a difference in the amount or extent? Any amount by a state officer, even if but 50 cents, while the other has to be for $60.

JUDGE WINSTEAD: Yes, but even then I can't see why it should be one to ten years for a state official.

(At this time the prosecuting attorneys joined the judicial session.)

JUDGE KOELSCH: Gentlemen, when the Commissioners asked me to prepare the program for the judicial section, I suggested that we have a discussion on suggested changes in substantive crime statutes and changes in procedural criminal statutes. I prepared certain notes and suggestions and I thought it would be wise and, in view of the remarks made by Judge Morgan a minute ago, I think before I get through you will agree that it is wise, to present this subject to this joint meeting.

## SUGGESTED CHANGES IN SUBSTANTIVE CRIME STATUTES

One of the excuses often heard from our lawyers for non-attendance at the annual convention of the State Association is that nothing of any practical value is ever accomplished at those meetings.

There may be—I believe there is—a grain of truth in that assertion. We get together, we orate on a great many topics, we have some off-hand discussions of many subjects, and then we disband without any conclusive action on anything.

It is, admittedly, of the very essence of a lawyer's profession that he should not lightly agree to anything. As was wittily said at one of our former meetings, let it be moved that we adopt the Lord's prayer as the opening prayer of our meeting, and some one will propose an amendment thereto. This is as it should be. Before any definite action is taken, there should be thorough discussion. Any idea that cannot survive the analysis of a group of lawyers is likely not worthy of further consideration.

But there is a suspicion—particularly prevalent amongst the laity—that improvements in our laws are often retarded because of the selfish interests of our lawyers; that they will not consent to changes and amendments greatly desired, when such changes and amendments are inimical to the lawyer's business.

The opinion is often expressed that lawyers could, if they would, suggest and bring about great improvement in substantive and procedural statutes concerning public and criminal offenses, but that lawyers oppose such innovations because they tend to cut into their business. Who has not heard the charge that lawyers as a rule oppose the simplification of the law of criminal procedure because such simplification would deprive them of those technical points by and through which they often circumvent the administration of justice?

I am not willing to say that this charge is true, but that many of our substantive crime statutes, as well as our statutes on criminal pro-

cedure, are archaic, technical, and often bring about miscarriages of justice, is only too well illustrated by hundreds of decisions of our courts. And if there be any brother members of the Bar who would oppose improvement and modernization of the statutes in these respects for fear that such improvements would deprive them of business, or deny to them victory in some cases, I can only say that in my judgment their fears for loss of business are groundless, and that a victory won by the perversion of justice is not half so sweet as one won on the merits of the case.

The true lawyer recognizes that he is not merely an advocate, but that he is an officer of the state and an administrator of justice, and that his compensation comes not only in fees and coin of the realm, but in the more priceless reward of the consciousness of having promoted the cause of right and justice.

By this preamble to what I am about to propose, let it not be understood that I give countenance to the charge that lawyers generally oppose and retard the improvement and the evolution of the law, out of selfish motives, or for personal reasons. Such lawyers are the exception, and not the rule.

Be it said to their credit, that lawyers will not consent to changes in the law for "light and transient causes." They must be convinced that a proposed innovation is, indeed, an improvement before they give it their sanction. But, once so convinced, lawyers are no more bound by precedents, and no more loath to abandon "the forms to which they are accustomed" than any other class of scientific men.

Fully persuaded that this estimate of our lawyers is correct, I submit today, for your consideration, a suggestion for amendment, both to our procedural as well as substantive criminal statutes, that in my opinion would, if made, constitute one long step in the right direction.

Moreover, if my suggestion be definitely disposed of, either by adoption or rejection, it would at least constitute concrete, practical, work-a-day action as distinguished from mere abstract discussion without definite conclusion, and thus answer a charge that is often made against our annual meetings.

A little over two years ago there was filed in the court over which I preside, against one John Hopper, a charge of crime under Section 17-3512, I. C. A., which section defines the crime of knowingly receiving stolen property. The charges against young Hopper was that he did "unlawfully, knowingly and feloniously receive stolen property, to-wit: Money in the sum of $20,401.49." The Information further alleged that said money was part of a larger sum which one Angela Hopper, City Clerk of Boise City, "did, between the 18th day of November, 1930, and the 27th day of September, 1933, feloniously take and embezzle," which larger sum had been "intrusted to her care and possession in her official capacity as such City Clerk, "and further that the said John Hopper at the time of receiving the sum it was alleged he did receive well knew "the same to have been embezzled as aforesaid."

Now, the statute under which this charge was laid reads as follows:

> "Every person who, for his own gain, or to prevent the owner from again possessing his property, buys or receives any personal property, knowing the same to have been stolen, is punishable by imprisonment in the state prison," etc.



Promptly the defendant filed his demurrer on the ground that the Information did not charge facts sufficient to constitute a public offense. Upon the argument on this demurrer it was strenuously urged that the information charged no public offense because it appeared therefrom that the money alleged to have been received by the defendant was by Angela Hopper obtained by embezzlement, whereas the statute under which the Information was drawn, denounced as a crime the receiving of personal property "knowing the same to have been stolen."

And counsel for the defendant supported their argument by numerous cases from several jurisdictions. (I recall especially the state of Missouri and the state of Texas.) The purport of this argument and of these cases is that the statute, Sec. 17-3512, I. C. A., creates a crime differing from the common law crime of receiving stolen goods (State vs. Hagan, 47 Idaho, 315), for at common law the receiver of stolen goods was an accessory to the thief, and was not guilty of a distinct crime; further that the crime of embezzlement is purely a statutory crime and was not known at common law, and, hence, that because the statute made it a crime to receive stolen property, it did not comprehend the receiving of embezzled property.

This was logical argument, and I had a difficult time to find logical grounds upon which to deny the same. However, I overruled the demurrer on the ground that embezzlement is a species of larceny and for that reason is comprehended within the statute. I confess, however, that as part of my reasons I advanced the weak argument that "To put any other construction upon the statute would result in this absurd situation: That one who had received property which was acquired by larceny, as defined by the common law and by statute, is guilty of a crime, while one who received property which he knew was acquired by embezzlement, could boast of his exploit with impunity. (And that is what they do in Missouri and Texas.) Miscarriages of justice, due to the inelasticity of our language, are plentiful enough without adding thereto by so narrow a construction. In my judgment the word 'stolen' in Sec. 17-3512 comprehends property acquired by embezzlement."

Happily, though the defendant was convicted, there was no appeal, and so I am privileged to continue to entertain the opinion that my decision was right!

Be this as it may, the question is still a moot question and will be such until the Supreme Court passes thereon. And should that Court come to a conclusion differing from mine, the situation that I instanced would have arisen, and one who had received embezzled property knowing the same to have been embezzled, could boast of his exploit with impunity, and it would then become imperative that the statute be amended, or a new statute enacted.

But the point I have discussed is but one part or one phase of the question. What lawyer, and particularly what prosecuting lawyer, has not been confronted with the question whether certain acts constituted

the crime of larceny, or the crime of embezzlement? What prosecuting attorney has not had a case thrown out of court because he charged a defendant with one of these crimes when he should have charged him with the other?

By our statute, larceny is defined as follows:

> "Larceny is the felonious stealing, taking, carrying, leading or driving away the personal property of another."
> Sec. 17-3501, I. C. A.

And embezzlement is defined thus:

> "Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted."
> Sec. 17-3601, I. C. A.

On the face of these statutes, the distinction is clear; but in actual practice, the evidence often makes the question very perplexing, and a wrong choice is frequently fatal.

A man hires an automobile to drive from Boise to Lewiston. He drives to Lewiston as he said he would, but at Lewiston, instead of returning to Boise as was his contract, he continues his trip to Moscow, and there disposes of the automobile and spends the proceeds. Is he guilty of embezzlement, or is he guilty of larceny? If guilty of the one or the other, where is the venue of his crime?

In the California case of People vs. Johnson, 27 Pac., 663, the defendant was convicted of embezzlement. The court states the facts by quoting the prosecuting witness' testimony as follows:

> "We went in to get a drink, and while we were at the bar a man came up to us, and asked us if we would like to buy a Louisiana Lottery ticket. I said no; that I did not care about it, as I never gambled. He said he was the agent of the Louisiana Lottery Company, sent out on purpose to this coast to explain the way the drawings were had to the people, and if we would go into the back room he would explain it. I did not want to go into the back room but this other man who was with me said, 'Let's go in and see;' so we went in. When we got in the back room there was a table there, and the defendant spread a paper on the table full of squares and figures, and said if I would put down a half a dollar or some money on the table he would explain it to us. I did not want to put my money on the table, but this other man said he would put in a half a dollar and so I did the same, and afterwards I put in a dollar. After that was lost, I put in five dollars, and lost that. I then wanted to get out but there were some other men there who said, 'Go on and play,' and I was afraid to go out, so I put up twenty dollars, and afterwards twenty dollars more. After that was lost, I asked for my money, and didn't get it. The defendant at all times told me I would get my money back as soon as he had explained the game."

As stated, the defendant had been convicted of embezzlement. In the Supreme Court there were three opinions. (There were more opinions than there were on the non-partisan judiciary law in our Supreme Court.) The majority reversed the conviction on the ground that the crime constituted larceny, and not embezzlement. There was one dissenting opinion urging that the facts constituted both larceny and embezzlement; while one dissenting opinion contends that the facts showed the crime of embezzlement. It might be asked: Was it not really obtaining money under false pretenses?



Sec. 17-3902, I. C. A.
State vs. Stratford, 55 Idaho, 65.
State vs. Whitney, 43 Idaho, 745.

A little reflection will show that these crimes are in fact, each and all of them, different ways of committing larceny; different species of the same genus. In fact, the embezzlement statutes were enacted to remedy a defect in the common law of larceny. Says Wharton:

> "In the common law definition of larceny, we must remember there are two gaps through which, in the expansion of business, many criminals escaped. The first of these gaps is caused by the position that to maintain larceny it is necessary that the stolen goods should have been at some time in the prosecutor's possession. The second results from the assumption that when the possession of goods is acquired bona fide by a bailee, no subsequent fraudulent conversion (unless there be a breaking of bulk or some other rupture of the conditions of bailment) can be larceny while the bailment lasts."
> 2 Wharton's Crim. Law (11th ed) 1463.

Though the courts, both at common law and under the statutes, have been keen in discriminating between a charge of larceny from that of embezzlement, they practically all agree that "Embezzlement is a species of larceny."

People vs. Burr, 41 N. Y. Cr. R., 293.
People vs. Perini (Cal.) 29 Pac., 1027.

Why then this useless nomenclature? A nomenclature that has perhaps been the cause of more reversals of conviction of crime than any other of the popularly designated technical rules of the criminal law?

If one man unlawfully takes the property of another and appropriates it to his own use, he is guilty of a crime whether it is designated larceny, embezzlement, or false pretense or cheating, and it does not tend to the respect for law, or tend to help in the administration of justice, when a man charged with and convicted of one of these named crimes is set free because the Supreme Court says the evidence shows him guilty of the other.

A rose by any other name would smell as sweet, and a theft is theft, whether the law denominates it larceny, embezzlement, or any other name.

Strange to say, however, the only states that I have been able to find to have done away with this adherence to names are California and Massachusetts. (Since then, I believe, I found Michigan too.) There may be, probably are, others, but my search has not taken me far enough to find them. California in 1927 amended its statutes, grouping all ways and manner of unlawful taking of the property of another under the scientific name of theft. Thus, Sec. 484 Hillyer's Consolidated Supplement of 1927-1931, page 6968, reads as follows:

> "Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor, or real or personal property, or who causes or

> procures others to report falsely of his wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money or property or obtains the labor or services of another, is guilty of theft. In determining the value of the property obtained, for the purposes of this section, the reasonable and fair market value shall be the test, and in determining the value of services received the contract price sball be the test. If there be no contract price, the reasonable and going wage for the service rendered shall govern. For the purposes of this section, any false and fraudulent representation or pretense made shall be treated as continuing, so as to cover any money, property or service received as a result thereof, and the complaint, information or indictment may charge that the crime was committed on any date during the particular period in question. The hiring of additional employees without advising each of them of every labor claim due and unpaid and every judgment that the employer has been unable to meet shall be prima facie evidence of intent to defraud."

It will be noticed that this statute is merely a consolidation of the several statutes defining the various offenses therein included, which California statutes correspond with our statutes defining such offenses (Larceny, 17-3501; Embezzlement, 17-3601; False Pretenses, 17-3902) and that each and all of these several offenses are designated or comprehended within, the generic name of theft. It is further enacted that

> "Whenever any law or statute of this state refers to or mentions larceny, embezzlement, or stealing, said law or statute shall hereafter be read and interpreted as if the word 'theft' were substituted therefor." (Sec. 490a, Hillyer's)

And theft, hy the California statutes, like the statutes defining larceny, is then divided into two degrees or kinds, namely, grand theft and petty theft. (And, by the way, they spell the name "p-e-t-t-y," not "p-e-t-i-t" the way we do.) Secs. 487 and 488, Hillyer's Con. Sup.)

This grouping of these offenses under the generic name of theft would, of course, have made but little change in the law, or in its administration and enforcement. California went further and amended its statute regarding the necessary averments in an information charging any crime to read as follows:

> "In charging an offense, each count shall contain, and shall be sufficient if it contains in substance, a statement, that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations of matter not essential to be proved. It may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused. In charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another." (Sec. 952, p. 7077, Hillyer's)

These amendments made necessary an amendment to the statute prescribing what allegations are necessary in an indictment or information in order to make the same sufficient, and that is: Sec. 959 of the California Penal Code, which is Sec. 19-1318 of the I. C. A.

This section consisted, and in our code still consists, of seven subdivisions. The Legislature of California eliminated the last two subdivisions, which read as follows:



> "Sub. 6.—That the act or omission charged as the offense is clearly set forth in ordinary and concise language, without repetition and in such manner as to enable a person of common understanding to know what is intended."

(I say that that still is in our statute, but I call special attention to the words "That the act or omission must be set forth.")

> "Subd. 7.—That the act or omission charged is stated with such a degree of certainty as to enable the court to pronounce judgment upon conviction, according to the right of the case."

Under these statutes, the following form of information charging larceny, was held sufficient:

> "The District Attorney of the County of Plumas, State of California, hereby accuses C. D. Plum of a felony, to wit, grand theft, in that on or about the 3rd day of May, 1928, in the County of Plumas, State of California, he unlawfully took the property of A. Wewhart, consisting of 50,000 board feet, or thereabouts, of lumber, of the value of Nine Hundred Dollars in lawful money of the United States."
>
> People vs. Plum (Cal. App.) 275 Pac., 518.

So, also, was the following information for the crime of embezzlement, held sufficient:

> "The District Attorney for the County of Fresno, State of California, hereby accuses Lee Manchell of a felony, to wit, grand theft, in that the said Lee Manchell on or about the 6th day of September, 1927, at and in the said County of Fresno, and State of California, unlawfully took the property of Harley S. Tyler and W. H. Rice, consisting of $373.72 in lawful money of the United States, of the value of $373.72 in gold coin of the United States."
>
> People vs. Manchell (Cal. App.) 267 Pac., 718.

In the case of People vs. Plum (Cal. App.) 263 Pac., 862, it appears that one Christman, a veterinarian (and by appointment a meat inspector), falsely represented to Dalby, a farmer, that the latter's cattle were afflicted with tuberculosis. He further persuaded Dalby to sell the cattle to a butcher named Plum, subject to inspection after slaughter, by Christman. Thereafter Christman notified Dalby that upon inspection he found the carcasses of his cattle so far diseased as to be unfit for human consumption, and that they had been "tanked" or destroyed. Plum also told Dalby that he had "tanked" the cattle. The truth was that the cattle were not diseased; that Plum had sold the meat therefrom and divided the proceeds with Christman.

Those of you who have ever drawn an information for the crime of obtaining property by false pretenses, know what a formidable document would be required under our statute to frame the proper information under the facts just recited. The following information in the case under the amended California statutes, was held sufficient:

> "The said Fred Plum and R. G. Christman on or about the 29th day of August, 1927, at the County of Yuba, State of California, then and there did * * * unlawfully take * * * the prop-

erty of one J. B. Dalby, consisting of 5 head of cattle of the value of $200.00."

On appeal the Appellate Court said:

"It was for the jury to determine from the facts proved whether the taking of the property was 'by trespass from the possession of its owner, a fraudulent conversion of it while intrusted to the possession of the wrongdoer, or an obtaining it by criminal false pretenses.'"

I have thus far confined my discussion to the designation, and the manner of charging, the kindred crimes of larceny, embezzlement and obtaining money or property by false pretenses.

Does not every reason in favor of the simplification of the statutes concerning these offenses apply also to all other offenses defined by our statutes?

It is true that our Supreme Court has held the short form of indictment and information in the case of murder and manslaughter sufficient under existing statutes.

Thus, in the case of State vs. Arnold, 39 Idaho, 589, the following information for the crime of murder was held sufficient:

"That the said Mike Donnelly and Noah Arnold, alias Robert Ford, on or about the 16th day of July, 1923, at the County of Bonner, State of Idaho, then and there did unlawfully, wilfully, wrongfully, feloniously, deliberately, premeditatedly, and with malice aforethought, kill and murder one Wm. Crisp, a human being."

The killing in this case was by shooting while perpetrating robbery.

In the case of State vs. Lundhigh, 30 Idaho, 365, a like information for murder was held sufficient, the Court saying (Judge Rice writing the opinion):

"The elements constituting the offense of murder are the killing of a human being, the unlawfulness of the killing, and that it was accomplished with malice aforethought. I think these are the ultimate facts to be pleaded and that the means by which and the manner in which the killing was accomplished, are evidentiary facts which need not be pleaded."

(That in the face of our statute which says that the acts must be set forth.)

In the case of State vs. Gee, 48 Idaho, 688, the defendant had killed a man by running over him with an automobile. He was charged with manslaughter by an information in the following form:

"That Charles H. Gee of Boise, Ada County, Idaho, on or about the 9th day of March, 1928, in Boise, County of Ada, State of Idaho, then and there being, did then and there wilfully, unlawfully and feloniously kill one Harry Tage, a human being."

This holding, I submit, is the logical consequence of the reasoning in State vs. Lundhigh, because manslaughter is by the statute defined as "the unlawful killing of a human being without malice."

The ruling in the Gee case was approved and followed in the case of State vs. Brooks, 49 Idaho, 404, where an information somewhat more in detail, was attacked for uncertainty in that the defendant was not thereby appraised of the particular facts constituting the acts or omissions on her part amounting to lack of "due caution and circumspection."



In spite of these rulings of our Supreme Court, I find that there is a diversity of opinion as to the correctness of the same in the face of Sec. 19-1309, which requires that an indictment or information should contain "a statement of the acts constituting the offense in ordinary and concise language." California found it necessary to repeal their Sec. 950 of the Penal Code, which was the model for our Sec. 19-1309, in order to warrant the short form of information. (And I am glad to see there are some members of the Supreme Court here. I want them to defend that, to defend the sufficiency of the short form of information in the face of that statute.)

Whether, without amending our statutes, and without repealing any of them, the short form of information for a charge of murder or manslaughter, is warranted as ruled by our Supreme Court, there can be no good reason for not so amending our statutes as to allow the short form of information in all cases.

This change in our criminal procedural law would be no greater innovation than was the change effected by our Code in criminal procedure at common law.

In an early California case the Supreme Court of that state said:

"Our criminal code was designed to work the same change in pleading and practice in criminal actions which is wrought by the civil code in civil actions. Both are fruits of the same progressive spirit which, in modern times, has endeavored at least to do away with the mere forms and technicalities of the common law which were productive of no good, and frequently brought the administration of justice into contempt by defeating its ends. Under the pretense of informing the defendant of the nature of the charge against which he was called upon to defend, it was necessary, at the ancient common law, to describe the means by which the homicide was committed, and the nature and extent of the wound and its precise locality; from which it necessarily followed that a trifling variance between the proof and the allegation frequently defeated a conviction, no matter how manifest the guilt of the defendant. It was a long time before legislators and judges discovered that this rule had nothing but the most flimsy pretext to support it. If the defendant is guilty, he stands in need of no information to be derived from a perusal of the indictment, as to the means used by him in committing the act or the manner in which it was done, for as to both his own knowledge is quite as reliable as any statements contained in the indictment. If he is not guilty, the information could not aid in the preparation of his defense."

People vs. King, 27 Cal. (910)

See also

People vs. Beesley (Cal. App.) 6 Pac. 2nd, 114.

JUSTICE MORGAN: I wish you would defend that last statement. It is also a quotation from the case of State vs. Lundhigh. I am sorry you didn't bring the dissenting opinion in the case of State vs. Lundhigh. I have never been able to understand why an innocent man is not charged in the information in the manner in which a guilty man is who has committed a crime,

MR. DONALD ANDERSON: You have your preliminary hearing to see what the facts and circumstances are.

JUSTICE MORGAN: And suppose you don't follow the same course in the trial as you do in the preliminary court?

MR. SWANSTROM: You have tipped off one-tenth of your case and got the man bound over.

JUSTICE MORGAN: Whether he drowned him or scared him to death, there is nothing to show.

MR. MOFFATT: I think under any of this practice the defendant can ask for a bill of particulars.

JUSTICE MORGAN: I wish you would find out and show me where you can invoke the rules of equity in a criminal case.

MR. MOFFATT: I think there is a statute in California.

JUDGE WINSTEAD: There is no statute in California. They don't furnish a bill of particulars. They have a statute that they must be furnished with a copy of the preliminary hearing. He can do that here hut there is no statute.

JUDGE KOELSCH: I presented this in good faith. I would like to hear a discussion. I cannot see why these lengthy informations are necessary. Take a question of false pretense—I spend four or five hours on demurrers to an information charging false pretense, because it is sometimes a difficult thing to see. It seems to me difficult for a prosecuting attorney when he takes a case to determine whether a man is guilty of embezzlement or guilty of larceny, and when he makes the choice of one perhaps it is fatal to his case. Now, if he could simply charge that so and so on such a date obtained money or property, or whatever it was, unlawfully, the defendant knows what he is charged with. The last statement of the California court, of course, requires no defense from me.

JUSTICE MORGAN: Mr. Chairman, I only wish to be heard to this extent: I dissented very vigorously for me, possibly as vigorously as I could, from the Lundhigh decision holding that merely accusing a man of having killed and murdered another is sufficient to conform to a statute which says that the means by which the crime was accomplished must be stated, and made a statement to the effect that the information in the case of Lundhigh would with equally impartial uncertainty accuse every man that committed homicide since Cain killed Abel, absolutely in simply the same language. As I recall the facts in the Lundhigh case, the man was shot. There was nothing in the information to show that he wasn't poisoned, drowned or killed in the perpetration of one of the other crimes which constitute murder. Now, that a party who has killed a man knows how he killed him, of course, doesn't even excite an argument, but we must under our American rule of procedure presume at least that the man is not guilty; if he is innocent, that he doesn't know what you are talking about when you say he killed him.

Let's assume your client was not guilty of any crime whatsoever. He is accused of grand theft. The statute does not say that you have to accuse him of grand theft by saying that he took cattle or lumber or money or anything else, but all that you have to do apparently is to accuse him of grand theft,



I am not objecting to making the duties of those whose duty it is to prosecute violators of the law as easy as may be in order that we lose not too much of the accuracy of accusations. I am fully agreed with you that before your time and mine, and probably within our recollection, the requirements of an indictment were ridiculously exacting and men actually escaped punishment which they richly deserved. In recent years, let it be said to the credit not of the layman who criticize the lawyer, but the members of the legal profession tbemselves, that a little intelligence has been injected into the criminal procedure, and had it not been for men of the profession of those here assembled it could not have been done. We would still have been stumbling along under the uncertainty of justice that had gone before.

Now, what I am suggesting is: Whenever it is within the knowledge of the prosecuting attorney to advise the defendant, who is presumed to be innocent, of the nature of the charge against him. You may call it grand theft to get out of distinguisbing between the fraudulent conspiracy to procure money of another, the embezzlement of money, or the larceny of money, or stealing, taking and carrying away. I don't care anything about that. Let that be under the general charge of grand theft, but if he is accused of taking the personal property of another of the value of $250, to wit, five head of cattle, let enough be indicated in that information to show that the conspiracy existed between the defendant and the horse doctor to procure this man to give up his cattle under those circumstances, which did amount to a theft, not leaving to the innocent man to find out from the conviction.

MR. MARCUS: Personally I think the defendant has too many defenses as far as the prosecuting of crime is concerned, and I think it is borne out by the facts of our crimes in this country. I was just wondering if Judge Morgan would go to the logical extent—since he would require the prosecution before the trial to inform the defendant of the proof on the trial—if he would also require the defendant to give the prosecution the nature of the defense.

JUSTICE MORGAN: I wouldn't require that of either of them. I would require only that he be given information as to the actual nature of the crime; in other words, the general charge of misconduct against a man ought not to be held sufficient to suggest a felony.

MR. MOFFATT: I think the main purpose here that Judge Koelsch had in mind was illustrated by a little case that Judge Winstead heard where a certain clerk in a state department took a check. The check was sent to him. He never had any statutory authority to accept it. No one had any authority to send it to him. So far as the law was concerned, that check should never have been written in the manner it was. The attorney general's office was of the opinion that the matter did not constitute embezzlement and thought it constituted some sort of a fraudulent transaction through the mail, the check having been sent through the mail, and should have been a federal offense, but the United States district attorney said that he could not see any federal offense in the matter, and, by the grace of God, I got a plea of guilty. There was no question but he had taken somebody's money and had taken it wrongfully and embezzled it and used it him-

self, but the matter of how to plead—there were three different opinions on the part of three officers.

JUSTICE MORGAN: That furnishes a most excellent example of what was in my mind. I was wondering if it would be well to formally accuse a man on the ground of grand theft, but note a special charge—note that he picked his pocket, or bent a gas pipe over his head, or simply did that, this or the other; charge him with grand theft, but give him to understand something of the nature of the accusation against him; and I will fully agree with that theory and believe it should be done.

MR. MOFFATT: In your examples from California that appears.

JUSTICE MORGAN: Then we are agreed on it.

JUDGE KOELSCH: This is the same proposition that I suggested in the first part of this topic of where a man hires an automobile to drive from Boise to Lewiston. Now, I am satisfied that if I asked these prosecuting attorneys their reaction to that, some would say the fellow was guilty of larceny and others would say he was guilty of embezzlement, but we know the distinction is this: If he went there and hired that automobile in Boise with the intent in his mind at the time of stealing that car, he was guilty of larceny; but, snppose that he was in good faith, he had business in Lewiston, and bired that car and drove to Lewiston, and at Lewiston he met a chum and pal of his who put it into his head that he should embezzle the car and sell it. What would he be gnilty of?

JUSTICE MORGAN: Far enough back that would have presented a very serious question, because you would have had to assay that act to find out when he made up his mind that he was going to steal it. I don't think our courts would have very much trouble in regard to it now. However that may be, I think you and I are fully agreed. I don't care what you call the crime the man is guilty of, provided you advise him as to the nature of the accusation you expect to make against him, not in such detail as makes it impossible to do that, but taking our prosecuting attorney's illustration here, if he charges that man with grand theft and indicates what it is to be, a check signed by a certain man, bearing a certain date, involving a certain amount, I would say that the man has a fair break because he has been advised of the nature of it.

JUDGE KOELSCH: That is what it does, and that is what I am advocating.

MR. TAYLOR: How could you combat such a situation as this: There were some people who went to a farmer up here and posed as federal agents on the proposition that they were taking a federal census and got bim to sign what was supposed to be a statement. In some way or another he signed or, at least, traced his name on a check blank, and they casbed the check. Well, the man had never seen it before, because it was concealed in some way, but it was his signature. The question arose—was it forgery, was it obtaining money under false pretenses, or what was it? By this simple form I believe you could charge him with grand theft. We got around it by shooting it into the federal court.

MR. MOFFATT: I think it is dodged many times. I know of a



case similar to Judge Koelsch's example, where he was put in jail because he wrote a bum check when he took an automobile.

JUSTICE MORGAN: You remember Al Capone is in the penitentiary for not paying his income tax, and I don't know anybody that is sorry for it but Al.

MR. SWANSTROM: I think the general intent of the Judge's remarks and his plan toward absolving the poor benighted prosecuting attorney who, like myself twelve years ago, didn't have a notion of the difference between an information and a complaint in the justice court on a board bill or promissory note, or attempting to distinguish or differentiate, plead embezzlement and larceny and obtaining property under false pretense—I think that would be a worthwhile step in the advancement of justice, to consolidate them under the general crime of theft, grand theft or petit theft, but I do most heartily agree with Judge Morgan that in pleading those offenses under the general term of grand theft there should be at least a reasonable specification of the means by which the offense was committed, because unfortunately our law enforcement officers don't always pick the rigbt defendant. Tbey do at times get an innocent man, and if I were innocent and heing charged with a crime I certainly would want some intimation, even before a preliminary, of the means and manner in which I am to be charged with committing a crime. It might be very material in the defense interposed by an innocent man as to whether the state intended to prove that I strangled a man or administered cyanide or shot him. If I am the man who actually committed the crime, I have the knowledge and it is not essential, but I am presumed innocent and I might he innocent, and I have certainly the right to fairly specific information of the manner in which I am supposed to have committed the crime and the means with which I have committed it. I recall being bumped very strenuously once about ten years ago on defining in an information what I thought was embezzlement, and the court disagreed with me, yet under the California statute as it now is I pled a good information and the proof would have been sufficient, so I think the general thought there is well taken and should be adopted in tbis state.

MR. DONALD ANDERSON: What would you say in case you could not tell what the means or mode of death was? It might very easily happen where you would have two or three different ways it could have happened, and if you would charge one the defendant would testify that he did it one way, and you stated another way.

JUSTICE MORGAN: Yes, that is already decided by the Supreme Court. This particular averment where you spoke of death in a manslaughter case, where the man ran over him with an automobile, all it states was—and the Supreme Court has held it sufficient—that he killed him. It does not say whether he killed him by shooting him, or drowning him, or by putting his foot in a box of rattlesnakes.

MR. DONALD ANDERSON: I understand that is the case, and that has been taken care of by the Court. If the Court were changed and Judge Morgan were writing the opinion, that eventually would not be the rule.

JUSTICE MORGAN: I would be in the minority the same as I have always been, I think.

MR. DONALD ANDERSON: That would be all right.

JUSTICE MORGAN: I take it for granted that Mr. Anderson doesn't want an innocent man hung. I believe myself it is preposterous to allow a man to steal something and then be permitted to escape on the quibble whether it was by embezzlement or larceny.

MR. MOFFATT: The prosecuting attorneys section is about to adopt the California criminal code procedure.

JUSTICE MORGAN: What I will welcome in California is a simplified criminal procedure.

JUSTICE AILSHIE: They certainly need it. It is very complicated.

MR. DONALD ANDERSON: I move that the chair appoint a committee to draft the necessary law and take it up with the legislature of this state to try to have it passed and become a law of the state.

JUSTICE MORGAN: I second the motion.

JUDGE KOELSCH: You have heard the motion. Those in favor signify by saying "Aye." Those opposed "No." It is carried.

JUSTICE MORGAN: I am wondering if those of us who are of the bench, as distinguished from the Bar, should not communicate our best wishes to Judge Hunt (you said he had illness in his family) without any formal motion. I know Judge Hunt very well, and I have a great sympathy in his trouble.

JUDGE KOELSCH: Very well, I will do that.

JUSTICE MORGAN: Anything else to come before the joint meeting?

JUDGE KOELSCH: No.

JUSTICE MORGAN: If there is nothing more before the judicial section, then I move that we adjourn.

JUDGE KOELSCH: Very well.

(Adjournment.)

## ATTENDANCE REGISTER

| | |
|---|---|
| Ailshie, James F. | Coeur d'Alene |
| Anderson, Donald | Caldwell |
| Anderson, Gus Carr | Pocatello |
| Anderson, Walter H. | Pocatello |
| Auger, B. | Grangeville |
| Babcocok, Edward | Twin Falls |
| Baker, H. A. | Rupert |
| Barclay, A. B. | Twin Falls |
| Belknap, Burdette | Lewiston |
| Bistline, F. M. | Pocatello |
| Boughton, E. V. | Coeur d'Alene |
| Brown, Robert E. | Kellogg |
| Butler, Edward C. | Lewiston |
| Colburn, Lyle M. | Spokane |



| | |
|---|---|
| Carter, D. L. | Weiser |
| Clemons, Dale | Boise |
| Cromwell, J. F. | Caldwell |
| Davison, W. H. | Boise |
| Dunbar, Wm. C. | Boise |
| Dunlap, S. Ben | Caldwell |
| Elam, L. | Boise |
| Fraser, Alfred A. | Boise |
| Givens, Raymond L. | Boise |
| Glennon, L. E. | Pocatello |
| Graham, John W. | Twin Falls |
| Griffin, Sam S. | Boise |
| Gyde, James E. Jr. | Wallace |
| Hanley, Harry J. | Grangeville |
| Hanson, Walter H. | Wallace |
| Hardy, A. S. | Grangeville |
| Hawley, Jess | Boise |
| Haydon, Curtis | Caldwell |
| Hopkins, Bert | Moscow |
| Hunter, C. S. | Boise |
| Jackson, J. | Boise |
| Johnson, Edward T. | Orofino |
| Kerby, F. M. | Cascade |
| Kasberg, Alex | Lewiston |
| Kester, Hartley P. | Lewiston |
| Koelsch, Chas. F. | Boise |
| Loofbourrow, W. C. | American Falls |
| Marcus, Claude V. | Idaho City |
| Maxey, Stewart S. | Caldwell |
| McCarty, Leo | Lewiston |
| McQuade, Jack | Moscow |
| Moffatt, Willis C. | Boise |
| Morgan, A. L. | Moscow |
| Morgan, Wm. M. | Boise |
| Morrow, McKeen F. | Boise |
| Musser, J. B. | Boise |
| Nelson, Ralph S. | Coeur d'Alene |
| Nelson, Spencer | Coeur d'Alene |
| Nielson, A. H. | Burley |
| Nixon, Carey | Boise |
| O'Leary, Kenneth | Boise |
| Paine, Karl | Boise |
| Peacock, John | Weiser |
| Poole, C. W. | Rexburg |
| Redford, Hugh | Rupert |
| Rettig, Frank M. | Jerome |
| Ryan, Frank D. | Weiser |
| Schimke, Welden | Moscow |
| Stellmon, Elbert A. | Lewiston |
| Smith, E. B. | Boise |
| Smith, Laurence N. | Caldwell |

Smith, T. W. ..... Rexburg
Sullivan, L. L. ..... Boise
Sutton, A. O. ..... Weiser
Sutphen, D. H. ..... Gooding
Swanstrom, Carl H. ..... Council
Swayne, Samuel F. ..... Orofino
Taylor, Fred M. ..... Cascade
Thoman, J. F. ..... Twin Falls
Thomas, C. W. ..... Burley
Tuson, Wm. L. ..... Homedale
Varian, B. S. ..... Boise
Ware, Eugene S. ..... Coeur d'Alene
Ware, Marcus J. ..... Lewiston
Welker, Herman ..... Weiser
Winstead, Chas. E. ..... Boise
Wormward, T. P. ..... Kellogg
Worstell, L. E. ..... Wallace



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