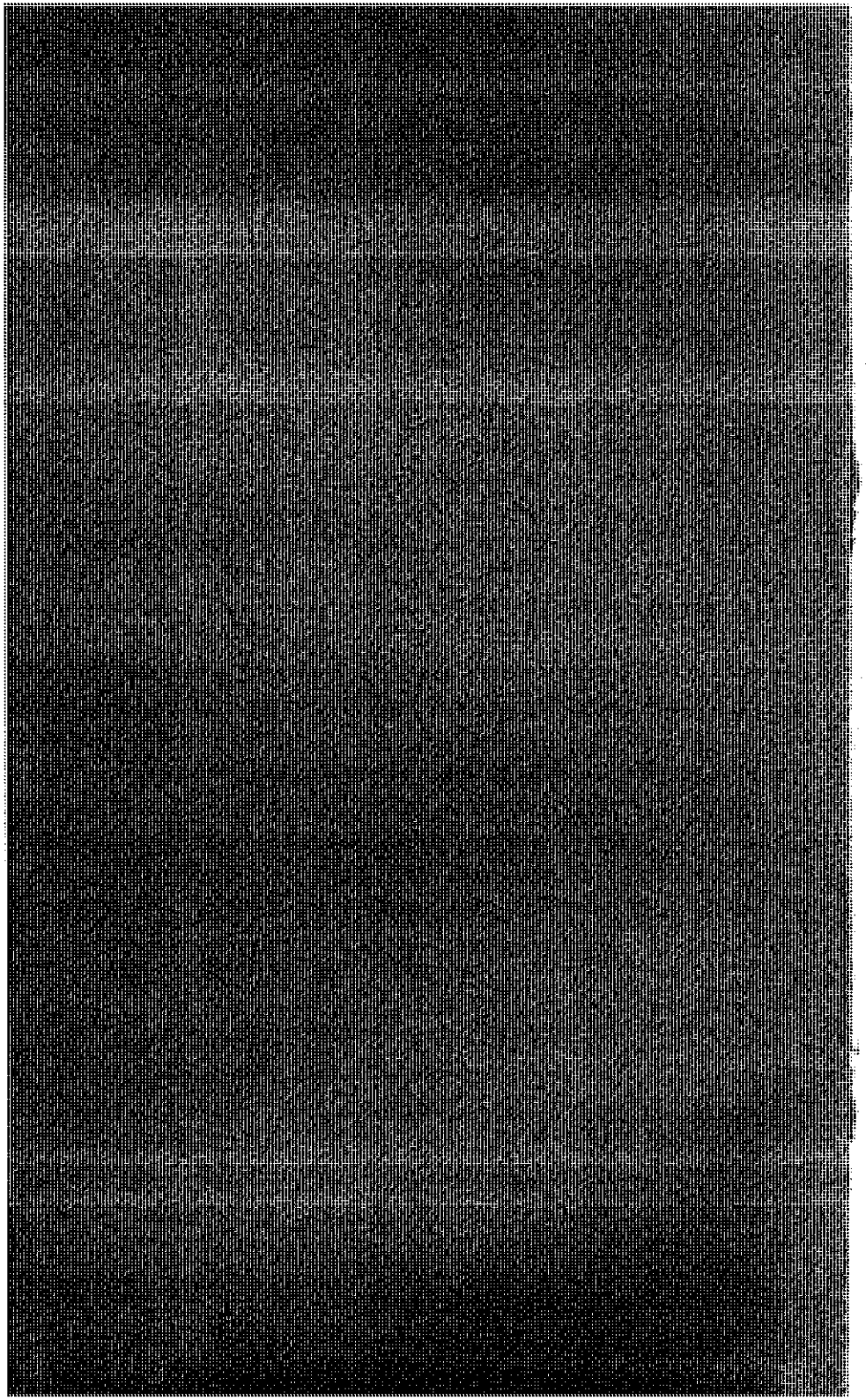

IDAHO STATE BAR COMMISSION

By_____, Secretary

PROCEEDINGS

of the

IDAHO STATE BAR

Volume X, 1934

TENTH ANNUAL MEETING

McCall, Idaho (Payette Lakes), July 12, 13 and 14

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—
JOHN W. GRAHAM, Twin Falls, Western Division .....1933—
WALTER H. ANDERSON, Eastern Division .....1934—

OFFICERS

JAMES F. AILSHIE, President
JOHN W. GRAHAM, Vice-President
SAM S. GRIFFIN, Secretary
212 Boise City Nat'l Bank Bldg., Boise, Idaho

The Idaho State Bar is organized pursuant to Sections 3-401—3-420, Idaho Code.

RULES governing admissions, conduct, discipline and general rules may be had on application to the Secretary.

ANNUAL LICENSE FEES ($5.00) are payable by all practicing attorneys to the State Treasurer prior to July 1, each year.

MEETINGS—Time and place of Northern and Western Divisions, and of Annual Meeting, in 1935 will be announced.

ELECTION of Commissioner, Northern Division, will be held in 1935.

Proceedings of the Annual Meeting of the Idaho State Bar

McCall, Idaho, July 12th, 13th and 14th, 1934.

President E. A. Owen: Gentlemen of the Bench and Bar: This is the time and place fixed by your Bar Commission for the annual meeting of the Idaho State Bar Association. There is every indication from the attendance that this is going to be a splendid meeting and a successful one. I believe that during the several years that I have been a member of the Bar Commission that this is the largest attendance we have had at the opening session.

The other day there came to my desk, and undoubtedly to yours, a pamphlet or treatise, if you please, on "Delegation of Power" written by our senior Senator. It had been my intention to write on that same subject and I had done some work on it. After reading the Senator's opinion, I decided that I would leave the field to him.

I am impelled by predeliction and partiality to make a few general remarks on the subject of constitutional government as we find it in this new era and as it affects present day problems. Understand me, I do not, for one moment, entertain even a remote presumption that what I say will be of any moment or serve any useful purpose. The reasoning of a country lawyer on such a profound subject, must, in the very nature of things, lack the proper background and perspective and for those, and various other reasons, fall far short of reaching the dignity of a logical and instructive dissertation that a student of the subject of constitutional law would deliver.

Tireless research in the limitless fields of constitutional law and political science, by those who presume to know, followed by reams of rhetoric thrown at the American people in articles, treatises, and almost countless volumes on these subjects, in all their different phases and ramifications, have left many of our public men and learned citizens in a quandary and others in a wilderness of doubt as to the efficiency and sufficiency of our national constitution. As a matter of fact, the average man, no matter in what state he may reside, as he goes about his daily tasks, thinks little of, and cares less about, the constitution. He does not think about it, and, therefore, does not realize or appreciate how constitutional government affects his property, his freedom, his life, his all. He simply passes it by. Should he, under all of the circumstances, be condemned for his attitude? Should he be criticized when there is such a diversity of opinion among those who think on these things. Since the few who attain exalted position and strut the stage of public life are confused, there is indecision. Indecision, want of settled and defined purpose, vacillation, or call it what you may, has brought us where we are. That indecision, unless it be completely overcome, will of its own force lead to naught but distrust and distrust in the minds of a free people is a dangerous and sometimes vicious thing. Striking and convincing proof of the truth of this statement may be found in the conditions that now obtain in some parts of Europe. So, during this period of stinging world depression and the consequent upward thrust of those primitive forces that make for distrust, jealousy, and violence, there must be an indomitable cour-

age and less confusion of thought among those who lead the way across the present slough of despond to those broad reaches of economic independence and national safety that will be reclaimed through a sane and reasonable adherence to the mandates of our constitution.

* * * * * * * *

True, the winds of adversity have swept away many of the institutions and instrumentalities that we have known and to which we thought we were permanently anchored. The old order changeth. It gives way to the new. That is at it should be. We must progress as a people and as a nation. Astounding changes have taken place in the life of this nation, within the past few years, evidenced by a different set-up in our economic organization, our political institutions, our social life, and our international relations. What is the meaning of all these changes? Have they resulted, will they result, in any well defined transformation in the spirit of the American people, in their interest in, and attitude toward, government, toward American traditions, toward each other and toward those individuals, who, for the time being, are responsible for the fortunes of America? Time, and time alone, will answer these questions. But we are reasonably certain of this, that to argue with these changes is to argue with the inevitable. We must, therefore, since we cannot prevent them, and would not if we could, prepare to direct their course, and master them, and they are bound to affect the form and conditions of our lives as citizens for many years to come. It becomes the duty of every member of the legal profession to assume the responsibility of disinterested leadership to try to correctly interpret their meaning. And it likewise becomes the duty of the members of the bar of this country not to approve or countenance sudden innovations in our government. They are neither desired or needed. We must understand and remember that stability does not come by way of innovations. Stability is the very slow result of well directed growth. Innovations and theory have their place but that place is not in government. Tradition and experience are the greatest allies of permanence and stability in our government and in our American institutions. Only those changes which come from calm reflection on the experiences, the ideals, the traditions that have made America great, will stand the test and dispel all doubt.

* * * * * * * *

America is a pioneer in the realm of democracy. The real pioneer should take no chance. He should proceed with caution. He must chart his course. America is still in the pioneer stage of government. One hundred and fifty years of successful pioneering in democracy is our record thus far. America, so to speak, stands at the threshold of a greater existence in a world that has of late discarded the mandates of democracy. We are in it and part of it. What the rest of the world thinks finds lodgment in our reasoning. What the rest of the world does affects us as a nation. What it says with reference to government, to constitutional law, political science, social reform, class conflicts, racial differences and economic problems and a thousand other things, is in a measure reflected in our national life. Are we, by being in that world and a part of it, to absorb its traits that run counter to our democratic traditions and way of thinkiug and doing things and thus thwart the

will of our forefathers and the true destiny of our nation? Are we, as a nation, to absorb and succumb to the wiles of facism and isms of like tenor or are we as a nation, under the constitution, to make it evident to a doubting world that a government of the people, by the people, and for the people, is the one solution and cure for its ills.

* * * * * * * *

Let us do nothing that will obstruct the vision on the constitutional highway traversed by the vehicles of national and state governments. And let there be no detours on this constitutional highway traveled by those vehicles of national and state government. No judicial interpretation detours based on fallacious reasoning. Such detours lead to dangerous ends and to unbridged streams that traverse this constitutional highway and slowly undermine its meaning and purposes. It is quite reasonable to assume that these judicial detours can, in a very great measure, be avoided by more careful application and less inclination to follow personal predisposition.

Then those detours of executive caprice and fancy prompted by ulterior motives such as appeal to popular acclaim are particularly insidious. Executive acts not based on sound reasoning and without constitutional sanction or authority. Executive pardons that tend to discredit our courts. Executive proclamations and promises, founded on political expediency, that have no foundation in law.

It would almost seem that executive ingenuity is inexhaustible when it comes to devising ways and means of trespassing upon the judicial and legislative domains. Such practice cannot be too severely condemned.

And we are not without legislative detours. These are so common and so conspicuous that comment on them is unnecessary. These legislative detours from the constitutional highway are becoming longer and more troublesome because they have, in many instances, the backing of respectable public opinion. It is to the lasting credit of our Senior Senator that he is leading the fight against the delegation of powers by our national legislature. Serious consideration should be given these questions by the legal fraternity. Up to the present time, thanks to the sound reasoning and fortitude of those who have not succumbed to the whims of the moment the vehicles of national and state government have therefore come back to the hard surfaced highway of constitutional law.

We must adhere to the Constitution, that instrument made immortal by its own virtues and harmonized by the work of its authors and that great body of highly intelligent and altruistic members of the legal profession, on and off the bench, who have correctly interpreted its meaning and fathomed its purposes in keeping with the increasing demands of an ever changing social order.

It has met all conditions in our national life and it will continue to meet all sorts of intricate and complex questions as they press for solution under a sane, safe and reasonable interpretation thereof.

A strategic position is held by the legal profession in the life of the nation. It is the one class that should maintain a solid front against radical and revolutionary forces in any assault upon the Constitution, no matter from what section that assault may come. The Constitution must be upheld in any event. It is sufficient to meet the needs of our people. We need not be

alarmed at the cry of those who would exhort us to go back to the Constitution. We do not have to go back to the Constitution. The Constitution is with us. Or if it is not with us, it is ahead of us waiting for us to catch up.

It is my admonition that we follow the advice of one of those men in Biblical history who said "Prove all things and hold fast that which is good." We should hold fast to the Constitution. I thank you.

If you have not read that article by Senator Borah you should read it on "Delegation of Legislative Powers." It was written after a great deal of thought and investigation and consideration of the subject.

Gentlemen of the Bar, the Commission has heretofore, in order to expedite matters, seen fit to appoint a Resolution Committee consisting of Mr. Oversmith of Moscow, Mr. Nixon of Boise and Mr. Merrill of Pocatello. This Resolutions Committee will report during the meeting and then the meeting will be thrown open for discussion of the resolutions they submit.

The Committee for canvassing the election for Commissioner of the Eastern Division is as follows:

E. B. Smith, Boise,
William Dunbar, Boise,
Harry Hanley, Grangeville.

I think it would be advisable to defer appointment of the Legislative Committee until after the Resolution Committee has reported and we know just what we have in mind in the way of recommendations to the next session of the state legislature.

We will hear the report of the Secretary at this time.

SECRETARY'S REPORT

In addition to office and traveling time, members of the Board, E. A. Owen, President, James F. Ailshie, Vice-President, and John W. Graham, spent a busy seventeen days in the seven Board meetings held since the last report. The outline which can be given in this report does not adequately picture the amount of work required in the disposition of matters before the Board.

To say that 20 formal complaints against Idaho attorneys were considered and dealt with, by dismissing 10, holding trials in two, reviewing three, of which one resulted in disbarment, that three are pending hearings before the Supreme Court or Committees and three are being further investigated, does not at all represent the work of the separate private investigation of each, discussion and determination of action to be taken, appointment of committees to prosecute and hear actions ordered, trial, in two instances, before the Board itself, review of the records and transcripts where committees have acted, etc.

The Board itself heard two trials, in one of which an accounting between attorney and client was directed (subject to the Supreme Court's review and affirmance not yet had) and the other a recommendation of suspension; trials before committees were reviewed in three cases, resulting in final dismissal in two, and recommendation of disbarment, concurred in by the Supreme Court, of H. K. Lewis, formerly of Hailey, Idaho, who was found to have collected insurance belonging to his children upon their mother's death, through the use of a false, forged certified copy of his purported, but untrue, appointment as his children's guardian.

The Board recommended suspension of two attorneys for nonpayment of license fees. Forty-eight complaints for nonpayment had been filed, after which all paid up with costs and were dismissed except two, who, after judgment, were reinstated upon payment.

In this connection it is suggested that, as six full months are allowed for payment of annual license fees, the Board should not be required to take formal action, with attendant expense, time and delay, but the statute and rules, which already make it a contempt to practice without payment, be changed so that the Supreme Court always have a list of licensed attorneys by having fees paid through the Clerk of that Court, and that each District Court be furnished with a list of qualified attorneys who have paid on or before July 1st, each year, and refuse to recognize attorneys who have not so qualified.

Two applicants were admitted on certificate from other states; one, who has applied is being further investigated. Of 24 applications for examination, three were rejected before examination. Seven were examined in December, 1933, of whom four passed and three failed; 17 (including the three failed previously) were examined in June, 1934, all of whom passed.

Here again statistics fail to reflect the work of investigating applicants, preparing questions, and grading the papers of two examinations of three days each in length, held at Boise and Moscow.

Considerable investigation has been had of illegal practice of law by Justices of the Peace, collectors, bankers, realtors and foreign non-licensed attorneys. In this the attorneys of the State should advise the Board of instances and evidence so that proper action can be taken to protect the Bar, the Courts and the public. The Board has advised two Probate Judges that in its opinion such judges may refuse to file papers presented by unlicensed foreign attorneys, acting as such; a contempt proceeding has been filed, and is now pending, in the Supreme Court, against a layman who has conducted and charged for services in, probate proceedings, drawing wills, examining abstracts, etc. The Bankers Association has also been contacted and advised as to the law.

The gathering of judicial statistics by the Judicial Council has been continued and financed by the Bar. The work of the Council has been held up pending resubmission to the next legislature of the statutes, redistricting and reorganizing the court system, which have heretofore received the approval of the Bar at previous meetings.

1933 Proceedings of the Bar were published as the November, 1933, issue of the Idaho Law Journal, which has temporarily suspended for lack of financial support. It is to be hoped that this most excellent legal publication, ably edited by the faculty of the College of Law, University of Idaho, and treating of many practical Idaho problems, can be reestablished.

Plans for this meeting have been discussed by the Board since last December. An innovation, suggested by the 1933 meeting, is the convening at a summer resort, instead of in one of the larger centers. The attendance to be had, and the response of the Bar, will determine whether it is a success. Suggestions and criticisms of members will not only be welcomed, but are solicited.

The financial statement would appear to indicate a considerable decrease in expenses; such decrease is in part due to inactivity of the Judicial Council,

and to the fact that expenses in recent disciplinary proceedings have not yet been paid from the appropriation.

APPROPRIATION

Balance June 24, 1933	$3,030.15
Receipts	3,208.00
	$6,238.15

EXPENDITURES

Secretary's office		
Salaries	$975.00	
Stenographer	15.00	
Supplies, stamps, etc	181.09	$1,171.09
Travel expense		586.86
Meetings		66.45
Publication 1933 Proceedings		313.00
Examinations		21.87
Judicial Council		16.50
Discipline		45.12
		$2,220.89
Balance in appropriation July 1, 1934		$4,017.26

LICENSED ATTORNEYS

	1931	1932	1933	June 30 1934
Northern Division	137	131	126	126
Eastern Division	138	125	131	127
Western Division	269	277	277	277
Out of State	26	28	21	21
	570	561	555	551

The following have been reported as deceased since the last annual meeting:

Gardner G. Adams, Boise
Edgar L. Ashton, Twin Falls
James E. Babb, Lewiston
T. C. Coffin, Pocatello
Robert M. McCracken, Boise
H. S. MacMartin, Boise
John W. Peter, Pocatello
Joseph H. Peterson, Pocatello
Calvin D. Phibbs, Rupert
H. R. Smith, Moscow
Alfred F. Stone, Caldwell.

Respectfully submitted,

SAM S. GRIFFIN,
Secretary.

PRESIDENT: You have heard the reading of the report of the Secretary. What is your pleasure?

MR. HAWLEY: I move it be referred to the Resolution Committee for consideration. Motion seconded and carried.

PRESIDENT: The next matter for consideration is the report of divisions. The report of the Commissioner for the Western Division is first. Mr. Graham have you anything to say?

MR. GRAHAM: Owing to the fact that the division did not hold any special meeting, we have nothing special to report. The Commissioners felt that one annual meeting for all reports would be more satisfactory than a division meeting and we dispensed with them last year.

PRESIDENT: The same report might be made with reference to the Eastern Division. The Board of Commissioners having heretofore considered the matter thoroughly from all angles, decided that these division meetings should not be held.

We will at this time listen to Judge Koelsch on "The Speeding Up of Trials of Criminal Cases." Gentlemen of the Bar, Judge Koelsch of Boise.

JUDGE KOELSCH: Since I wrote my paper my attention was called to an article some of you may have read on Defense in Criminal Cases. You will notice if you have read it, that there are certain affirmative defenses of which the defendant should be required to notify the court in advance. In California, by statute, if the defendant intends to make insanity his defense, he must enter such plea when arraigned. He can enter five pleas but the two that are usually entered are "not guilty" and "not guilty by reason of insanity." If these two are both entered, then the plea of "not guilty" is first tried out. If he enters a plea "not guilty by reason of insanity" then that question is tried out and not the other. It was interesting to me to note that the first case that came up was the Hickman case and the man confessed the killing and the only plea entered was "not guilty by reason of insanity." When the case came up for trial, the Prosecuting Attorney had the indictment read and the plea of the defendant stated and then rested its case. Then it was up to the defendant to produce evidence to show he was insane, and the state had to meet that question.

When the Board of Commissioners of the Idaho State Bar asked me to take part in the program of this meeting, they assigned as the subject of my discussion "The Speeding Up and Improvement of Criminal Proceedings."

I thought then the subject was a rather circumscribed one, and one that required but little time in its preparation or in its presentation here today. When, however, a few days ago the actual printed program came to my hands, I found that my subject was even further restricted. You will notice, that as therein stated I am to talk merely on "The Speeding Up of Trials of Criminal Cases." I shall not confine my discussion to the restricted subject. I do not upon two main grounds:

I do not believe that under existing law, and under prevailing practice, our trial courts are justly subject to the criticism that they are too slow. I will admit that in some minor details the actual trial of criminal cases can be speeded up somewhat, and I shall submit several proposals which in my judgment would expedite the actual trial of criminal cases. But I do not

at all concede that there is any just ground for the popular criticism that the delay in bringing criminals to justice, is at the basis of the prevalent disrespect for the law. I am well aware that no less an authority than the late Chief Justice Taft said that the administration of our criminal laws is a disgrace, and this, mainly because of the long delays in bringing those charged with crime to trial, and the long delays in punishing those actually convicted of crime.

When Judge Taft said this he cannot have had in mind the administration of the criminal laws of Idaho, unless he referred to the too liberal policy of pardoning boards.

So far as the procedure in and through the courts of this State is concerned, I unhesitatingly say that the animadversion is not pertinent.

I am not going to support this statement with burdensome statistics, any more than to say that the records of the several District Courts of this State show how a delay properly chargeable to the Court, of more than 60 days between the apprehension of the one charged with crime and the trial of the charge, is the exception rather than the rule. My subject confines my discussion to delays in the trial courts. Were I to discuss the question of appeals from the trial or District Courts to the Supreme Court, I should be trespassing upon a subject also upon this program that will be presented by Hon. Raymond L. Givens of the Supreme Court. My opinion is that he, too, will show that under our laws concerning criminal appeals and their administration by the Courts undue delays are infrequent.

Investigation, I think, will disclose that the cases in which the delays properly ascribed to the courts in bringing one charged with crime to trial, have occurred, were cases in some of our outlying counties in which the interim between terms of court are unavoidably long.

All in all, I think it may well be said that only in exceptional cases are the delays in the trial courts in this State greater or longer than a fair time to enable the defendant to prepare his defense, and the State to properly investigate the charge.

In Owyhee county last year, a murder was committed on August 6th, and on October 6th following, the defendant entered the penitentiary to serve a life sentence for first degree murder.

In Ada county, on April 17, 1932, a hit-and-run automobile killed a 16 year old girl. The case baffled the best efforts of our officers for over two years. On May 4, 1934, the grand jury returned an indictment against three defendants, who were brought to trial on June 11th. The jury having disagreed, a second trial was commenced on June 27th, and ended by acquittal, on July 1st.

To have brought these cases to trial any sooner would have handicaped both prosecution and defense.

These are but illustrations of what will be found the usual records in the Districts Courts of the State, and I am unable to sugest any change in either statutory laws or rules of court that would or could bring about sooner trial or shorter delays.

But, as already stated, I do have in mind certain changes that in my judgment could and ought to be made in the actual trial of criminal cases.

Some of them are proposals of changes in procedure, while others involve amendments to substantive laws governing such trials.

Under the constitution and statutes of this State, we retain the two

methods of preferring charges for crime, that is: by indictment by grand jury, and by information by the prosecuting attorney after a preliminary examination before a magistrate.

It would be without the scope of the topic assigned me for presentation here today, to discuss the relative merits of the two methods of procedure, and I will only say that in my judgment the State is wise to retain both methods. The calling of a grand jury at intervals has many far-reaching, beneficient effects.

ENDORSEMENT OF NAMES

There is, however, one requirement of our statutes pertinent both to indictments and to informations, that I think should be changed. I refer to the requirement that the names of witnesses be endorsed on the indictment returned by the grand jury, and on the information filed by the prosecuting attorney. (Secs. 19-.304 and 19-1202.)

In the case of State vs. Barber, 13 Idaho, 65, 88 Pac. 418, our Supreme Court went so far as to construe this statute to mean that the state had to endorse the names of witnesses it expected to use in rebuttal. However, in the case of State vs. Silva, 21 Idaho, 247, 120 Pac. 835, it receded from this position and held it unnecessary to endorse such names on the information.

The requirement to endorse the names of witnesses on an indictment is entirely of statutory origination, such procedure not being necessary under the common law (16 C. J. 795), though it must be admitted that most, if not all of the states, do now have statutes so requiring.

The chief, perhaps the only argument in favor of this compulsory endorsement of the names of the State's witnesses, is that it prevents taking the defense by surprise, an argument that is not very cogent with me. In 99 out of every 100 cases I dare say that the defendant knows what he has to meet and the witnesses whom he has to face. This is true be he ever so innocent of the charges against him. Moreover, as a practical question, requiring the state to expose the names of its witnesses does not inform the defendant of what such witnesses are going to testify to. If, as is often, if not generally the case, these witnesses will not talk to the defendant or to his attorneys, there is no power lodged anywhere to make them talk until they are placed on the witness stand.

In my humble opinion, the requirement that the state must expose the witnesses by whom it expects to prove the charge, is valuable mainly to the unscrupulous defendant. It enables him to tamper with witnesses that are vulnerable either to threats or bribery; or, if these methods do not succeed, then to commit subornation of perjury. Perhaps it will be said that there often are witnesses on the part of the state who, out of motives of revenge, or to shield themselves, will commit perjury. But it is just such witnesses who will not talk to the defendant or his counsel, other than from the witness stand. I do not believe that the doing away with this requirement of our statute, that the state must in advance of a trial, notify the defendant of the names of all of the witnesses by whom it expects to establish the charge, would work a hardship or an injustice in any case.

But, if the argument in favor of this requirement of the statute be deemed to outweigh the arguments against it, why not, within certain limitations, require the same on the part of the defendant? Will it be answered that

that would be on a par with requiring the state to endorse the names of those witnesses that it expects to use in rebuttal?

Rare instances might happen when such a result would follow. If it does, the trial court can always take care that no injustice is done, by granting a delay, or a continuance.

I said that this requirement on the part of the defendant should be within certain limitations. It surely would not be demanding too much to require that if he has what may be termed an affirmative defense, that he notify the state in advance of such proposed defense and of the names of the witnesses by whom he expects to establish such a defense.

Thus, there are now a number of states that require, when the defendant expects to urge an alibi as his defense, that he submit in advance of the trial the names of his witnesses to such alibi. (Ohio and Michigan.)

VOIR DIRE EXAMINATION OF JURORS

As conducted in the several District Courts of this state, I do not know of any step or procedure so prolific of waste of time as the so-called voir dire examination of jurors. After the state has elicited from the prospective juror a veritable biography, and asked him a catechism of questions, the defendant proceeds to cover the same ground and to repeat the same questions.

Our statutes are silent as to who is to do the questioning on voir dire, but in the case of State vs. O'Neil, 24 Idaho, 582, the Supreme Court says: "The law requires counsel for the defendant in selecting a juror to try diligently to ascertain his state of mind and his qualification as a juror. If he neglects to do so, the defendant cannot complain after the trial."

Prior to 1927 the California Penal Code was equally silent with our Code as to who should examine jurors upon their voir dire. In that year they amended Sec. 1078, so as to read as follows:

> "It shall be the duty of the trial court to examine the prospective jurors to select a fair and impartial jury. He shall permit reasonable examination of prospective jurors by counsel for the people and for the defendant."

Within a year after the adoption of this amendment the question whether the trial court had unreasonably restricted such examination by counsel for the defendant, was before the Supreme Court of that state; and, though the case was not reversed, the trial court's action was held erroneous, as being too strict. (People vs. Coen, 271 Pac. 1074.) (See also, 35 C. J. 397.)

So, whether a statute of that kind woull really be an improvement over the existing practice in our courts, is a question that may be profitably discussed by this convention. It must be conceded that a great deal of time is wasted in impanelling juries. Hardly a criminal case that is hotly contested, in which a full day is not consumed in the selection of a jury; sometimes no more time is consumed in the rest of the trial.

COMMENT ON DEFENDANT'S FAILURE TO TESTIFY

The next point that I shall discuss comes not under the head of speeding up trials, but under the license given me to propose improvement in trials.

I believe that the prosecuting attorney should be permitted to comment on the failure of a defendant to take the witness stand and testify.

I know that this proposal will arouse a storm of debate, one of the very purposes I have in proposing it here today. Do not misunderstand me. I

do not propose this amendment to our laws merely to stir up a debate. I do it because I believe in it, and am convinced that it would be an improvement of the trial of a criminal case, and a weapon for the promotion of justice.

Under the common law, as is well known, one accused of crime was incompetent as a witness on the trial of the charge against him. Under that condition of the law, it was and would be, eminently unfair to comment on his failure to take the witness stand.

The disqualification of an accused to be a witness in his own behalf was in consonance with the rule prevailing as well in civil cases where not only the parties to an action, but witnesses who were interested therein in a material way, were disqualified as witnesses.

This disqualification of parties to civil actions, and witnesses interested therein, was early removed by statutes similar to our Sec. 16-201 I.C.A., which provides that "All persons, without exception otherwise than is specified in the next two sections, who, having organs of sense, can perceive, and perceiving, can make known their perceptions to others, may be witnesses. Therefore neither parties nor other persons who have an interest in the event of an action or proceeding, are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although in every case the credibility of the witness may be drawn in question, by the manner in which he testified, by the character of his testimony, or by evidence affecting his character for truth, honesty or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility."

Sweeping and broad though the provisions are, it seems that there still remained some doubt whether it enabled an accused in a criminal case to be a witness in his own behalf.

The above-quoted section of our statute was found in the old Practice Act of California enacted long prior to 1866. Yet, in 1872 the legislature of that state enacted a statute providing that "The rules for determining the competency of witnesses in civil actions are applicable also to criminal actions and proceedings, except as otherwise provided in this Code."

Kerr's Penal Code, Cal., Sec. 1321.

The same session of the legislature, and as part of the same act, also enacted the statute now found in most of the states of the Union, namely (Kerr's Penal Code, Sec. 1323):

> "A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but if he offer himself as a witness he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief. His neglect or refusal to be a witness cannot in any manner prejudice him nor be used against him on the trial or proceeding."

Wigmore, in his work on Evidence (Vol. 1, p. 709) says:

> "The competency of accused persons was first declared in Maine, in 1864, and was not finally reached in England until 1898; it now remains unaccomplished in Georgia only."

But it appears that in the old Idaho Criminal Practice Act of 1864, there appeared a section somewhat similar to the California statute, to-wit:

> "A defendant in a criminal action or proceeding to which he is a party, is not, without his consent, a competent witness for or against himself. His neglect or refusal to give such consent shall not in any

manner prejudice him nor be used against him on the trial or proceeding."

This was Sec. 12 of the Criminal Practice Act of 1864, later incorporated as Section 8143 of the Revised Statutes, and is now Section 19-2903 of the Idaho Code Annotated.

Whether this statute antedates the Maine statute mentioned by Wigmore I was unable to determine. And, as near as I am able to find out, the Maine statute, like the early statutes on this subject in many of the other states, did not include therein the provision that the failure of the defendant to take the witness stand should not and could not be used against him.

Where such is the case, that is, "Where the statutes permit an indicted person to become a witness in his own behalf, and do not provide that his failure to offer himself shall not raise any presumption against him, or do not forbid an allusion to such failure by counsel, accused's failure to offer himself as a witness in regard to matters which may be disproved by him may be commented on by the prosecuting attorney."

16 C. J. 901, Sec. 2247.

Thus, in the state of New Jersey, their statute merely removed the disqualification of the accused as a witness and simply admitted him to testify in his own behalf if he offered himself for that purpose.

In the case of Parker vs. State (N.J.L.), 39 Atl. 651, the Supreme Court of that state ruled that such comment was permissible. The court reasoned on a parallel with the generally accepted rule that evidence is admissible of extrajudicial accusations made in the presence of the defendant and to which he made no denial. Such evidence is admissible not as direct evidence against him, but as showing acquiescence therein by silence, when, if they were not true, he would naturally speak. And the court proceeds: ". . . when the accused is upon trial, and the evidence tends to establish facts which, if true, would be conclusive of his guilt of the charge against him, and he can disprove them by his own oath as a witness if the facts be not true, then his silence would justify a strong inference that he could not deny the charges. Such inference is natural and irresistable."

As already stated, the great majority, if not all of the states of the Union, by this time have statutes, not only making an accused a competent witness in his own behalf, but providing that if he does not avail himself of this right to be a witness, such failure shall not be used against him, and the Prosecuting Attorney shall not comment thereon.

The reasons for this tender regard for the defendant in a criminal case are variously stated.

In an early California case the court says:

> "The policy of such a statute has been considerably discussed by law writers and others, and, to our minds, the strongest objection that has been urged against it, is, that it places a party charged with crime in an embarassing position; that, even when innocent, a party upon trial upon a charge for some grave offense may not be in a fit state of mind to testify advantageously to the truth even, and yet if he should decline to go upon the stand as a witness, the jury would, from this fact, inevitably draw an inference unfavorable to him, and thus he would be compelled, against the humane spirit of the law, to furnish evidence against himself, negatively at least, by his silence, or take the risk, under the excitement incident to his position, of doing worse, by going upon the stand and giving positive testimony."

Similar reasons for adding to statutes making the accused in criminal cases competent witnesses, the safe-guard that if such an accused failed to avail himself of this statutory habilitation, such failure was not to be used against him, were advanced by the great Justice Field, in Wilson vs. U. S., 149 U. S. 60, 37 Law Ed. 650.

Said Justice Field: "But the act (removing the disqualification) was framed with a due regard also for those who might prefer to rely upon the presumption of innocence which the law gives to every one, and not wish to be witnesses. It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarass him to such a degree as to increase, rather than remove prejudices against him. The statute, in tenderness to the weakness of those who from the causes mentioned might refuse to ask to be a witness, particularly when they may have been in some degree compromised by their association with others, declares that the failure of the defendant in a criminal action to request to be a witness shall not create any presumption against him."

This was written by Justice Field in 1893—only yesterday, as it were, in the slow evolution of the law.

In spite of that, I give it as my humble opinion that the experience of the last 25 years has demonstrated that the statute has been the shield behind which more guilty defendants have made their get-away than any other single provision of the criminal law, unless it be the modern definition of reasonable doubt.

I say with the greatest deference of that justly noted Judge, that the reasoning employed by Justice Field in interpreting that statute, is fallacious. A man unjustly accused of crime may be too timid to answer his tormentors when subjected to the third degree; but in the court room where he has the guidance of his counsel and the protection of the Judge, the most unsophisticated school girl is not too timid or nervous to speak up when unjustly accused. The consciousness of innocence gives strength to the weakest and courage to the most timid. Was it not St. Paul who said that "the individual clothed in righteousness shall withstand the multitude?"

Thomas S. Rice, associate editor of "The Panel," and one of the country's leading students and writers on criminology, says: "The right to remain mute and defy the police, prosecutor, judge and jurors, after which the judge must warn the jury that the muteness of the accused is not to be counted against him, is the greatest single stumbling block to justice under the American flag."

The argument has been advanced to me that to repeal this protecting part of the statute would work a hardship on a defendant innocent of the instant charge against him, but who had theretofore been once convicted of a felony; that if he took the stand the state, under the statute allowing him to be impeached by showing that he had been convicted of a felony, would, under the right to impeach his credibility, bring before the jury the fact that he had once before been convicted, with the attendant prejudice.

It may be that there is some weight to this argument, and, rare though such cases necessarily are, there should be some limitation or safeguard in order to avoid working an injustice.

My suggestion to meet such situations, infrequent though they are, would

be to do away with the right to impeach an accused by showing that he had once been convicted of a felony, except perhaps in the single instance of a prior conviction for perjury. I see no logic or reason in the statute which says that conviction of felony is necessarily an impeachment of credibility. If I had my way I would not permit it against any witness, except, as stated, if such conviction had been upon a charge of perjury.

Be that as it may, I am convinced that the right on the part of the prosecuting attorney to comment on the failure of an accused to take the witness stand, is a right that need not be feared by the innocent, and would be a powerful weapon for the furtherance of justice.

There are other steps in our criminal procedure that, in my judgment, could and should be improved. Among such, if I had the time, I would like to discuss "Instructions to the Jury," "The Number of Preemptory Challenges," and "The Unanimous Verdict."

But because of the shortness of time I must content myself with their mere mention. Those that I have discussed, and am advocating, are not a great departure from our prevailing laws; they are not drastic innovations. I believe, however, not only that they would constitute improvements in our present trials of criminal cases, but that they are urgently necessary.

That something must be done to so improve our criminal laws is implied from the subject assigned me here today, and is demanded by the people of this country. Invidious comparisons are constantly made between the administration of our criminal laws and the administration of the criminal laws of foreign countries, particularly those of England; miscarriages of justice here are so frequent; crime is so much on the increase, that it should enlist the quick, sincere and devoted efforts of our best lawyers to seek the causes and to remedy, if possible, the ugly situation.

I submit the few suggestions I have made, asking only that you give them such consideration as they may merit.

Instructions to juries I think are altogether too long. We generally write a text book on law in a jury trial and expect twelve men, untrained in the law, to assimilate it in the short time given a jury to determine their case. I thank you.

PRESIDENT: Surely the able paper delivered by Judge Koelsch will provoke some discussion on the suggestions he has made to the members of the Bar. This meeting is open for discussion of any point submitted by the Judge in his paper.

MR. OVERSMITH: Regarding the first suggestion that the court be permitted to examine the jury on voir dire, I am afraid I will have to disagree. In some cases it would be proper for the court to make that examination but in other cases it wouldn't. Take our complicated statute with reference to accomplices. The instructions of the court to the jury with reference to accomplices are easy enough for a lawyer to understand but not for the ordinary citizen. I recall defending a man where the main testimony in the case was given by two accomplices. In examining the jury I went into the question of accomplices very thoroughly. I found I had to go into the voir dire examination to educate the jury on the law in the matter and what the court's instructions would be. One man, intelligent, formerly a Land Commissioner of the State, I asked, "Would you, if you were chosen as a

juryman in this case, vote not guilty in the event that the only testimony against this man was the testimony of the two accomplices and you were convinced beyond a reasonable doubt from their testimony solely that the man was guilty but their testimony was not corroborated?" and he said he would have to vote "guilty" under those circumstances. The Court tried to explain but he said if he was chosen as a juryman in the case and there was no testimony except the accomplices, he would not vote "not guilty." He wouldn't follow the instructions of the court because he didn't think they ought to be the law. That case gave me a definite idea that I would be opposed to any legislation giving the court the exclusive examination of the jury on voir dire. In a state like this we don't need so many changes in our criminal law to meet the ever popular opinion that crime is on the increase in our big states. We haven't gangs of criminals out here like we have in the big cities; if we had there might be some excuse for changing our criminal laws. What we need most is a tightening up of our political system that allows those things to exist in the large cities.

JUDGE MORGAN: With respect to the second suggestion which Judge Koelsch made, having to do with placing the names of witnesses on the information or indictment, or, if that be abolished, the disclosure of the names of witnesses by which the defense expects to establish any affirmative defense, I might say that I would prefer the latter one to the former. I am of the opinion that no harm is done and much good may be accomplished if counsel on both sides have as full information with respect to a case as it is possible for him to get. Judge Steele who presided over the Second District for many years, frequently told witnesses it was their duty, as citizens, to give such information as they knew about the case to both attorneys for the plaintiff and defendant, in order that these lawyers might properly discharge their duty. It is a good thing. All of us here know that, generally speaking, lawyers run pretty high in the average of human honesty and decency. They are not very prone to suborn perjury. They are looking for the truth of the matter. If we require names of state witnesses to be endorsed on the indictment and information, I cannot see why it is not a good rule to require the giving of names of witnesses by whom the defendant expects to establish his defense. If we are to keep the attorney for the defense in the dark as to witnesses, the information or indictment reasonably ought to be made more specific and not one-sided, and particularly in manslaughter cases. For instance, where the act of killing is the mismanagement of an automobile. The indictment alleges that on or about such and such a day in a certain county the man did feloneously kill, and you have charged him with manslaughter. It would charge every homicide since Cain killed Abel, with different dates and places. It doesn't say whether he scared him to death, ran over him, hit him or poisoned him. A man may have defective brakes; he may be entertaining a young lady in the seat with him or in any other manner be careless but you have no information and you can't find out from the indictment what the exact nature of the offense is nor get ready to meet it unless the indictment or information does specify the facts upon which the prosecution intends to rely to bring about the conviction of the defendant. He ought to be given the names of witnesses who are going to testify against him, for, in common honesty, the State of Idaho desires to bring about his conviction after a fair trial and this cannot be had of an innocent man unless he has this information.

MR. MARTIN: I disagree with the Honorable Justice. The Supreme Court has said in several cases, that the 17 words in a murder indictment and the 19 in a manslaughter case constitute a complaint which is proof against demurrer. However, I know in one county the Judges, if the complaint does not state any more than the seventeen or nineteen words sustains a demand of defendant's counsel for a Bill of Particulars. That has been done in our district and I think is generally followed elsewhere. Where there is any question in the defendant's mind with what he is being charged, on his application, the court will at its discretion give him a Bill of Particulars of the facts which generally he knows all too well. Judge Koelsch and I have talked his suggestions over for the last two years and I heartily agree with him that the judge could do the greater part of the examining on voir dire and do much toward speeding up the trial of the case. It may be that in some instances instructions or law upon which the instructions are based are so confusing a jury cannot understand them; in that case the attorney should be allowed to ask concerning those things. The general run of questions, as asking the juror if he will follow instructions, is absolutely absurd because if there is any institution upon which we have got to rely it is the fact a juror will follow the instructions of the court; if they don't we haven't any jury at all.

By endorsing the names of witnesses on the indictment, from a prosecuting attorney's standpoint, I feel the defendant is given an undue advantage in knowing the names of the witnesses. Much may be said on both sides of that, yet the only thing the defendant can gain by knowing the names of the witnesses is in knowing the character of the people who are to testify against him, because witnesses who have been examined and upon whose testimony an information or indictment is brought won't give that information to a defendant or his counsel. It seems no more than fair from a prosecuting attorney's standpoint that he should also know the facts from the defendant's witnesses—that he should have an opportunity of knowing the people who are to be put on the stand, so that if their character is bad he can tear that character down. There are lots of times when defense witnesses are put on, whose character we know, but to obtain proof of that character would take more time than the entire trial. The attorney has only the time between the adjournment of court in the afternoon and the next morning to find out what he can about the witnesses which have been put on and usually after the cross examination has been completed. The better thing would be to have both the witnesses for the prosecution and the defense endorsed though I can't see any real reason for endorsing any of them. It does not help anybody but only gives the defendant, who is entitled to a fair trial but no undue advantage, an advantage which is really a hindrance to the prosecution of criminal cases.

JUDGE MORGAN: The courts having found it necessary because of the vagueness of criminal pleadings to require a Bill of Particulars, for which there is no statutory authority, don't you think there should be amendment of the law to make it conform to the practice judges have found necessary?

MR. MARTIN: No.

JUDGE MORGAN: If a trial judge would refuse to grant a Bill of Particulars the Supreme Court would have to say the man wasn't entitled to it.

MR. MARTIN: They would probably do that. I think the Legislature should change that.

JUDGE MORGAN: I think so. We are agreed.

MR. HAWLEY: The address which Judge Koelsch gave was unusually thoughtful and had the real attribute of being interesting. There are points in it which struck me as particularly interesting; one was with reference to examination of jurors. If the statute permitted the Judge to examine the jurors that much time could be done away with, and then if the statute permitted the attorneys to supplement that examination I am quite sure you would find quite an improvement over the present condition. The court can ask the usual questions as well as the attorneys and I think it would be quite seldom that additional questions would have to be asked. We know pretty well whether we are going to take a man before we go into court. The second matter that interested me was the Judge's suggestion that there be taken from the defendant the right to sit mute. Many agree with him. There seems to be no good reason why the man who would know most about his whereabouts should be permitted to keep that knowledge away from the court. I have no doubt more convictions would be had if the defendant's failure to testify could be commented on. But you take the other side, the psychology of America at the time this particular right was granted. Is that still the psychology of America? It is merely an expression of mercy and I doubt if we, as lawyers, are the ones to say whether the American public is hard or merciful. It is a very fine thing in certain cases to permit a man to remain silent. I have in mind a man I defended on a banking charge who would have made a very, very poor witness because he was embarrassed by the fact he had done things in the bank which caused the community to lose money. He was a man who didn't appear in public and was embarrassed to face a jury not because of his guilt but simply because he was in a crowded court room. He would have presented the picture of a guilty man before an average man and yet he was not a guilty man. The mercy of America saved that man. I really believe the Judge has expressed one side of the picture and that is that there should be more convictions for crime. I am inclined to agree with him, but I wonder if you are not interfering with an individual's liberties or his rights when you provide he must testify on his trial or take the consequences.

FRIDAY, JULY 13th, 1934, 10:00 A. M.

PRESIDENT: We are going to hear an able address this morning delivered by one of the members of our Supreme Court, he having been assigned the subject "Contempt of Court" and in the event he says anything you take exception to we are right near the lake and you can throw him in it. I have the pleasure and honor at this time to introduce the Hon. William M. Morgan, Justice of the Supreme Court of Idaho. Judge Morgan:

JUDGE MORGAN: It is said in Black's Law Dictionary, page 416: "Contempt of court is committed by a person who does any act in willful contravention of its authority or dignity, or tending to impede or frustrate the administration of justice, or by one who, being under the court's authority as a party to a proceeding therein, willfully disobeys its lawful orders or fails to comply with an undertaking which he has given."

In 13 Corpus Juris, page 5, contempt of court is classified as direct, constructive, criminal, or civil. Direct contempt is therein defined to be "an open insult committed in the presence of the court to the person of the presiding judge, or a resistance or defiance in his presence to its powers or authority, or improper conduct so near to the court as to interrupt its proceedings," and constructive contempt, as "an act done, not in the presence of the court, but at a distance, which tends to belittle, to degrade, or to obstruct, interrupt, prevent, or embarrass the administration of justice."

Many acts have been, by statutes and decisions, declared to be contempt of court. However, my part in this discussion will be confined to contempt arising out of criticism of courts and judges thereof.

The purpose in promoting this discussion is to encourage, by the bar, the press and others, fair, fearless and constructive criticism of the work of judges. Probably no other branch of government is so in need of constructive criticism as is the judiciary, and certainly none has the benefit of less of it. This, I believe, is due to lack of understanding of the nature of contempt of court by the members of the legal profession as well as by the general public. The lack of exact knowledge as to what a judge may or might do to his critics has a prevailing influenee toward silence on the part of those who should and would be heard if they knew when they might speak with safety.

Idaho Constitution, art. 1, sec. 9, is as follows: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty." Any criticism which is calculated to, and tends toward, interference with or obstruction of justice is an abuse of the privilege of free speech and liberty of the press guaranteed by that section of the constitution.

In considering this subject two features must not be lost sight of: First, it is the duty of every one to refrain from conduct tending to obstruct justice and, therefore, criticism of a court, calculated to influence the disposition of litigation pending therein, is not permissible; second, judges have no more right to exemption from criticism than have other people, except with respect to matters in litigation pending before them.

Two cases on this subject are to be found in the Idaho Reports, which are outstanding. One is McDougall v. Sheridan, 23 Ida. 191, 128 Pac. 954. That case was the outgrowth of criticisms of the supreme court, published with respect to State ex rel Spofford v. Gifford, 22 Ida. 613, 126 Pac. 1060. The eighth section of the syllabus, which was by the court, is as follows:

> "Held, that the Spofford-Gifford case was pending until the 23d day of October, 1912, when the petition for rehearing was denied, and that many of said editorials and articles were published prior to that date, and that those published after said date were attached to said information simply to show the malicious and vicious intent of the defendants."

The eighteenth section of the syllabus reflects the views of the court, as follows:

> "The freest criticism of all decisions of the court is allowed and invited, but criticism ceases and contempt begins when malicious slander, villification and defamation bring the courts and the administration of the law into dishonor and disrepute among the people."

In a minority opinion, discussing the power of courts to punish for contempt, and pointing out that it is contempt of court and not of individual judges which is meant, Justice Ailshie said:

> "This power is not given to or assumed by courts for the protection of the judges. They as individuals have the same protection under both the civil and criminal laws that the law gives to every citizen. This power is conferred by the people themselves when they create courts, and is exercised by the courts as the constituted agencies of society for the preservation and efficient service of that department of government in order that the administration of justice as between litigants, on the one hand, and litigants and the people on the other hand, may not be embarrassed, delayed, impeded or swerved from the true course of law and justice by intimidation, charges or threats of any kind."

Justice Ailshie further said:

> "The debatable ground is reached when it comes to dealing with writings, utterances and publications concerning the acts and proceedings of courts and judges of courts. In that field there is a great diversity of opinion among the courts, lawyers and laymen as well... As I understand the law, it is well settled that to charge a court with venality or corruption in litigation then before the court constitutes contempt, for the reason that it embarrasses, impedes or tends to render more difficult and uncertain the administration of justice in that particular case. Judges are only men vested with the authority of the state for the time being, and they are human like other men. However honest, courageous and just they may be, they are still liable to be prejudiced, whether consciously or unconsciously, one way or the other by such utterances and publications. Again, I presume they, in common with most men, like to merit the esteem, confidence and goodwill of the people and community at large, and to threaten them in advance with the opposition and displeasure of an influential press if they decide a case in favor of a particular litigant, and that if they do so they will be charged and denounced as the tools of the criminal class, while it may in no way affect the final judgment in the case, does most assuredly place an added obstruction and impediment in the way of administering unprejudiced and unbiased judgment in that case. Such charges will constitute as much, if not more, of an obstruction and impediment in the administration of justice if made after a decision has been reached and while a petition for rehearing is pending. In such case, the petition should be examined and considered and passed upon deliberately and dispassionately. Does any reasonable person suppose for a moment that a court presided over by live human agencies can as easily, fairly and impartially consider an application for a rehearing and the arguments in favor of a reversal or modification of its previous judgment when at the same time it is laboring under the charge made broadcast that its original decision was entered through conspiracy and corruption of the judges, as it could consider such application if no such charges had been made? This proposition needs no argument with thinking people. What I have already said has reference to *charges of corruption* on the part of the court made through the press—it has no reference to *criticism* or *censure* of either the court or the judges of the court. Criticism, censure and protest are lawful."

That will be a correct statement of the law, as I understand it, if we add a clause to the last sentence making it read: "Criticism, censure and protest are lawful, *when the case which provokes them has been finally disposed of.*"

Poff v. Scales, 36 Ida. 762, 213 Pac. 1019, was an original proceeding in the supreme court for writ of prohibition against a district judge wherein it was sought to prevent the defendant, as such judge, from punishing plaintiffs for contempt of court because of charges made against him and others in a complaint for damages filed in his court. In the opinion, written by the late Justice Dunn, granting a peremptory writ of prohibition, it is said:

> "If the averments of this complaint were made in good faith in a belief that they were true, and were not couched in language that would be justly condemned in an action against one not a judge, then plaintiffs must be held to be simply exercising a right given them by law to bring their actions and have them passed upon by a competent tribunal. (Sec. 18, art. 1, State Constitution.) It is a matter of daily occurrence for parties to bring actions on the advice of counsel and to be sent out of court with a decision that they have no cause of action against the party sued. The parties sued in such cases have no legal cause to complain if their adversaries have only exercised in a proper manner the rights that the law gives them. The same rule must apply to a judge. There is nothing sacred about either trial or appellate judges."

In that case the court quoted from In re Pryor, 18 Kan. 72, written by Justice Brewer, afterward a famous justice of the Supreme Court of the United States, as follows:

> "It will be borne in mind that the remarks we have made apply only while the matters which give rise to the words or acts of the attorney are pending and undetermined. Other considerations apply after the matters have finally been determined, the orders signed, or the judgment entered. For no judge, and no court, high or low, is beyond the reach of public and individual criticism. After a case is disposed of, a court or judge has no power to compel the public, or any individual thereof, attorney or otherwise, to consider his rulings correct, his conduct proper, or even his integrity free from stain, or to punish for contempt any mere criticism or animadversion thereon, no matter how severe or unjust."

A studious investigation of this subject will disclose that anything published, or publicly spoken, derogatory to a court, in criticism of its conduct, or anticipated action, with respect to any matter then pending therein, is punishable as contempt; that criticisms of courts and judges, however severe, made with respect to matters which have been finally determined are not punishable as contempt. A defamatory statement with respect to a judge may become the subject of an action for libel or slander, the same as if made with respect to anyone else, but if it does not tend to obstruct or pervert justice, it is not contempt of court.

To the average layman the administration of justice borders on the mysterious and, at times, to his mind seems to take on some of the characteristics of a sleight of hand performance. When, as occasionally occurs, the decisions of a court are not what they should be, lawyers practicing therein know, better than laymen can, there has been a failure in the administration of justice and the reason for it.

There is a tendency on the part of citizens, generally, to venerate courts and their judges and to accept their rulings and decisions uncomplainingly. Whether public confidence in a judge produces good or evil depends upon whether or not he deserves it. If he is an able and worthy judge, that confidence tends to continue him in work the proper performance of which requires the very best efforts of the very best man available. If his work is tainted with dishonesty or lack of ability nothing is so efficient to protect the public from his maladministration of justice as is honest, fearless criticism of the manner in which he has performed his duties.

In the performance of the important duties which have been given our profession to perform, those who practice before the courts have as great a public obligation as do those who preside over them. It is the duty of judges and lawyers alike to see to it that only men of integrity and ability be permitted to practice the profession of the law, and it is the duty of lawyers and judges alike to see to it that only lawyers of the very highest type available be permitted to preside over the courts in the administration of justice. Whenever it is found that a lawyer or a judge is proving himself to be unworthy of his stewardship, it is our duty to the public to let that fact be known and, however disagreeable that duty may prove to be, it must be fearlessly performed, for our failure to do so will prove us to be unworthy of our stewardship.

Fortunately lawyers and judges, as a general rule, are men of high type and worthy. Unfortunately there are exceptions to this rule, and against these exceptions we must constantly be on guard. It is not to be expected that mistakes will never be made in the admission of applicants to the bar, nor is it to be expected that mistakes will not occasionally be made in the appointment or election of men to the bench. Care should be taken, in the first instance, in choosing those who are to be the ministers of the law, and it should be continuously exercised to the end that those who prove to be unworthy be promptly deprived of their powers.

No doubt there are those among us who, knowing they should speak, remain silent because of fear that criticism of a judge would make the one voicing it unpopular and result detrimentally to his clients. Whether this would be the result of honest, fearless, constructive criticism or not is beside the question. The profession of the law has no place for the man who will let his fears prevent the performance of his duty and Idaho has no room for him. The sooner such as are so afflicted with timidity depart from the borders of our state the better it will be for us, but the state of their adoption will have no occasion to celebrate their arrival.

A man who has sufficient education to enable him to find the law and who is studious enough to do so; who is sufficiently industrious and intelligent to properly apply it when he has found it, and honest and courageous enough to do that, possesses the necessary qualifications to be a useful lawyer. When he has demonstrated his abilities in these particulars, and has become a useful and dependable lawyer, worthy of the confidence of the members of his profession, he may well be made a judge. However, the appointment or election of a man to a judgeship does not improve his qualifications. You cannot make a big man of a little one by putting him in a big position; you cannot make an industrious man of an indolent one by placing work within his reach; you cannot make a wise man of a foolish one by giving him employment which requires the exercise of intelligence, and you cannot make an honest man of a crook by increasing his opportunities for the exercise of his crookedness.

Those who have won their way to positions in the legal profession where they command and enjoy the admiration and respect of their fellow practitioners are worthy of judgeships and are entitled to the honor such positions carry with them. Those who have not done so are unworthy and, if elevated to such positions, should receive the criticism which their misconduct in office will invite.

Where we are to go and what is to become of us in the work of our chosen profession is well stated in the rhyme relative to mankind in general:

"We came into this world naked and bare,
We will go through it with sorrow and care,
We will go out of it, God knows where,
But if we're thoroughbreds here we'll be
thoroughbreds there."

PRESIDENT: This speech of Judge Morgan ought, and no doubt will provoke some discussion. The meeting is now open for the general discussion on the subject of contempt of court.

MR. GRIFFIN: I think everybody is afraid to speak.

JUDGE AILSHIE: Nobody wants to be in contempt of court.

PRESIDENT: This is the first time I was in a crowd of lawyers who refused to talk. If the Judge has exhausted the subject and had the last word we will proceed.

MR. A. MORGAN: I am disposed to voice one protest and that was to the particular phrase in his address referring to judges as being human like other men.

MR. FRASER: What is the idea of the bar as to whether the judge should decide the contempt himself or refer it to somebody else, or should there be a jury trial?

JUDGE MORGAN: I have prepared myself only to discuss a very small part of this question, not on what the law should be but what it is. I don't know of any special law such as you suggest and I don't know any reason why there should not be. It strikes me Judge Ailshie was right when he wrote the minority opinion and referred to judges as human beings. He should not try a man whom he imagines injured him. I haven't given that any attention. I think I have a recollection of one or two Supreme Courts holding that a judge who has deemed himself insulted, should refer that to some other judge for final decision as a matter of policy rather than law.

MR. GRIFFIN: There is another consideration. If the conduct takes place in the presence of the court and jury and counsel and an audience it would not be very much of a vindication of the court's authority if he had to wait to get another judge in to determine if the man was in contempt of him. The effect of the punishment would be lost even if it was ultimately held to be contempt. The judge should uphold the authority of the court immediately, and should decide it rather summarily at that time.

MR. MARTIN: Isn't there a difference between contempt of court in the court room before the jury and spectators, and the other kind? Wouldn't there be a question whether the punishment should be summary or carried on later. If committed in the court room it should be summarily dealt with but wouldn't it be far better to have some other court try a case of contempt for violation of the court's orders where a judge has felt his authority had been taken in vain and he might have some personal feeling in the matter himself?

MR. MERRILL: It would seem to me there would be some distinction as between contempt of court as being a bar to the administration of justice and slander or libel of the judge of the court. In the latter event of course the matter should be tried by another judge. In the first instance the judge himself knows best whether or not justice has been impeded or if there has been any attempt to thwart the administration of justice and it is within his power to attend to that. If we take the definition of contempt as being impeding the administration of justice it should leave with the judge presiding the duty and obligation of punishing then and there.

MR. FEENEY: In my experience I can recall a single instance that would seem to indicate we have any matter for revision on this matter in Idaho. I think our judges have been of so high a character that there is not any pressing need for this association to discuss this as a practical matter in Idaho.

JUDGE MORGAN: I would like to suggest a discussion of Judge Koelsch's paper. I have noticed that a great many cases come to the Supreme Court involving instructions given by the district judges to the jury. If the instructions were submitted to counsel and they were required to specify the portions they objected to I think appeals might be obviated. I know in two or three cases, appeals would have been obviated during the eighteen months I have been on the bench this last time, if counsel had been told what the instructions were going to be and had objected to specific features of it. The Judge could take a half day and call counsel in and read the instructions to counsel and they could discuss the various instructions and the attorney who objects to some instructions could preserve it in the record. Very generally the court would correct it if it should be corrected. It seems to me it is fair and it would save considerable work on the part of the Supreme Court and what is more important, a good deal of expense.

MR. OVERSMITH: That question has been considered in the recommendations of the Resolutions Committee. The trial lawyer's mind is generally occupied about the time the instructions are really given and if he does not take an objection at the time he waives. He has not had any time to look up the law. After a hotly contested matter it is almost impossible for an attorney to look over instructions with the judgment he should have.

MR. GRIFFIN: Heretofore the Bar discussed and adopted a resolution copied from Wyoming embodying Judge Morgan's suggestion. My recollection is a statute was presented providing that the Judge could submit his instructions in advance and give a reasonable time for investigation and then if no objections were taken, any objection would be considered waived.

MR. OVERSMITH: A careful trial lawyer will take exception to every instruction whether or not he knows they are good. It would tend to delay the administration of justice rather than aid in it. I don't believe it is wise to compel a lawyer to take exceptions to every instruction and they will do that. He is representing his client and you would have a longer record than you have now if you compel him to take his exceptions.

MR. HACKMAN: I brought this up several years ago in Boise and read from a brief I had prepared. I went into the question exhaustively and found that every court of last resort in the United States had held that a man had a constitutional right to have his lawyer know the instructions requested by the other side before they were presented to the court itself; that plaintiff's attorney should give defendant's attorney his instructions and vice versa and each had a constitutional right to present objections to the other's instructions to the court itself; that it was a secret communication for the attorney to give the court a request for instructions without the other attorney knowing what it was. At that time I suggested to the bar that we frame a proposed bill to that effect. It is a simple thing. The court takes plaintiff's instructions and asks the defendant for any objections; when he objects the judge says he will ask him what he meant and maybe it will be

modified. If the instructions requested are very conflicting he will ask for their authorities and they will cite their cases. You would know just what the instructions were going to be instead of doing as we do over where I practice in Twin Falls—saying to a jury "I am satisfied the Judge will instruct you so and so," and then finding out he did not give any such instructions; you are put to a disadvantage before the jury. Where you know the instructions you can say, "His honor will instruct you thus and so and that means thus and so when applied to such evidence." In that way the jury can better understand the instructions. There isn't much time used in that way and you can get a fairer trial. We have already drafted a statute based on the Wyoming statutes.

MR. PAINE: You didn't say anything about the lawyers having a right to examine the instructions given or prepared by the court on its motion.

MR. HACKMAN: Yes, they should know them in advance too.

MR. BRINCK: The bill to which Mr. Hackman refers was recommended by the Judicial Council to the Bar Association in 1930 but was not just as Mr. Hackman thought. There has never been any question but that requests for instructions by counsel should be submitted to opposing counsel. It is certainly a communication to the court which should not be secret. The particular bill which was suggested was based on the Wyoming statute, requiring a settlement of instructions in all cases before they were given to the jury. The reason it was not made mandatory was that there might be cases where it would consume an undue amount of time and it was thought best to leave it to the court whether that settlement should be had before the instructions were given. It is apparent however that there is now no opportunity given the trial judge to have called to his attention clerical defects, defects in expression or substance, defects in his instructions which really, in the interests of final determination, should be called to his attention at the time of the trial and it was thought that in some cases the judge could ask the attorneys to express to him at that time their objections to the instructions so he would have in mind when instructing the jury the position taken by counsel on matters of law. The effect of that statute might be that attorneys would have to act without sufficient time to fully investigate the subject, but I believe generally attorneys are too well versed in the law of the case they are trying for this to cause trouble. If a proceeding were had for the settlement of instructions, attorneys could point out the objections that might be made, and give the trial court an opportunity to consider that objection before the instructions are given. Such a bill would prevent any reversals where the correction could have been and should have been made by the court at time of trial, had it been called to its attention. A method of settling instructions that way would prevent a good many appeals and reversals.

MR. GRAHAM: I don't think there is any necessity for any new law. There are too damned many laws now. The trial judge is liable to have his attention called to some error in some instruction submitted by opposing counsel or the court himself which could be corrected before the matter is submitted, but on the other hand requiring counsel to object and except to certain instructions at the time is absolutely ill founded because he may not have had time to investigate the law, and if you force him to take his position on an instruction, as sure as anything he is going to take exception to every instruction submitted because he is going to see that his client's rights are

protected. If error has occurred and the rights of an individual have been jeopardized by an erroneous instruction, that should be called to the attention of the court and the rights of that individual protected; whether or not counsel objected to it at the time shouldn't waive the right.

This suggests other matters and one of them is the matter of having the trial judges convene at the time of the annual meeting of the State Bar so they may get their ideas together and talk over questions of procedure and practice in their districts and thereby remedy some defects. It certainly would aid the trial judges to know what some other jurisdictions are doing in matters of practice and I hope the time will come when the trial judges will feel it their right and duty to attend the Bar meetings and hold meetings of their own for their own benefit.

MR. HACKMAN: I claim you should have the right to examine them all.

MR. GRAHAM: Suppose you agreed on those instructions, would counsel be bound by it?

MR. HACKMAN: He had agreed to it.

MR. GRAHAM: I can't agree with you. Some propositions of law might be presented and you are not prepared and you can't defend yourself. You should be given the right to determine what the law is on any instruction submitted.

MR. FRASER: Judge Brinck made the statement I believe that the attorneys could settle these instructions in a very short time. The attorney for the plaintiff has drawn his complaint along certain lines, he knows the law; the attorney for the defendant has filed his answer, and knows the law on that question. But during the trial of this case many new questions involving the evidence and other questions arise that the attorney is not prepared on and never knew would arise. He had not had time to look up those particular questions, questions he could not anticipate but are supported by the other attorney. I would not be in favor of any legislation of that character. We would just take exception to every instruction.

JUDGE MORGAN: My position here is not quite clear. The theory of our courts of appeal is to correct the errors of the trial judge. What position is the trial judge in? Here two lawyers, equal or superior to the trial judge in ability, paid for knowing how and getting ready for a case and helping in the trial of that case; how does it look for them to sit back and say they haven't had time to look into this matter? That is what they were hired for. Mr. President, we want to be fair to the district courts, not say "I don't know what the law is but if you make a mistake I will reverse you." I agree that this matter should not be left to the discretion of trial judges. There are things which must be left to the discretion of the court but nothing in the administration of justice if it can be well avoided because this is a government of laws, not men. I believe the discretion of judges should be limited wherever it properly may be.

A. MORGAN: This discussion and especially the last remark might lead to the conclusion that the proposed change in the practice is for the protection of the court, both trial and appellate. That way it might save a good deal of time of the appellate court and it might protect the feelings of the district court in case of reversal. The fellow who suffers is the litigant and not the court if there is an error made in the instructions. What difference does it make if a trial court is reversed. He has not lost anything except his own feelings. The litigant is the man who is the loser. Questions arise in law

suits the law of which is impossible for the attorney to have a correct and complete understanding of. If a litigant has suffered in the trial court, it is proper he should be protected in the Supreme Court. Time after time grave errors in the instructions of the trial court appear after weeks of labor and study that nobody saw when they occurred. It doesn't make any difference whether an attorney is negligent or ignorant when a defect is discovered it ought to be corrected and there should not be any limitation on the time that that correction can be made. I am not the man who suffers and that judge is not the man who suffers but the poor individual I am representing is the man who suffers and he ought to be protected at all costs.

MR. HAWLEY: It seems to me the Supreme Court is trying to pass the buck to the lawyers. All of you gentlemen have had this experience: at the end of a four or five day trial the trial court says, "hand up your instructions. I will give you an hour"; you have been constantly in the trial of the case and then have to go in and within an hour or two examine instructions and then waive your client's rights. That is not right. That is what we have the courts for, to pass upon these questions and it is the Supreme Court's duty to pass on them and the District Court is just out of luck if he doesn't guess right. The lawyer should have a right to go to the highest court in the land to pass on that.

PRESIDENT: We are very fortunate in having these men present these papers to our Association. We will now have a paper on Speeding Up Criminal Appeals. I present to you Raymond L. Givens, Justice of the Supreme Court of Idaho.

SPEEDING UP CRIMINAL APPEALS

RAYMOND L. GIVENS

No doubt the main objectives of criminal prosecutions are the punishment of the guilty and the protection of persons and their property through the reflected deterrent effect upon those criminally minded. While such purposes are thus affirmative and positive, there is a corresponding duty necessarily resting primarily upon the state, that is, the collective voice and action of the people, to provide such a system as will, while punishing the guilty, protect and safeguard the rights of the innocent, without which consideration the enforcement of the criminal laws would of course soon become unjust, resulting in lack of respect on the part of the citizen for the agency designed for his protection with a resultant defeat of the purpose for its existence. In considering then, how criminal appeals may be speeded up, we must have in mind not only speed in prosecuting appeals with the aim of quickly bringing to a culmination the prosecution of the guilty, but also allow sufficient time to fully protect the rights of the innocent, the essence of an appeal being for the purpose of avoiding or correcting any mistakes that may have been made during the trial of the case before the fact finding tribunal, appreciating that litigation, criminal as well as civil should be concluded as expeditiously as possible consistent with justice, namely a keenly alert regard for the interests of the real parties behind it all, the litigants, whose property or lives, are disposed of by the courts, once the machinery starts, with necessarily relentless compulsion.

The Commission when requesting me to present some views upon this subject, no doubt had in mind criminal appeals within the state of Idaho, as of

course this Association is state limited, and concerned with jurisprudence within our own commonwealth. We may, however, advisably in examining the record of criminal appeals in our own jurisdiction, compare it as to the time element, with the records of other states. Since there must be some limit to the extent of our investigation, I have rather arbitrarily selected in our own state, other states in the West, Southwest, and Middle West, generally the last 25 criminal appeals, 50 in a few of the larger and more populous states in the same territory, for such comparison.

The record in our own court is as follows:

	Time from Filing to Submission	*Time from Submission to Opinion*
Shortest	26 days	13 days
Longest	291 days	73 days
AVERAGE	124 days	35 days

	Time from filing notice of appeal in District Court to filing of Transcript	*Time from filing notice of appeal in District Court to filing of Decision*
Shortest	15 days	91 days
Longest	417 days	669 days
AVERAGE	115 days	274 days

An examination of the following states discloses the following comparative figures:

	Time from Filing to Submission	*Time from Submission to Opinion*
Arizona	180 days	35 days
Arkansas	34 days	60 days
**California	45 days	60 days
Colorado	98 days	89 days
*Kansas	250 days	40 days
Kentucky	Submitted When Filed	80 days
Michigan	281 days	68 days
Missouri	90 days	75 days
Montana	120 days	20 days
Nebraska	194 days	51 days
New Mexico	180 days	60 days
North Dakota	38 days	78 days
Oklahoma	86 days	28 days
Oregon	105 days	26 days
Tennessee	35 days	25 days
*Texas	30 days	15 days
Utah	150 days	50 days
Washington	143 days	56 days
AVERAGE	122 days	50 days

Note: *50 cases; **All cases 1930-1932.

Under rule No. 33, adopted in 1926, the Clerk of the district court, at the end of 15 days after filing the notice of appeal, is required to notify the Clerk of the Supreme Court that an appeal has been taken. Prior to this rule the

Supreme Court had no knowledge of the appeal until the transcript was filed or motion to dismiss or some such special appearance.

It does not appear that all the states named have a similar rule, for comparative purposes therefore, we may take the period between the time of filing the appeal in the appellate court, which is generally when the transcript is filed, until the case is submitted, and then, from the time the case is submitted until an opinion is rendered, on which basis we find the average time in our own state for the first period was 124 days, or roughly speaking 4 months, and from the time the case was submitted until opinion rendered 35 days or a little over a month; the average time for seventeen other states from filing to submission was 122 days, and for 18 states from submission until an opinion was rendered 50 days.

It is thus apparent that more time elapses between the time the appeal is filed and it is ordered submitted, than between the time the case is argued and the opinion is rendered therein.

In the last 24 cases filed in our court (one of the 25 was a habeas corpus proceeding wherein no judgment of conviction had been rendered, the point being the sufficiency of the information to state a cause of action, hence not in point in this immediate table) one appeal was filed the day the judgment was rendered, in the other 23 the time ranged from 2 to 90 days, the full time allowed after judgment, the average being 42⅛ days, 13 being taken over that time and 11 under.

Under our present rule No. 45, the appellant has 40 days within which to file his brief, the respondent has 30 days to reply, and the appellant has 20 days for a reply brief.

By the same rule it is required, though there has been some relaxation, that all briefs be in before the case is set down for argument. This latter is a salutory rule, of advantage both to the court and to the litigants and counsel.

The time between the filing of the appeal and submission for argument now depends almost entirely, in the present state of our calendar, upon counsel having their briefs in. If both sides take the full time allowed by the rules, 90 days or three months may elapse.

Criminal cases take precedence on the calendar and since the court is practically in continuous session at Boise, and holds four terms during the year outside of Boise, a criminal case may be heard about as soon as it is ready, within the time allowed by the statute and the rules.

From an examination of the record in the last 25 criminal cases we find that extensions of time for appellants' briefs were granted in 14 cases ranging in point of time from 1 to 217 days. Respondents' time was extended in 4 cases from 4 to 57 days an average per case of 24 days for appellant and 4½ days for respondent or 28⅛ days extension per case. Comparing this with our 124-day period between filing and submission, it accounts for one month's time, leaving a difference between the 90 days allowed by the rules for the briefs and the time of submission of less than 10 days, for which the court might legitimately be considered responsible, this period could readily be accounted for on the basis of the case not being filed within time to be heard until the next succeeding monthly sitting, the court generally sitting at least once a month in Boise, and generally not more frequently.

All of the states referred to above, have somewhat similar provisions, the length of time being different, with regard to the filing of briefs, and that

criminal appeals generally take precedence over all others and are brought on for rather speedy determination.

In Iowa, if the appeals from the district from which the appeal had been taken have been passed the case is continued to the next term.

In Kansas, criminal cases are ordered assigned for hearing on the next criminal trial docket, which dockets are printed 75 days before hearing.

In Michigan the Clerk advises me that the court will not consent:

> "to continuing a case over a term without the consent of the Attorney General. Where the defendant is let to bail the order contains a provision that the case is submitted at the next term of the court and is made a condition of the bond. Where the defendant is in prison the Attorney General and the Court are not averse to a continuance, naturally, and that accounts for the much larger average number of days between the allowance of the appeal and the submission of the case."

In Oregon, all criminal cases which are to be heard at Salem are set within 60 days after the filing of the transcript, unless otherwise ordered, which, I am advised, contemplates additional time for the filing of briefs.

A study of this matter as to California appears in the Journal of the California Bar Commission, of May, 1934, at page 109:

> "The biennial reports of the Attorney General list each criminal appeal decided and give the date of the lower court judgment, the date of filing of the transcript in the appellate court and the date of appellate court judgment. From this information three time intervals have been computed for the cases decided in the bienninum 1930-1932; first, the time elapsed between the lower court judgment and the filing of the transcript; second, the time elapsed between the filing of the transcript and the judgment of the appellate court; and third, the total time elapsed upon appeal from the lower court judgment to the appellate court judgment."

The Clerk of the California Court further advises:

> "The Supreme Court has original jurisdiction in those cases only where judgment of death has been pronounced, but it has supervisory jurisdiction over, and power to transfer to itself for decision, all cases in the four district courts of appeal, which cover the ordinary run of felonies."

Rule 9 of the Washington Supreme Court is as follows:

> "1. For the purposes of hearing in this court, causes from the several counties will be assigned in the following order: 1. Thurston, 2. Mason, 3. Lewis, 4. Grays Harbor, 5. Pierce, 6. King, 7. Kitsap, 8. Pacific, 9. Wahkaikum, 10. Cowlitz, 11. Clarke, 12. Skamania, 13. Snohomish, 14. Skagit, 15. Whatcom, 16. Island, 17. San Juan, 18. Jefferson, 19. Clallam, 20. Kittitas, 21. Yakima, 22. Benton, 23. Klickitat, 24. Chelan, 25. Okanogan, 26. Douglas, 27. Grant, 28. Adams, 29. Lincoln, 30. Franklin, 31. Walla Walla, 32. Columbia, 33. Asotin, 34. Garfield, 35. Whitman, 36. Spokane, 37. Stevens, 38. Ferry, 39. Pend Orille."

This rule is apparently the reason, why some cases from the later counties might not be heard with as much dispatch as would otherwise be possible.

To properly analyze the period elapsing between the filing of the appeal and the filing of the transcript we must briefly survey the pertinent statutes.

Section 19-2705 I. C. A. provides:

> "An appeal from a judgment must be taken within 90 days after its rendition, and from an order, within 60 days after it is made."

In California this time has been reduced to 2 days after judgment, section 1293 of the Penal Code.

The time within which an appeal must be taken or a writ of error allowed in the other states is as follows:

Arizona	60 days
Arkansas	60 days
California	2 days
Colorado	Allowed at discretion of court
Iowa	60 days
Kansas	730 days (2 years)
Kentucky	60 days
Michigan	20 days
Missouri	During term in which judgment rendered
Montana	365 days (1 year) from judgment
	60 days from order
Nebraska	During term or next succeeding term
New Mexico	180 days (6 months)
North Dakota	180 days (6 months) from judgment
	60 days from order
Oklahoma	180 days (6 months)—Felonies
	60 days—Misdemeanors
Oregon	60 days
Tennessee	30 days
Texas	During term when convicted
Utah	60 days
Washington	30 days
AVERAGE	132 days

The proposed provision in the Code of Criminal Procedure as adopted by the American Law Institute, section 441 of the proposed final draft of May, 1930, and apparently, sections 429 and 430 of the final draft, is 60 days.

A motion for new trial must be made within 10 days after verdict unless the court extends the time. Section 19-2308 I. C. A.

Section 19-2709 I. C. A. provides that except in capital cases the appeal does not stay the execution of the judgment unless a certificate of probable cause for appeal be granted.

The requirements for notice of appeal, Section 19-2706 I. C. A., are very simple.

A motion for a new trial, however, may and usually is more complicated and requires considerable time for its preparation, section 19-2307 I. C. A., especially if affidavits as to newly discovered evidence, etc., are used. Of course the 10-day period for the making of a motion for a new trial may be extended, it would seem, however, that there would be much less reason for having a longer period of time within which to appeal than to allow a motion for a new trial.

Under section 19-2712 I. C. A., the Clerk is required to prepare his transcript within 40 days, and ten days thereafter is allowed for service. If a reporter's transcript of the testimony is to comprise part of the record, if not made before the appeal, the same is to be ordered within 5 days after the perfection of the appeal.

The time within which the reporter prepares his transcript is regulated by

sections 7-509 and 19-2632 I. C. A., orders for extension of the time being given by the district judge, which, except perhaps in the case of abuse, are now solely within the trial court's discretion and not within the jurisdiction of the Supreme Court.

This situation is rather an anomolous one in that the Supreme Court acquires jurisdiction of the appeal when the statutory notice of appeal is served and filed, and yet the District Court retains the right, at least, to regulate the time within which the reporter's transcript must be prepared. Of course the District Court is in a better position, probably, to know the status of the reporter's work than the Supreme Court; on the other hand, it might be advisable to require the reporter to secure such extensions from the Supreme Court, making a sufficient showing for his reasons for such extension.

In 1915 the court by rule provided that testimony should be abstracted in narrative form unless the questions and answers and parts thereof were essential to an understanding of the error claimed, and only the material evidence should be contained in the abstract. This abstract was prepared by the appellant in the first place, with opportunity for the respondent to have it corrected or present a supplemental abstract of his own. This practice continued with the approval of the court until 1919, when abandoned, largely, as I understand it, because of the dissatisfaction of the Bar, over the additional work required. That system is now in vogue in a number of the states. particularly in Washington, and I believe Utah. While such a system does impose considerable labor on the attorneys it does shorten the time required for study of the case by the court, reflected in a possible speedier preparation of the opinion, and it insures, it would seem to me, a thorough understanding of and complete familiarity by the attorney with the facts in the case and the record, and is at least worthy of thought by the Bench and Bar in connection with this matter.

Thirty or thirty-five days for the Supreme Court to prepare an opinion in a given case, consideration being given to the fact that on the average of the working time of the court outside of sittings, each judge prepares better than one case a week and participates by concurring or dissenting in four others.

From the Territorial rules of 1870, until 1926 the time within which appellants' brief had to be filed varied from, at least one day before the argument to, by the rules of 1919 as amended in 1926, 20 days for appellants' brief after the record on appeal was served, respondent 20 days thereafter, and 20 days for reply brief. In 1928 this time was changed to 40 days for appellant; 30 for respondent; and 20 for reply brief, and frequently extensions of time have been given for the preparation of briefs for both parties, sometimes based upon a showing and sometimes upon stipulation of counsel.

This question would probably be more productive of discussion than any other in the matter of speeding up criminal appeals. In the case of a long record, with many assignments of error, particularly if counsel participate in the appeal who did not participate in the trial of the case, 40 days is not excessive, if, however, the case has been well briefed before trial and the record is comparatively short, appellants' brief might well be prepared in less than 40 days. Sufficient time should be allowed for the preparation of such briefs as will be of the greatest assistance to the court, in other words, the time should not be so extended as to result in mere delay without any cor-

responding benefit in the way of a proper elucidation of the law necessary to a correct determination of the case.

For a long period of our existence as a Territory and State the time for preparation of briefs was much shorter than now allowed.

In March, 1933, Montana changed their rule as to filing briefs for both appellant and respondent to 30 days and 10 days for reply brief.

Oregon allows 20 days for appellants' brief, 20 days for the respondents', and 10 days for a reply brief.

In 1928 when the period was extended as above indicated the court was not as well up with its calendar as it became a year or two later, which was perhaps one reason for extending the time. It would of course, if no extensions were granted, expedite the hearing of criminal appeals to shorten this time.

By rule amended 1933, petitions for rehearing in both criminal and civil cases must now be made within 20 days after an opinion is first promulgated. Rehearings in criminal cases have been the exception rather than the rule though extensions are granted for filing a brief in support of the petition.

Prior to the unification of the time in both criminal and civil cases in 1933, the time for a rehearing in criminal cases was 10 days, this was changed to harmonize with the civil practice of 20 days, perhaps both could be changed to 10 days. The remitittur is of course held until the full time for filing a petition for rehearing has expired, if none is filed within 20 days, if one is filed the remitittur is held until the rehearing is disposed of.

In conclusion we see there are 6 periods which might be shortened: time for filing the notice of appeal; preparation of the transcript and filing it on appeal; and, the preparation of briefs; setting the case after it is ready and the time between the argument and the rendition of the opinion; application and/or disposition of rehearing.

The first period, that is, the period within which the appeal must be taken, could be shortened from 90 to 10 days and perhaps even as short as now is apparently the custom in California, where oral notice is given immediately on rendition of judgment, or pronouncement of sentence. Of course the time of pronouncing sentence or rendering judgment is a matter under the control of the trial court and not properly a matter coming under the subject of my address. In some instances the reporter's transcript could perhaps be prepared more expeditiously than it has been, and 40 days is probably longer than the Clerk needs to prepare his transcript, since such is merely a copy of proceedings already of record, and shortening the time for preparation of briefs might be advisable.

The question first to be determined is whether criminal appeals should be speedier; if that question be answered in the affirmative, then I have endeavored to point out some of the places where time can be shortened.

MR. CARTER: I move that Justice Givens' address be referred to the Resolutions Committee.

Motion seconded and carried.

FRIDAY, JULY 13, 1934, 2.20 P. M.

PRESIDENT: We will hear the report of the Canvassing Committee on the election of Commissioners from the Eastern Division.

MR. SMITH: Walter H. Anderson of Pocatello as Commissioner of the Eastern District is announced by the Canvassing Committee.

PRESIDENT: Mr. Anderson will you stand? Knowing Mr. Anderson, I know the ability of the Commission will be greatly enhanced by his being on it.

PRESIDENT: There are some matters that will come up for argument and it may be there are some more points that might be discussed touching on the papers given so far at this meeting. We will put those over for the time being and we will hear W. F. McNaughton, former Justice of the Supreme Court, deliver an address on the subject, "How May We Improve Our Civil Procedure?" It is a pleasure to introduce to you Hon. W. F. McNaughton.

JUDGE McNAUGHTON: There is a slight misunderstanding as to just how I should proceed here today. Judge Ailshie called my attention to the fact that they were thinking of my taking part on the program on this subject. I told him I would be glad to take part. After that when I was feeling pretty good about the honor, then he said "you have got to write out your speech and file it right there on the table. You can't just depend on the inspiration of the moment." I never read a speech in my life but finally I wrote the speech and then I was more convinced than ever that I couldn't read it intelligently; then after I edited it I was firmly convinced nobody but a printer's devil could read it. But I did write it and I'll file it and here it is.

It is quite natural—I think quite appropriate—at bar meetings in these times that some thought be given as to what is happening to American institutions, what is happening to American law and what is happening to American jurisprudence in this period of rapid growth and development of administrative law.

The Attorney General of the United States at the last meeting of the American Bar Association gave some candid and sincere assurances that the new institutions and their modes of procedure—the NRA, the AAA and other institutions for the administration of the government's aid activities—are to be only temporary. However, whether temporary or permanent, these enlarged governmental activities have introduced a new, or at least have greatly advanced a machinery for the application and enforcement of the various new statutory objectives.

In this new legislation, the statutes as a rule are rather general, not specific, and but little more than define the objective rather than the rule of law leading to the objective and then vest broad rule making, rule enforcing and rule interpreting power in the "authority" which is to accomplish by administration the purpose of the statute. This new technique is well illustrated in the NRA and depends largely upon its centralized, if not arbitrary massed command.

The training of the American lawyer both from a practical and academic standpoint is unprepared for this new idea in law enforcement. He is perplexed, and indeed very much doubts the wisdom of vesting under one head, under one authority, this rule making, rule interpreting and rule enforcing power. Many careful political thinkers claim the plan is a violation of the prohibition in the constitution against the delegation of powers. The attorney as a practitioner, however, is not so much concerned with the mere wrongful

delegation, if such it be, of legislative power, but from training and experience he is firmly convinced that the keystone in the arch of American jurisprudence and American liberty is the constitutional guaranty that no person shall be deprived of life, liberty or property without due process of law. He, therefore measures the wisdom and the legality of this new process or procedure in the law by that yardstick.

Of course, the first requirement in due process of law is opportunity in advance of decree to a hearing before a competent tribunal, which shall be unbiased and untrammeled by any fixed, arbitrary rule, to test the right and reasonableness of any act disputable. This fundamental doctrine of a tribunal to settle disputes, which shall be wholly independent of executive power or authority, is the genius of the Anglican system of law. I have no fear of it perishing, least of all in America. However, we must not confuse thoughts or phrases. This due process of law guaranteed by our constitution is not synonymous with judicial process as descriptive of the process or procedural system obtaining at any given time in our ordinary court practice. The phrase "due process of law" is of American origin. For the benefit of the British barristers and solicitors, Chief Justice Hughes undertook to define it as used in our Federal Constitution at the London visit of the American Bar Association in 1924. The Chief Justice said:

> "We have provided the constitutional guarantee that no one shall be deprived of life, liberty or property without due process of law. But this did not confine practice to archaic forms or deny the opportunity of improvement. It did not refuse to legislatures the authority to enact reasonable measures to promote the safety, health, morals and welfare of the people, or make rational experimentation impossible, but it was intended to preserve and enforce the primary and fundamental conceptions of justice which demand notice and opportunity to be heard before a competent tribunal in advance of condemnation, and with respect to every department of government, freedom from arbitrariness."

It is quite apparent upon reflection that we must not confuse due process of law such as is guaranteed us with any fixed court procedure. However, by our state constitution all judicial functions are reposed in the courts and by the Federal Constitution, in the judicial department of the government.

I do not care to discuss today either the wisdom or the constitutionality of this new growth of administrative law. This is not the time or place for such a discussion. I wish only to note the fact as a trend of the times and what, if anything, that trend portends. This trend is not new. Its origin antedates the new deal by more than a score of years.

I am mindful of the apparently mixed governmental functions performed by the Interstate Commerce Commission, the Court of Custom Appeals, the Federal Trade Commission and various state boards, such as are set up in workmen compensation statutes, and I am also mindful of some very earnest recent demands for compulsory motor vehicle insurance laws with a board of commissioners to adjust claims for injury or damage.

This trend has extended so much faster and so much farther afield from the beaten path of court procedure very recently in national legislation that it has become more conspicuous and has given rise to graver concern, especially among lawyers. The thought uppermost in every lawyer's mind is why this departure from court procedure in any fact finding body engaged in the settlement of disputes which may arise in the administration of certain laws

of a protective nature? This thought, no doubt, prompted the topic assigned me on this program.

The trend away from a court and toward an administrative authority in the law, whether permanent or temporary, prompts an inquiry into the adequacy of our court procedure in this age of our civilization. To my mind, it indicates a belief firmly rooted that our court procedure is not sufficient for trying disputes which may arise in the field of the newer governmental activities.

In recent years, there has been great development in corporate activity touching and affecting the daily lives of great masses of people. Incident thereto, there has been the enactment of a great many protective laws concerning the services of such corporations in these daily contacts as well as in their relations to employes. Many honest, patriotic and well-meaning legislators have doubted the practical sufficiency of our court procedure in the settlement of disputes arising in the enforcement of these regulatory and protective laws. These laws in their application, of course, are social rather than individualistic. A social rather than an individualistic inquiry and application is necessary, hence they are officially administered in behalf of all rather than dependent on an individual initiative. But they very frequently, if not always, do involve private rights, and it is difficult to determine exactly when administration ends and judicable inquiry may as such begin.

Other arts than simple positive law are involved such as the arts of engineering, financing, accounting and medicine. Fact finding power is necessary for administration and also for judicial inquiry. Usually the record for fact basis used by the administrative board is also used by the court. The findings of the board are not a step in the judicial inquiry; they are not adopted in the courts except occasionally as in Idaho where the findings of fact of the Industrial Accident Board are by statute made binding upon the court in the absence of error. But generally the board's findings are given great weight in the courts, though the procedure resulting in the record is very different from any court proceeding.

These laws are of great concern and their importance is growing daily under our civilization. They involve highly important rights.

In American jurisprudence, daily we are confronted with this situation: Are we to have a different tribunal with a new system of procedure for the settlement of disputes arising in the administration of each regulatory or protective law, state and national? Have we been unable or disinclined to develop a general system of procedure simple enough, direct enough and prompt enough to be adopted for the protection of any and all rights in all tribunals?

Human rights are sacred rights whether they arise in criminal law, civil law or these protective laws. All rights are entitled to simple, sure and prompt protection. If our procedure is too cumbersome, too technical and too dilatory for anyone of these uses, it is so for all of them. One general system with possibly varying rules should serve for the settlement of any and all legal rights arising under any American law.

Who is to be blamed for the drift away from our general court procedure in the setting up of this multitude of separate tribunals and in the setting up very recently of this administrative authority, which last development, by the way, may imply dissatisfaction also with board tribunals functioning semi-judicially in administration? Our procedure has been criticized not only by

laymen but by eminent jurists as too technical, too cumbersome, too indirect and too slow for the more complicated jurisprudence of the times.

I realize much of the criticism is not well founded, but much of it I feel is well founded. If we are to deal with law in action, I realize quite firmly that it is one thing to offer criticism of law in action from a distance and another thing to try to reform law in action upon the field. It is easy to criticize the other fellow for doing something one has never been tempted to do himself.

If one general procedure for fact finding and law interpretation shall be made adequate for all uses, that task will not be performed by men up in the clouds viewing it from a distance, but it will be done by those on the ground who are accustomed to protecting clients who are involved.

It is not an easy matter to write a law or a rule of procedure that cannot be misapplied and made a vehicle to impose upon a court and become a vehicle of injustice. If my observation has been correct, 95 per cent of the shortcomings of our procedure is abuse of rules which are really simple and quite essential.

We have made wonderful progress in speeding up and simplifying the practice in the past two or three decades, but with that, we have not kept abreast of the times. Courts are no longer over technical. Few, if any, cases now turn upon a mere question of practice independent of the merits disclosed; also judges are doing all in their power to simplify and speed up hearings. The fault is largely with the attorneys. In our zeal for our clients, we still sometimes forget we are officers of the court and that our whole duty does not begin and end with the parties litigant. We forget that the state is concerned in every case and that notwithstanding a duty to our client, we owe a higher duty to the state to not actively impede or delay justice for any private advantage.

Let us examine the law as written, the law static, and also let us consider the same law in action. The law recognizes the right to demur for the purpose of settling an issue of law that may terminate the action. It is a wholesome rule for that purpose. It does not intend, and we know that it does not intend, that we shall demur to each complaint filed on the false claim that it does not state a cause of action. The law written authorizes a demurrer to a complaint which is indefinite, uncertain or ambiguous. It does not intend, however, that our first appearance shall be a general and special demurrer falsely claiming all of these defects. The law written authorizes a motion to strike from the complaint superfluous or sham allegations, but not allegations which may be only disapproved by the defendant.

My observation on the trial bench a few years ago was that the first appearance as a general rule was a demurrer or motion to strike; the result of a practice habit that usually got nothing but false motion and delay. This false use of practice rules is not nearly so prevalent now as formerly, but still in getting our cases at issue we almost daily offend against straightforward, speedy justice, only because the law in providing us safeguards unfortunately at the same time opens the door to false dilatory tactics.

Again at the trial we offend. The law gives us the right of cross-examination in the interest of clarity, but so far as possible we abuse the right in the purpose of confusion. Of course the law permits an objection to hearsay, irrelevant and incompetent testimony. It does not, however, intend that out

of an "abundance of caution" opposing counsel shall object on all grounds to practically every question asked of the important witnesses.

The most imperative need of the present is to simplify and speed up our court practice as a general practice sufficient to fully protect in any hearing not only the simpler rights between man and man, but at the same time also those rights equally sacred but more complicated in association with the arts of financing, accounting and other sciences which arise in our regulatory and protective laws. We must do this or we shall have little or no use for our old formal court practice.

If to acquire this we need more or different legislation, we can procure it. The legislators, Federal and state, have quite generally aided by enacting legislation for procedural reform whenever solidly backed by our state or American Bar Association. But if our procedure is improved by legislation, it will be by repealing every salutary practice provisions which are harmful only because abused through false and wrongful application by attorneys.

I think we are quite competent to adjust affairs peculiarly within our field without being straitjacketed by any legislation. I do not believe it shall be necessary to repeal beneficial practice provisions in order to avoid the greater evil of misapplication.

Progress has been marked within the past few years. What has been accomplished has resulted from the efforts of judges and attorneys acting individually. The time has about arrived for the massed action of the whole Association against obvious abuses. If that time has arrived, I feel sure these evils will disappear almost as completely as any other thing looked upon by the Association as unethical. Then our court procedure will become more sensible and more reasonable, with a chance to become a worthy pattern by precedent quickly adopted by their fact finding and rule interpreting tribunals. They are invariably presided over by able lawyers. This will insure greater security and betterment in all law enforcement.

PRESIDENT: The meeting is open for discussion of this subject. Fire your questions at the Judge if you have any.

MR. HAWLEY: How would you treat the matter of the fixation of litigation for the various types of public service?

JUDGE McNAUGHTON: The Workmen's Compensation was one of the most humane of acts. We had over-emphasized the old master and servant doctrine that the industry was not responsible for the negligence of the fellow servant. The new idea is that the industry must pay the human wear and tear as well as the wear and tear on machinery. Idaho has gone a little further in mixing administrative law and judicial law. Where there is a fact finding body for the purpose of administering these protective laws, while the same record is used in the court as before the board, the court is not bound by the findings of the board, although the courts say that great weight will be given the findings of the board. In Idaho the findings of the board are binding upon the courts. The court has the same record and the findings the board arrived at are the same findings. That has been debated back and forth in our state. I came to the conclusion there was a delegation of judicial power and we had gone too far. Let's leave that to the statesmen. Sometimes they are given a law making power which should be legislative. On

the other hand the courts have tended to adopt proceedings and it would be too expensive to have new proceedings over again. If we drag cases along six or seven years like they did in Nebraska, the man would be dead and his family starved. We have a government to a certain extent by officers. People have certain rights. I believe we should initiate a procedure that is simple and direct enough for any board that passes upon questions of fact which arise in the administration of any American law.

MR. HAWLEY: What of a situation where the fact finding body has before it hearsay testimony or some document that you and I would act on in private affairs of life but which could not be admitted in a law suit.

JUDGE McNAUGHTON: Of course the court says that is error and it is apt to reverse the case. Our court has reversed a good many cases where hearsay evidence was introduced. I think the chief difficulty is in thinking of the executive power administering when it comes to a question of rights. We have thought we must have a separate tribunal to adjust rights arising between the government and individuals. I am not sure that some of these loose practices found before these boards are not about as good as are the practices in some of the courts. I think we go too far.

MR. HAWLEY: I might not confine it to compensation work, but valuation, a hearing held before the Commission. You know that a great many things are presented as evidence which could not be admitted in court as they are hearsay and not the best evidence but they are really the evidence that a businss man would act on in business affairs.

JUDGE McNAUGHTON: That is true. It may be we are a lot too technical and I think we should permit a little more liberality in the statements of accidents. We used to be pretty particular that every item was proven, now we are rather easy and we rely upon his statement. I think we are a little too technical. I do think Idaho has come a long ways and this Bar has taken a pretty good stand. This Bar and the American Bar Association have never gotten solidly behind any thing that the legislatures of the state and the Federal legislature have not been willing to grant. As far as the courts are concerned, the personnel of the courts are the least criticized of any. I do believe if we will cut out the worst laws that do not get us anywhere and come right to the issue in a straightforward way and put on facts in a narrative form and close the litigation and then appeal if we have to, the Supreme Court will take care of it rapidly. It is a cumbersome practice but it would not be very cumbersome if we would use it as it was intended.

MR. GRAHAM: Let's look at the necessity for the Workmen's Compensation Law. What caused it to be enacted? It was the fact that the courts were too cumbersome and laborious and expensive. We organized a board for that and nine times out of ten they are all laymen who pass on the hearing and admission of evidence. Then they make a finding of fact and then appeal to the court to pass on the same evidence. My judgment is that the lawyers are delinquent in their duty in not finding a combination whereby the court at the present time can be liberalized so it can perform the functions of this board and give speedy rulings, dispensing with jury trials in such matters. Instead of having one judge have three commissioners. Liberalize the rules of evidence and you have accomplished the same result. Our proceedure is so sacred we think we can't change it.

JUDGE McNAUGHTON: In regard to the Workmen's Compensation Law it seems to me we have a lot of false motion in appealing from the board

but I think the board has understood the law. We appeal from the board to the court and try it out in the district court on the same record offered before the board, and then we appeal from the district court to the supreme court. That should be simplified.

MR. OVERSMITH: The Supreme Court has said there was no direct appeal from the Public Utilities Board to the Supreme Court, and I think the law is so framed as to require two appeals. Don't you believe the work of the lawyer is becoming so cumbersome on account of searching through so many law reports.

JUDGE McNAUGHTON: Certainly and so many different kinds of practice before different boards. We should have one general practice with certain rules for certain classes of litigation, a simple, direct, scientific practice that will be ample for all cases. The Federal Government has recently simplified their practice.

MR. OVERSMITH: I would say in the thirty-four years I have been practicing there are about four times the amount of reports out that there was when I started. Twenty-five or thirty years from now no law office could possibly pass on a question without a lot of clerks.

MR. GRAHAM: In the matter of automobile accidents, there is a movement now to delegate that power to a board. Isn't it possible that we can simplify our proceedure some way rather than to create another board?

JUDGE McNAUGHTON: The compulsory insurance idea is back of it, and the board follows that. I think if these boards were administered under a general practice with regular qualifications for the commissioners it might be all right.

JUDGE MORGAN: Would it be consistent to abolish the Industrial Accident Board and simplify the practice before the courts and remove one tribunal? What we want is to save the working man the expense and delay of one more lawsuit. We have sixteen trial judges in this state. There have been some efforts to cut down the number of judges. It occurs to me that the trial judge and his reporter could handle that matter properly whenever there is a controversy, calling witnesses before the court and have the judge make the award just as the board does. Then you would have the basis of your appeal. Now to appeal direct from the board to the Supreme Court rather than through the district court would require an amendment to the constitution.

JUDGE McNAUGHTON: There was, a few moments ago, reference to the number of reports to examine. Some few years ago the Lord Chief Justice of England delivered an address and said England had been fifty years behind the United States at one time but now she was fifty years ahead and he thought we ought to keep up. He said they used to depend on cases but it was so laborious and now they were deciding their cases on principles and thus disposing of their business much faster.

I was surprised to hear about Idaho being so up-to-date about its cases. I felt we were rather slow. The filing of demurrers is one of the principal causes of delay. I have had the thought that we ought to have the attorney certify that he believes his demurrer to be meritorious. If he doesn't do it, his demurrer should be overruled by the court. Another thing is the general denial we now have. An attorney files an answer in the form of a general denial, for instance, knowing his client had executed the note which was sued upon and has been promising to pay it up to the time that it was sued on.

That is just perjury. I once told the attorney it was just perjury and if his answer wasn't changed I would swear out a warrant against whoever swore to it. I asked him why he didn't admit the signing of the note and deny the other things. I feel we should have a statute, if necessary, to require a man to admit the things that are true and deny those he can controvert and get his answer in and have the issues framed in that way and try the case without so much delay. I believe those two things will expedite cases. I examined authorities some months ago to see if I could in court raise the question on a man who put in a general denial of that sort. I found it was perjury and the man ought not to put in any answer denying anything except what he would be able to controvert.

JUDGE DUNBAR: It has been a long time since I practiced law in New York but you may be interested to know that there if your demurrer is overruled the attorney has to pay $10.00, so you can see there were very few demurrers filed.

MR. MERRILL: I am very much interested in this matter of practice and I wonder if Judge McNaughton has any figures showing to what extent judicial procedure is delayed by the general demurrer. It does serve a very useful purpose and I can hardly see how to get along without it sometimes. Clients sometimes bring their papers in immediately after they are served with them but many times they wait until almost the last day. When they bring them in right away the lawyer has lots of time and perhaps would have no need of filing a time-killing demurrer but so frequently they come into the lawyer's office with the complaint served seventeen or eighteen days before and if he is engaged in the trial of a case and has no time, there is nothing to do but file the demurrer until he can look into the matter to determine what he wishes to do. In that same connection with the speeding up of the work in the courts, I am going to make this suggestion. I have observed that by and large it is far more satisfactory if the District Judge rules from the bench on most of the matters presented on argument on motions and demurrers rather than taking it under advisement and asking for briefs. A lawyer may have several matters and present them to the court and the court may be satisfied on all matters except one matter in doubt. If he rules of those he is satisfied on and asks for a brief only on the one thing alone, a good deal of time is saved. Otherwise the lawyer will probably cover the entire field. It seems to me that the use of the general demurrer might be judiciously handled by the lawyer and if at the same time the courts would rule from the bench on any matters which are necessary for an understanding of the pleadings, we might not be subject to criticism for the use of the demurrer.

JUDGE McNAUGHTON: My thought would be that by reason of the demurrer, if the trial was delayed one day, there ought to be another way to get additional time rather than to use it that way.

MR. MERRILL: Sometimes it can be done through stipulation.

JUDGE McNAUGHTON: But you will use the demurrer to get more time than the law gives you. You have got to get around it someway.

MR. OVERSMITH: Don't you think sometimes a demurrer is filed in order to have time to compromise and settle things up.

JUDGE McNAUGHTON: It is not given to us for that purpose.

MR. HEALY: While Judge McNaughton was talking I was thinking that this subject may go deeper than procedure. Take the necessity which all

the states found for the adoption of compensation acts and the setting up of boards and commissions. The necessity was not merely that the procedure of the courts had got behind but also that the courts and lawyers had gotten behind in their views of substantive law. The prime reason for the adoption of these acts was because in the development of the common law the courts had reached the point where they could get no further than the old law of master and servant. How, for instance, would it be possible for the court to develop the idea which General Johnson developed in his NRA. Procedure is only one aspect of a very large subject and the least important. There are many things lawyers and courts could improve in the administration of justice, but there are many other things which should still be used. Substantive law as well as adjective law has not proceeded as fast as the development of public opinion. Why were the courts unable to advance as fast as public opinion? It was possible the courts might have developed the common law because that is supposed to be a developing and growing thing. There is one thing that it seems to me should be done. The bar of the country ought to be thinking of this because unless the court and the bar can become awake and alive to what is going on in this country a way will be found to dispense with the services of the courts and of lawyers. I think in Pocatello two years ago I suggested that unless the bar and the courts were ready to set their house in order and to meet court conditions and public opinion that the people of the country would find a way to dispense with their services and I am still convinced of the truth of that. I agree entirely with Judge McNaughton. It is sometimes impossible for a court to go beyond a given point in the development of substantive law. I think Judge Holmes pointed that out but I think it is one of those things necessary to our survival and it is necessary for the survival of the courts that a way be found to develop as rapidly as public opinion develops.

JUDGE GIVENS: What solution does Mr. Oversmith have for the great accumulation of judicial decisions?

MR. OVERSMITH: Only such decisions as will lead to a better understanding of the law should be printed. We would get down to a selective system. One thing is sure, we will have to find some solution because we can't keep on burdening ourselves by tremendous libraries. Case after case decides the same point. One case should be sufficient and I see no necessity to keep on publishing the same rule or law over and over again.

Now as to the courts developing, I don't see how we are going to get away from the three departments. It is up to the legislature. It is not up to the courts to develop. They couldn't abolish the master and servant law or the contributory negligence law or any of those things. It was necessary to build up a workmen's compensation act but the law could be administered by the courts as far as the legal questions are concerned. Your public utilities men are mostly men from the legal profession. Are these commissions any better than the District Judge on the bench. You do not need a commission. Abolish the commission and put it back in the courts because it will reach the courts anyhow and the Supreme Court will have the benefit of the experience and findings of fact and conclusions of law of a court of record.

JUDGE AILSHIE: Twenty years ago, with a couple of gentlemen, I secured the passage of an act authorizing the Supreme Court to announce decisions orally in all cases, or such cases where the judgment was affirmed, if they might deem it unnecessary to have it reported and especially in those

cases where no construction of a statute or constitutional privileges were involved. The legislature passed it and Governor Alexander vetoed it saying that the litigant had a right to know the reasons why he had been beaten. While the present statute says the opinions of the Supreme Court must be announced in writing, it doesn't say how much writing. Unless the case involves the construction of a statute or a constitutional right, the Court could comply with the statute by merely writing "judgment is affirmed." If the judgment is reversed it is necessary to point out errors upon which the reversal is based for the guidance of the trial court.

JUDGE MORGAN: I would not like to see this Bar recognize that the Legislature can dictate to the Supreme Court whether it hands down a written opinion or not because Article 5, Section 13, is to the effect that the Legislature is not to deprive the courts of any powers properly belonging to them but it shall provide a proper system of appeals and regulate when necessary the procedure in all events below the Supreme Court. The matter of written opinions or oral opinions is for the Supreme Court. If the Bar will stand for it I am in favor of memorandum decisions in every case.

JUDGE AILSHIE: You have the statute and you have either to comply with it or say the legislature had no power to enact it.

PRESIDENT: The Bar meeting in Boise last summer presented a question that was passed over at that time without discussion and placed squarely before this meeting. That question is the proposal to increase the annual license fee. That matter is reported in the 1933 bar journal. The question is shall we increase the license fee from $5.00 to $15.00 per annum?

MR. HAWLEY: I move we postpone the question. We don't need the money; we haven't the money and we don't need it.

PRESIDENT: The question is that the matter be postponed indefinitely. All those in favor of the motion say "aye." The Chair declares the motion carried.

PRESIDENT: We will next take up the report of the resolutions committee.

MR. OVERSMITH: The resolutions are on the secretary's desk. We have not completed our report and there will undoubtedly be a supplemental report. But we want to hear the discussion.

PRESIDENT: It is your desire we take them up resolution by resolution is it? If so, will the Secretary read them.

MR. GRIFFIN (reading): "The Committee on Resolutions begs leave to report for your consideration the following recommendations. First. We recommend a permanent committee to be known as a Recommendations Committee be appointed in the following manner: That at the close of this meeting each member of the Commission appoint one member of the bar from his district as a member of the committee, and that such committee shall serve for a period of three years, except the first committee appointed shall serve for one, two and three years and shall cast lots for the terms of office and that after each annual meeting the member whose term expires shall be filled by the member of the Commission from that district.

We further recommend that such committee organize as early as possible and that every member of the bar shall feel free to make suggestions as to needful legislation and recommendations of matters beneficial to the administration of justice. That such committee shall formulate recommendations or resolutions to be presented at the next annual meeting, which recommendations shall be mailed to each member of the bar before May 1st next preceding the annual meeting. That said committee shall meet with the Commissioners in the planning of the program for such meeting in order to harmonize the program with the contemplated recommendations and resolutions.

We recommend that such committee serve without compensation but shall receive actual expenses for attendance at one meeting."

MR. OVERSMITH: I move the adoption of the resolution.

Seconded.

MR. EBERLE: The reason Mr. Oversmith is making me the goat is that when I saw the program I expressed myself rather forcibly on the type of subjects assigned to the speakers. I had come year after year and listened to the same discussions and similar ones and I wondered whether the same problems were worrying me and the other members and I thought this was the place we might discuss them. However, I do wish to make a few comments. I think it is well to coordinate with the program committee on the matters that might be discussed. We are perhaps the leading profession in an organization of an association with the purpose of keeping intact the ethics and traditions of our profession and the betterment of the individual welfare of our members. I come to these meetings and sometimes wonder whether these discussions are a drawing card to those of us wondering about the state of our profession and about the present rather precarious situation we are in. In view of those conditions of the legal profession it has given us an opportunity to do some thinking and I have been reading reviews of various conventions and authorities in industry and business and as I read them I find that the speakers are referring to the ethics of business just as we have for a good many years, but being business men they are also very practical about it and are formulating very definite provisions toward the betterment of their entire industry and each individual in it. There are a number of things that bother me. I would like to come to an association meeting where we could talk about them. I would like the reaction of other members. I can see the entire investment business of our office going; the insurance companies and loan companies for whom we have done business for years—these are slipping off into governmental agencies. Is that going to continue so far as our profession is concerned? Codes have and purport to be given the effect of law. They set up authorities which have legislative, judicial and executive functions. They cover the entire field. What are we going to do? The entire field is uncharted. What part are we going to take? Is that entire business going away from the legal profession? They have their regular lawyers. When it comes to matters pertaining to code authority they employ somebody else. Why is that? If these things are worth while it is up to us as individuals or an association to find out whether or not people are going to let the legal profession participate, because when all is said and done these things are contrary to our legal traditions. We must chart these things. We have nothing on our books today that could help us. Our only precedents are Rome and the Orient law. This is only one field. We know of others. There are so many things close to our hearts we might discuss.

MR. GRAHAM: I am a member of the present Commission and also of the present program committee and we try to get some suitable subject for the members. If there are any members who will aid and assist the Commission in getting up a live subject, we wish they would volunteer.

MR. OVERSMITH: The committee gave a lot of thought to this. We

realize the Commission is without salary and to act for the entire bar, besides the duties imposed by law, we thought was placing too much on the commission for they are devoting their time and spending their money—more money than they are getting, and we felt it wasn't fair to burden them with the matters which it looks at this time might be worked out through a committee. Anybody is welcome to write any members of the committee and make suggestions. At this time you appoint a committee on resolutions to meet the day before. You can't very well draw your resolutions and make your recommendations and resolutions to fit a program already constructed. We thought we could coordinate the resolutions and the program and be of some assistance to the bar.

PRESIDENT: The question is on the resolution. All in favor make known by the usual sign. Contrary. The vote is carried.

MR. GRIFFIN: Resolution number two: "That a survey be undertaken through and under the direction of the Bar Commission, by means of a secret questionnaire on the business of the attorneys of this state and the conditions, legislation and other matters affecting the same and that such questionnaire be prepared in such manner as to elicit information touching the business conditions of the attorneys in the State of Idaho and particularly to ascertain the effect of governmental activities upon the administration of justice and the curtailment, if any, in the business of members, and that the Bar Commission take such action as the findings justify."

MR. GRAHAM: I will move its adoption. I can say the inception of that was that a great many attorneys told me a lot of these things are affecting their business and if there is any way to correct it or help it, we should do it.

MR. PAINE: That seems to carry this implication that if we prosper under the new conditions we are for it and if not we are against it. It seems a very selfish view to take.

MR. GRAHAM: That was not my thought. I thought to ascertain the actual conditions of things. What is it that has cut down your abstract business? What can be done? What is cutting down other business of attorneys and their income, and is there anything we can do as an association to assist the individual attorney to get a little more of the 59c dollar? I don't intend it as criticism.

MR. OVERSMITH: If we can't make conditions better for the business as a whole then we should not exist. There seems to be in some places conditions existing, which if they continue, the legal profession will have to go out of existence. After all the legal profession has as much right to exist as the medical profession because we are making this a happier and better world. If the government can do it better, very well.

MR. GRAHAM: My idea was a practical survey.

MR. MERRILL: That recommendation is quite far reaching. I believe it would be a very vital and helpful one for the association. It is one that has engaged the thought of a number of us for a good deal of time. We may be idealistic but we are in need of meeting certain changing conditions that envelop us. We see business organizations with codes and see them giving attention to their own financial existence and it seems to me that unique methods must be considered before cultural advances will be enjoyed. We must give attention and thought to that as well as to the proper administration of justice and the ethics and ideals we have been taught to consider. We

have been decrying the fact that business is practicing law but we have ourselves often times been on forbidden paths in operating businesses and it seems to me that out of it might grow a serious condition. I have chosen a profession—that of a lawyer. That should be my business. In order that I might best serve my clients I should free myself from as much private business worries as possible. I sell to my client my legal judgment and legal training. That is an ideal I think the profession should consider and understand. This theory is not original. It has been tried elsewhere. It will enable us to discuss intelligently at future meetings the condition of the members of the bar as a class. The trends of business are various. We are going at it now in rather a poor way, without any guide and with the aid of a questionnaire of this sort and the information elicited we will be able to get some very helpful things that will assist us in mapping out for the profession a field of endeavor that will be somewhat to our economic advantage.

MR. PAINE: I was objecting to that because of its form. It is too narrow. I don't think the laymen care whether I shall make money or not and I don't believe the members of this association are particularly interested in whether I prosper. It seems to me it should be broader in its scope to find out whether or not I am in favor of the new deal, not whether I make money by virtue of it or lose money. Of course if these so-called measures that are affecting our business are merely temporary, and I don't believe they are, although I hope they are temporary, this would be all right. I believe we will only get rid of them by voting them out of existence but that is the question I am interested in and not determining who made a thousand dollars less in 1933 than in 1932, or whether you are examining more abstracts or less. Let's broaden it.

At this point the resolution was voted on.

PRESIDENT: I declare the resolution carried.

MR. GRIFFIN: Number three is: "That the legislative committee of this association be authorized to draft legislation for presentation to the 1933 legislature legalizing the status of the Judicial Council."

MR. OVERSMITH: : I move the adoption of this.

Seconded.

MR. HAWLEY: I think the members understand that. It is a matter we can vote on without discussion.

Carried.

MR. GRIFFIN: Number four: "The Idaho Workmen's Compensation Law was designed and has for its objective prompt and just compensation for injuries or death resulting from industrial activities. The injured employee or his family is entitled to every reasonable opportunity to present his cause. In some cases the workman is denied his right to a final decision by the Supreme Court on account of the large expense of transcript of the evidence, printing of the briefs and payment of costs. We recommend that legislation be enacted so that necessary transcripts of the testimony be furnished without cost and that the cause be submitted to the Supreme Court on typewritten briefs and upon payment of merely the costs of filing the appeal in the Supreme Court.

MR. OVERSMITH: I move the adoption of that.

Seconded.

EARL SMITH: Who is going to prepare those transcripts?

MR. MERRILL: We thought the situation was that occasionally there are

people who are unable to get their matters presented and we could see no reason why some legislation could not be made which would enable them to be on the same basis as one charged with a crime or perhaps they could use the same transcript used by the I. A. Board in submitting the case. The latter procedure would not involve any expense or require any payment.

JUDGE MORGAN: I would say it is gravely doubtful whether or not the preparation or presentation of a case upon a typewritten as distinguished from a written brief is not a matter within the control of the court rather than the legislature. The court has never failed to permit a typewritten brief to be filed when permission has been applied for. Anyone who sets up any kind of necessity for a typewritten brief instead of a printed one is given that privilege.

MR. SMITH: I have always seriously doubted if there were any fees in a compensation case. I don't have any objection to $12.00 but we still have a question as to whether the workmen's compensation is civil or what it is. If it is a civil case all other kinds of civil actions are wondering why this kind leads. The statute states that upon appeals from the District Court the transcript should be sent from the District Court to the Board. It then provides that if there is no appeal taken within twenty days all the records sent up from the Board shall be returned to the Board. I draw attention to the fact that there is no specific provision in the law in what time the appeal should be taken to the Supreme Court. Under the statute before referred to it must be within twenty days. Apply that principle a little further, if the appeal must be taken within twenty days then when that appeal is taken the same rule applies as from the Board to the District Court. You must send that transcript to the Supreme Court. It is a matter of procedure, a rule of the Supreme Court, as to the records which will be supplied. It is my theory that the Supreme Court can by rule designate how many transcripts should be sent up and they can be prepared by the reporter or anybody else. The practice, however, should be as I see it that the Supreme Court should designate these cases brought up by a bill of exceptions which can be prepared by the attorneys if they will work a day or two. I don't know of anything else to add except that I object to that proposal.

MR. OVERSMITH: We didn't intend to legislate. The Supreme Court has a power to make rules which have the same effect as legislation and we want to get away from this indefiniteness in the matter of these appeals.

PRESIDENT: The question is as to the adoption of this amendment. Let us have a rising vote on it.

Voted: 17 in favor of adoption; 10 against adoption.

PRESIDENT: I declare the motion carried.

MR. GRIFFIN: The next one is numbered four and a half. "In this connection we also recommend that in cases where a lone workman is mortally wounded the rule of evidence be modified in order to permit dying declarations to be admitted under reasonable restrictions."

MR. OVERSMITH: I move the adoption of this recommendation.

Seconded.

MR. SMITH: This thing of hearsay testimony, and that primarily is what this is, has been discussed ever since I have been in the practice and perhaps long before in these cases. I have had a number of cases involving the strict interpretation of what was hearsay and what was not and I believe in the ten years I have never found one case where there was a miscarriage

of justice under the old rules of evidence and I don't believe that sort of a resolution should pass. It opens the entire field for hearsay and that is not evidence and it never was and never will be. I think there are two cases in our reports that resolution is aimed at. I personally have an idea there was not a miscarriage of justice in either of them. As I see it that thing is going to open up all kinds of evils. It is going to open up the entire field here against the surety companies. Are we going to permit an injustice to be done to the surety companies who have to pay these bills? I maintain any lawyer if he will get busy and look up the law and knows what he is doing, will find he does not need that kind of a resolution.

FRANK MARTIN: I don't think it would work any injustice. It applies to cases only where a man is injured when alone and dies.

MR. SMITH: That is simply an opening wedge to have hearsay regarded by the Industrial Accident Board and perhaps the Supreme Court will say they are bound by the findings of that Board.

FRANK MARTIN: We accept this kind of evidence in cases where a man's liberty or life is involved in criminal cases. I don't believe that the money of an insurance company is more sacred than a man's life and his liberty and if a man is injured when alone and dies and makes a statement in view of impending death, I am unable to see the objection to that class of testimony.

MR. SMITH: There is a case decided on that by the Supreme Court if you will read it.

MR. MERRILL: The situation is this: In many instances a workman is working alone. He may be a night watchman injured while engaged in his business but no one sees the injury. He goes home or is taken home and he tells the doctor and his wife or nurse how he was injured while at work and he dies. There is your testimony. It is ruled out because it is hearsay and the family loses the compensation because of hearsay. The exception to the hearsay rule has been recognized in homicide cases and it is merely recognizing the same testimony in industrial accident cases in order that the workman might have the full protection of the law. It isn't against the insurance companies. I don't think any insurance company would want to evade the payment of a just claim. This is made with the purpose that this hearsay testimony may be recognized and justice done.

MR. SMITH: I think I have come across case after case along the lines you speak of and it is a uniform rule that the mute evidence of that death and the surrounding circumstances and what the man was doing at the time will govern the decision. There is a presumption against a man deliberately killing himself.

JUDGE MORGAN: Whether he is careless or not does not enter into it; if he is found on the premises of his employer he could recover anyway.

MR. SMITH: The thing I object to is opening this wedge in this law when our Supreme Court has held we are bound by the findings of that board and if we are bound by that board we are going to be bound by hearsay.

MR. MERRILL: How about criminal cases—how about a dying declaration?

MR. SMITH: Some of these days surety companies are not going to write that kind of business. Everybody is beginning to wonder what the solution is. The insurance companies are going to have to revamp their entire setup and charge prohibitive premiums and it will mean that as long

as this rule of the Supreme Court is in existence that we are bound by the findings of a fact finding body.

JUDGE MORGAN: I haven't looked into this matter to determine if there has been a miscarriage of justice in Idaho by reason of the exclusion of dying declarations.

MR. DONART: I can't answer the Judge's question. I have had very little experience before the Industrial Accident Board and know very little about it, yet I agree with General Martin and I think everything that has been said along that line is true. We like to think that surety companies want to pay if a man is injured in the course of his employment but I had a recent experience that changed my idea. I appeared for a young man in Weiser who was injured in the employ of a local concern. There was no witness there as to how he was injured—he was not killed, at least he has not died yet. When his claim for compensation was first discussed the surety company admitted he was injured in the course of his employment. When the man became incurably insane then the surety company denied he was so injured and we were unable to prove his injury arose in the course of his employment, although he was at his place of business and he was injured by a barrel of oil falling upon him. They held his injury was self-inflicted, while before he had become incurably insane and disqualified himself as a witness the question of how the injury occurred had not been objected to. I don't care whether it is going to increase the premiums. We can perhaps get along without the surety companies, but I say it is a hundred times better to have premiums increased than to have one man's family go without the compensation that is justly theirs and which the insurance company has been paid a premium to pay them. It would be better to increase the premiums as many as a dozen times. The idea is to protect and to see the insured man is protected rather than to protect the surety company who is a volunteer in this. If evidence of that kind is admissible where human life is at stake it should be admissible to determine whether or not an employee met his death by something that occurred in the course of his employment or not.

MR. SCHOOLER: In answer to Judge Morgan's question. I recall one of these cases before the Accident Board where a man had strained himself, according to his own statement, later resulting in an intestinal complication from which he died. His testimony was ruled out and the case went no further.

FRANK MARTIN: I do not understand this resolution would open the doors to hearsay except in the one instance. The purpose of workmen's compensation is to provide compensation for a workman and his dependents for injuries incurred in the course of his employment and the law should be construed to accomplish that purpose and industry should bear the burden of the things that occurs in it. It does not make any difference whether the insurance company has to raise the premiums for the insurance. They would simply raise the price of their product and the consumer would ultimately have to pay. The question is whether or not it is dangerous and whether it would lead to wrong conclusions. I imagine that the law would be so framed that this would be hedged with the same safeguards as the homicide declaration is. There would be very few of this class of cases for consideration but if only one comes up that one should be able in some way to receive justice and to receive the compensation to which he is entitled and not have

it fail because by his death he is unable to present any proof it occurred in his employment.

MR. SMITH: If we have a provision that the appeal should be on questions of law and fact it would not be so objectionable because we would have a right to review the facts found. A large majority of lawyers who practice this class of law believe that limiting the appeal to questions of law only is unconstitutional. That is one of the primary reasons why we believe this sort of resolution should not pass. We are going to be guided by hearsay. I think when a man is hurt the first thing that flashes through his mind is his family. I have gone through that and it is the first thing in my mind. Can I get $5,000.00 for my family? I think in view of that situation, we do not want to pass any such resolution.

PRESIDENT: The question now is upon the adoption of this resolution. Those in favor signify by the usual sign. Contrary? I declare the motion carried.

SATURDAY, JULY 14, 1934, 10:00 A. M.

PRESIDENT: Gentlemen of the Bar: After six years as your Commissioner and three times presiding at the annual bar meeting, I now turn this position over to my successor, that distinguished gentleman and lawyer, Judge Ailshie.

JUDGE AILSHIE: Gentlemen: In assuming the duties as President of this Bar I want to ask your cooperation and assistance. I have served on this Commission for two years with Mr. Owen, who is just retiring, one year with Mr. Healey, and one year with Mr. Graham. I have found it entails a great deal of work and you must have suspected as much from the report of the secretary. There are numerous complaints, a great deal of correspondence, the examination of applicants and a multitude of things that require the attention of the Commissioners and that consume a great deal of time. I have found we can only succeed in the work with the cooperation of the bar, and that is particularly true in cases against a member of the profession. A great injury can be done to an attorney by some irresponsible person who wants to file charges against him and have him disbarred. If this is made public it will do him a great deal of injury. On the other hand there are cases in which you have simply got to hew to the line and discharge a very unpleasant duty, and while I think the bar of this state and the Commission is losing a very valuable servant and officer when we lose Mr. Owen, who has had six years' experience at this work, I can appreciate the sense of relief he must feel as he retired from the work he has done so earnestly and devoted his time to the last six years. We are losing a great deal when we lose that experience. It takes a man a long time to link the things to be done and the manner in which to do them and how to despatch the work. We will now proceed with the regular business of the association.

MR. OVERSMITH: I believe it is fitting that we give Mr. Owen, who has been on the Commission so long, an expression of our gratitude and I move we give him a rising vote of thanks for his excellent work and his long experience and service. I think he is the only man who has ever served two terms. I move a rising vote of thanks. I will ask you to rise.

Rising vote.

PRESIDENT AILSHIE: Will the secretary read the next resolution.

MR. GRIFFIN: The next one is number five. "We direct your attention to the fact that tax levying boards and tax spending boards often exceed legal authority in the levying and expenditure of tax money. The tax payer is without protection except his right to bring suit in his own name and hire counsel at his own expense. We recommend legislative action which will permit any person feeling himself aggrieved on account of any such illegal action, to bring such facts before the Attorney General of the State of Idaho, whose duty it shall be to require the Prosecuting Attorney of the county in which complaint is made, to investigate the facts and report, and after such report showing an illegal tax levy or illegal expenditure of money or threatened expediture, it shall be the duty of the Attorney General to bring suit in the name of the State of Idaho for proper relief, and he or the Prosecuting Attorney shall prosecute such suit to its final conclusion."

MR. OVERSMITH: I move the adoption.

Motion seconded.

MR. OVERSMITH: In our county we have a highway district bonded for $320,000.00. There was $85,000.00 in the sinking fund and the board of the district decided it wanted to build another road and took every cent and spent it. The bonds of the highway district now are in bad shape. There is a statute that an appointive officer of the county cannot have his salary increased either directly or indirectly and yet that is continuously violated in my own county. The Chief of Police was allowed $25.00 for his automobile contrary to law. An individual taxpayer cannot afford to pay the expense of litigation over the matter. We, as lawyers, get no business, but with a requirement of that kind some litigation will result to the benefit or interests of the taxpayers and we, as lawyers, should be interested in public affairs. I hope the resolution passes. It will be no particular hardship if the law is on the books, and it will have a good effect. If anybody steals my property the state takes it up as a public matter and he is punished, but a tax-spending or tax-levying body can still steal all they want to through illegal investment and I have no protection whatever. It is a matter the state should control.

MR. HUEBENER: I wonder if the committee has carefully searched our statutes. My recollection is that we have a statute which requires the attorney general and prosecuting attorney to take action against these boards if they have exceeded their authority in levying or spending money.

MR. OVERSMITH: I think the one you have in mind refers only to sinking funds.

JUDGE MORGAN: I move the following: That last clause be made to read, "and it shall be the duty of the attorney general to bring suit in the name of the State of Idaho for the proper relief and he or the prosecuting attorney shall prosecute such suit to its final conclusion."

JUDGE AILSHIE: Does the committee accept the amendment?

MR. OVERSMITH: Yes.

JUDGE MORGAN: Sometimes the presecuting attorney is the advisor of the board that is wasting the money or sometimes somebody wants to inquire in the proceedings of the county commissioners.

JUDGE AILSHIE: The amendment will be considered a part of the resolution as offered.

MR. OVERSMITH: The reason I had them report to the attorney general was to reach the matter you have in mind. It should be a state matter and not a local matter.

Voted. Carried.

MR. GRIFFIN: Resolution number six: "That Section 3-409 be amended by striking out the exemption of Judges of Courts of record who are lawyers from payment of annual dues to the State Bar Association. Closer relationship between those members of the bar who are fortunate enough to be on the bench with the active practitioners is desirable and by the payment of dues, Judges should have a more active interest in the State Bar Association. We believe it would be highly advisable if the District Judges would meet with the Supreme Court Judges at each annual meeting of the Bar and recommend that the legislative committee draft appropriate legislation along the line of this suggestion. The Bar Commission and the recommendations committee will endeavor to arrange a program for the annual bar meeting so as to permit free and open discussion between the members of the bar and bench."

MR. OVERSMITH: I move its adoption.

Seconded.

JUDGE AILSHIE: I notice you are going to include the judges of all the courts. The constitution does not require a judge of the Supreme Court to know anything and he does not have to be a lawyer.

MR. GRIFFIN: Have you considered whether or not you can impose this license fee on a judge? What would you do with him if he did not pay?

GENL. MARTIN: The license is collected upon the theory it is an occupational license. The fee we pay is paid not as a voluntary fee. It strikes me the legislature cannot impose on a judge a fee as a practicing attorney because the law forbids him being a practicing attorney. I think the Bar is proposing to the legislature a law which they couldn't legally pass.

JUDGE MORGAN: I believe the General is unduly disturbed in regard to the nature of this law. This is a fellowship and there isn't a man who ever has practiced law and gone on the bench who does not get lonesome once in a while to be back practicing. I feel grateful for having been invited to come into full fellowship but I wonder if it is possible for the legislature to pass a law that is unconstitutional. I would like to see the color of a judge's hair, if he has got any left, who would raise the question of its constitutionality.

MR. MERRILL: I believe the resolution should be amended by adding the words "who are lawyers" after the words Judges of courts of record." To leave it as it is now may bring into the association probate judges who are not lawyers. I move an amendment to that effect.

MR. OVERSMITH: The committee accepts the amendment.

Voted. Carried.

MR. GRIFFIN: Resolution number seven. "We recommend to the legislative committee a study of Section 30-301 I. C. A. with a view of ascertaining whether or not disciplinary proceedings can be had on any other ground than the six grounds specified in this section. In the event it shall be found that proceedings cannot be taken except upon statutory grounds, then that this section be amended so as to include the most important legal ethics laid down by the American Bar Association. The following are suggested:

(a). Refusal of attorney to act as counsel where he has been appointed

by the court for the defense of an indigent person accused of a crime, unless excused by the court.

(b). Advising any person as to his legal rights on the part of any attorney who represents opposing interests unless a full disclosure is made of such attorney's relationship to clients who might be affected by such advice.

(c). Any wilful attempt on the part of counsel to settle a controversy with a person who is represented by other counsel.

(d). The stirring up of litigation on the part of any lawyer who directly or indirectly solicits legal business for the purpose of bringing any suit or proceedings for advantage or gain to himself.

(e). Refusal on the part of any attorney to account to a client for the full amount of all moneys or property received as a result of such employment and to turn over to such client such moneys or properties, less reasonable compensation to the attorney.

(f). When a client is represented by counsel in any matter no other lawyer should take up such matter for the same person except with the consent of the attorney first employed or unless the client has first discharged and paid such attorney. An attorney should not arbitrarily refuse to terminate his relationship with a client or demand excessive charges for his services. This suggestion should be so drafted into a law as to permit the District Court to pass on the reasonableness of compensation of an attorney whose client has terminated his employment as attorney.

(g). An attorney who is acting as Trustee or who is acting as Fiduciary should be subject to discipline if he represents as an attorney or otherwise any interest conflicting with his duties as such trustee or fiduciary.

MR. OVERSMITH: I move its adoption.

Seconded.

MR. MARTIN: There are a couple of those sections I don't think should be in there. The one concerning the attorney representing a client when some other attorney has been representing him. I never will and I know no member of our office ever will represent a client where another attorney at the time represents him, until all connection with the other attorney is settled, but to make that a basis of discipline is going a little too far because sometimes the fault is with the attorney who refuses to do something. A client should be able to go to some other attorney in that case and I think that is going too far. The other relates to settlement with an attorney's client. It is not generally done but there may be cases where an unscrupulous attorney might refuse to settle for his client's benefit. There might be cases where you feel you could actually gain something for another man's client if you could make a settlement, where his own attorney would not allow him to settle. I think those two things as a basis for disbarment proceedings is going too far. I move those two sections be stricken from that resolution.

JUDGE AILSHIE: What are the numbers of those sections?

MR. GRIFFIN: (f) is about restriction of counsel where client has another counsel.

MR. GOFF: I think we can cut out the specific grounds set forth. I don't believe our Supreme Court will be or is limited to disbarring an attorney to those six reasons set forth in the statute. I feel we are agreed it ought to be up to the Supreme Court to determine who should practice before it and it could state what are grounds for disbarment. The legislature can't limit

[illegible] I believe it can be much simplified by simply adopting the [illegible] the resolution.

[illegible]SMITH: That is only a recommendation that this investiga-[illegible]

[illegible]: As I interpret this resolution it is to make it easier [illegible] to dispatch its work. If these are actually there it might [illegible] for the commission to go through the legal action on it and [illegible] the work of the commission lighter and easier.

[illegible]: One thing should be included and that is in regard to [illegible] of a crime. We have at this time a complaint before us of an [illegible] in Federal Court of taking illegal fees. The question is [illegible] conduct of that kind comes within the statute. I think the [illegible] ought to include any lawyer who has committed, [illegible] of a felony.

[illegible]SMITH: We include that if it is agreeable.

[illegible]SHIE: A man serves a term under a Federal judgment, [illegible] in the case referred to, we are in doubt whether or [illegible] power to do anything.

[illegible]SMITH: All of these are taken from the most important [illegible]. Of course an attorney has a lien upon any cause of action in his [illegible] to settle anyway without his consent. With respect [illegible] members of the bar who see no harm whatever [illegible] which is in the hands of another attorney.

[illegible]: If it was a suggestion or instruction to the legisla-[illegible] to prepare bills, I think we are going pretty fast, particularly [illegible] between attorneys and clients. The bar commission [illegible] such questions and advised with the attorney and [illegible], that a settlement be made and money paid over and [illegible], but sometimes there is a dispute between the attorney [illegible] as to the amount of fees he should be paid and we ought to be [illegible] anything in the statute.

[illegible]SMITH: There is no such thing thought of.

[illegible]SHIE: The question is upon the adoption of the resolution. [illegible] carried.

[illegible]SHIE: We have been fortunate enough to secure the [illegible] experienced and able lawyer from the neighboring state of [illegible], a man who holds the position of President of the Washington [illegible] Association. I take pleasure in presenting to you Mr. O. B. [illegible] of Seattle, President of the Washington State Bar.

[illegible]:

Mr. President and Members of the Idaho Bar: The Washington State [illegible] by your invitation to appear before you. I am not an orator; [illegible] to tell you some of our problems in the neighboring state. [illegible], Idaho was a pioneer in the bar movement. Some ten years [illegible] it. We adopted it ourselves a year ago and we have only [illegible] integrated bar since August, 1933. It has been a very [illegible] year and I have enjoyed the work. We cannot shut our eyes to [illegible] there has been a wide spread criticism of lawyers and judicial [illegible] a large part of that criticism is not merited we know. Some [illegible] perhaps we are rather conservative. We like to do things in [illegible] and we have met the changing conditions as best we could. But

we probably have not been careful enough in adopting disciplinary methods when needed. We have also been criticized for delay in judicial proceedings. Maybe the courts can share that criticism with us, but we all know we are rather prone to continue matters, and while I don't think it amounts to much we are bothered by criticism in eastern states. When you do want to get a case through, or when some prosecuting attorney wants to prosecute a person he can get the case through, in quick time. However, there is some merited criticism and we feel that through the integrated bar we can do much more to remedy affairs that exist and help keep lawyers in better repute with the public generally.

Our work is changing. I went into a law office in February, 1895, in a Nebraska town and I have had nearly forty years' experience. The practice has changed much since that time, through title companies which took our abstract work, down through companies who administer estates and trusts, through workmen's compensation acts, through State and United States bureaus. Through those things a large part of the work formerly considered proper for lawyers and which brought them remuneration is taken away and further we have a constant chiseling away of our agencies, taking away work which should be done by lawyers. In my case my work has changed from court work to commission and bureau work. Lately I have had to handle matters requiring correspondence and a trip to Washington. I don't like this bureau and commission work but we have to prepare ourselves for it in order to represent our clients and therefore we must keep up to date and be able to do that required legal work.

We feel we owe a responsibility to the public generally, so we decided to do what we could to improve the standards of the bar as to admission, as to what should be standards of ethics for lawyers if admitted, and also to do what we could toward simplifying court procedure and helping the courts get through the work imposed on them. To do this we organized in Washington. Our Act is copied to some extent from yours although it is shorter, and a lot broader powers are given to the Board of Governors. We had other states to follow and Supreme Court decisions to follow and we could build a more flexible act and give the Bar more power.

We have in Washington about 2400 active lawyers and 100 inactive ones. If a lawyer does not desire to practice he is put on an inactive list and pays only $2.00 a year. We have a $5.00 charge with the right of the Board of Governors to raise it to not exceeding $10.00. Our $5.00 fee brings us in about $12,000.00. In addition we have an examiner's fee of $25.00 for taking an examination which can be used for examination expenses. Anything left over goes into the state treasury. Of the $3,000.00 we raised this last year, some $2,000.00 will be used for examinations and the remainder will go back into the state treasury. Having a new organization we are fairly well fixed financially with a sum of approximately $15,000.00 allowed to use in the work.

We decided that to question and examine properly 120 or 125 men a year was too much work for the Board of Governors, for, as here, the Board receives no compensation except actual expenses in attending meetings, so we appointed a board of three men for examiners. We found that for a man to prepare proper questions and make examinations fair and comprehensive would require two or three years of experience. So also in marking papers, experience is worth a great deal and we appointed men on this board who were good lawyers and who were good students of law and who were willing

[illegible] the position for some years. We pay them $500.00 a year [illegible] an examination in January and July. From 40 to 50 take [illegible] and at the July one from 80 to 85.

[illegible] problem is handling the disciplinary work. Formerly a com- [illegible] matters but it was not satisfactory at all and [illegible] local administrative committees in the various counties. In [illegible] we had a committee of five and in the smaller ones we [illegible] two counties and have one or two on the committee, [illegible]. We are trying to keep up local interest because we realize [illegible] annual convention is not sufficient to keep lawyers interested [illegible] are trying to interest them locally. These committees hear [illegible] different types of complaint that come to their [illegible]. We refer to them those that come within its borders. [illegible] we ask them to hear and settle them, themselves. Some- [illegible] complaints that do not merit any serious consideration. [illegible] are necessary to clear up some local situation and [illegible] lawyers who are able to use good judgment and will try to [illegible] these local problems. In the last eleven months [illegible] our various local committees ninety-two cases, of which [illegible], without any notoriety, and without doing the [illegible] where the charges were unjust. In a few cases they [illegible] a censure and it was administered. The more serious [illegible] to the Board's attention and we decided what should [illegible] referred it to a trial committee. We have trial committees [illegible] and we have a trial presided over by a member of the [illegible] of the particular district, because there are two mem- [illegible] who act as trial judges. They hear the evidence and [illegible] and we decide what should be done and make final [illegible] to the Supreme Court, which has absolute say as to who [illegible]. The hearings are public unless the members [illegible] a private hearing and if they do, it is a private hear- [illegible] reported so we will have a transcript of the proceedings to [illegible] coming up before the Board. In some cases the accused [illegible] and sometimes he desired it to be public. I think [illegible], however.

[illegible] enough to have enough money so we can employ a man [illegible] and try the more serious cases. Sometimes we do get a pros- [illegible] or some local man to take charge of it. Ordinarily our [illegible] by the Bar prosecutor or investigator, who used to be assistant [illegible] Attorney, is a man of judgment, and knows how to conduct [illegible] it can be done so much quicker.

[illegible] which we had was that of admissions. Our bar is very [illegible] especially in the cities along the Sound. The number of [illegible] who come through my office is tremendous, possibly because [illegible] of the Bar Association and am in one of the larger offices. [illegible] the young fellows who come in looking for a place where [illegible] to do some work and find a foothold. We can't [illegible] and have practically twice the number admitted we should [illegible] we ought to stiffen up admission.

[illegible] in two ways. We have taken it up with the local law [illegible] we expect in the first year of law school to weed out those mani-

festly unfit. It is not fair to let boys go three years to law school and then turn them down, hence they are going to weed out those who cannot make good lawyers so they will get into some other line of work. We have increased the qualifications somewhat. I think, however, you did that before us. You have two years of college required before they can study law even in a law office. We have had that in force so far as the law school is concerned.

One of our problems has been those who attempt to get into the profession through law offices. For many that was the only way, but now it is not, and we found that when we took over last August over a hundred law students had been registered as law students who had no more education than a high school. Some were stenographers in law offices who desired to study law and be admitted, some were clerks and a few were actually clerks in offices, but we found that lawyers generally did not have time to give them help or to prepare them to take the examination and become competent lawyers. With our requirement of two years of college work before they can study, we have very few registered now as law students, but we do have those we inherited and will have a problem for some time as to men coming in from that poorly prepared method. Some through careful work can sometimes prepare themselves so they can pass the examination. The mortality in examinations of that kind, however, is very large.

We also try to investigate the character of applicants. This is very difficult. We have a number come in from the outside. Some who have practiced five years have a right, if they have sufficient standing in their locality and have proper moral qualifications, to be admitted on motion by payment of a fee of $50.00. Those practicing less than five years have to take an examination. We make quite a thorough investigation in the locality where the man is from to ascertain why he is changing. We found a number who were changing to get away from disbarment proceedings at home. We can restrict that to some extent. We are depending largely on the fact that the law schools are attempting to hold down their students to men who are all right morally. We have not been able to make much investigation though we are contemplating some oral quizzes. It is difficult to work that out satisfactorily and yet keep our examinations impartial and without the examiners knowing whose paper belongs to any particular one. We now have the same system as used here.

We are also stressing the work of the American Bar Association. You probably know they decided a year ago they would stress certain work. One matter was the selection of judges. We have a very live active state committee working on that subject. Our judges are elected. The Supreme Court judges have terms of six years and the Superior Court judges have four years. Some come to their positions through appointment and then there are a number elected in the first place by the state. It is not entirely satisfactory although I feel it will be some time before the public will be willing to give up their control of judiciary by giving up their right to elect members of the courts. Our committee is going to present a plan to us at our meeting in August whereby a commission composed of the Bar Governors with the Governor and three laymen, to be selected by the Governor, will make appointments. Then in order to meet the popular demand for some control by the public they are considering either a vote at the end of the term as to whether a man should be recalled, not running against anybody, and if

[illegible] he commission will appoint somebody in his [illegible] whereby the people will have a chance to say [illegible]

[illegible] our very best judges are not men who can [illegible] people generally and they are handicapped when they run [illegible] over the work of putting them across but [illegible] to do it and we do feel that this question of [illegible] is a big question in our state and we shall continue to [illegible] it will be some time before the people will [illegible]

[illegible] criminal law. This is not nearly as bad here as [illegible] there are some abuses. We have considerable delay. The [illegible] much and they handle some private work and [illegible] all their energy in pushing through a crim- [illegible] often the best defense is delay and they do very frequently [illegible] there is some abuse. There is some abuse also through [illegible] on the part of judges. This is not so marked now as in [illegible] we have two or three judges before whom [illegible] will get away with a very short sentence, and a lawyer [illegible] that judge feels he has gained something.

[illegible] some juries. You can appeal to their emotions [illegible] when you should not. By and large we do not have [illegible] enforcement of the criminal law they have in the east. [illegible] actual corruption but there is a certain amount of perjury [illegible] criminal work. I think that we have not been stern enough [illegible] prosecution of our cases where we know there is perjury.

[illegible] was the question of admission to the bar, and this [illegible] to the Board of Governors and the Bar Examiners.

[illegible] Cumberland practice of law. There has been a great [illegible] of lawyers' rights in our states from outside agencies. [illegible] more than you do in a state like this where there are not [illegible] We find that a number of title companies are really [illegible] papers and documents necessary to clear [illegible] all kinds of legal documents, and while they do not [illegible] charge for such paper, they do make a general charge for [illegible] When they handed out title insurance policies they covered [illegible] from the lawyers. As a rule those papers are [illegible] manner and sometimes by lawyers, but it does take [illegible] the lawyers in the small communities and it is work upon [illegible] lawyers rely for a livelihood.

[illegible] abuse through collection agencies and credit associa- [illegible] for collection. Most lawyers don't care about [illegible] although I tried the first year in Seattle on them and some [illegible] had the same experience. Collection claims are being [illegible] They actually solicit them and handle them [illegible] bankruptcy court. There was a great deal of work handled by [illegible] and they pay a lawyer a monthly salary and what- [illegible] to the credit association. We are trying to stop that and [illegible] pending to determine what they can do.

[illegible] the adjustment company formed for the purpose of get- [illegible] claims. Sometimes they worked as runners for lawyers and

they decided it was a good business. Through their touch with the insurance agencies, sheriff's office and so on they are able to get contacts with parties injured and they attempt to settle as quickly as possible for as much cash as they can get, frequently doing the injured parties injustice. Where they wouldn't settle they employ a lawyer and split the fees. We brought some actions and enjoined two of the leading adjustment companies engaged in that work and have temporarily stopped their work.

We have a great deal of trouble with accountants who go out to organize corporations. Two firms did more organizing than all the lawyers in the city. They would for a small fee agree to open up the books of account of a small company and do the work of organizing. We have had one of these cases heard and a decree entered enjoining those companies from doing that work.

We have the general amount of unauthorized practice done by real estate insurance agents and by officers of the banks in the smaller places who prepare papers. There is a certain amount of that kind of work which will be done by such agencies, but in some places there is quite an abuse. I know one or two who really make a great deal of their money from that work and they charge about a third what the lawyer would charge. The simple papers are prepared all right but the others are in very poor shape and their advice is often very bad. We will through injunction proceedings and, in the case of trust companies and banks, meeting their officers, try to cut out that class of work as much as possible. They may say we are selfish in doing it, but I think that if we are going to raise the standards and require a fine education for a man, we have a right to see no one else handles those lines of work, those legal problems, and we are really protecting the public when we see that these people are not allowed to practice law.

We are doing some work on the restatement of the law. As you know, that is being done by the American Law Institute. With 175 volumes of state reports in Washington, you will see it is quite a job to annotate it. With the help of the law school and with a little monetary assistance we are getting annotations to the restatements, so they will be used by the courts and bar.

We have a problem in our state of free legal aid. A great many legal problems come up and we have organized committees to take care of that work. We find that numerous cases go to the county for help when they are ahle to pay for the legal advice. If we find though that a person has no means and does need some help through this committee, we are going ahead and seeing he gets that advice. In Seattle we have forty lawyers, mostly young fellows, who under the direction of two or three experienced men, are doing a lot of that work. In the small places work is not so extensive and we have smaller committees. We are doing a work which is helpful and which is helping us also with the public generally because it is an unselfish work.

We have in our state a Judicial Council. Our legislature has recently given the Supreme Court the right to establish rules and regulations in regard to pleadings and court procedure. We are trying to make it simpler and better. The Bar Association is actively assisting in that work.

We have a number of local associations in Washington and we think in order to have an integrated bar that the local interest must be kept up. We want local associations wherever there are a number sufficient to form such

an association. In our larger centers we have associations which meet quite frequently. In Spokane, Tacoma and Seattle they meet once a week and in other places once or twice a month and they are helping to keep up interest in Bar matters. We think they are very necessary and can help a lot particularly in this one trouble which you do not have—the chiseling and cutting of fees. Many people go from one lawyer to another, sort of shop around you know, and finally get one to take his work at a very small fee. This is not fair to the lawyer or client. I have never known a case where a man took a case at a ridiculously low fee where he gave it the attention it demanded and as a consequence that work is not well done. We find through the work of the local associations they can bring some pressure to bear on those chislers and can keep the abuse down.

In our annual convention we have changed somewhat our form of procedure. Formerly we had some papers prepared by some good lawyers on a legal subject. It was an interesting paper but we found it was not attracting the real interest. The lawyers want to hear and talk about things that affect them. They can read such papers in legal magazines and so we are doing as you do here, we are talking over practical matters of interest; we will send out pamphlets with reports of our committees and recommendations so the lawyers will have them before the meeting and they will take a real active interest in the Association.

We are hoping, with this kind of work, we can gradually help the lawyers in public esteem, in their work and get them more interested in the problems recently coming up, and raising our organization in the respect of the public. I thank you.

JUDGE AILSHIE: I am sure I am safe in saying that this Association greatly appreciated your address and particularly the fact that you gave a practical address on the every day subjects which come before us all.

JUDGE MORGAN: I feel very grateful and I move we tender Mr. Thorgrimson a vote of thanks for the care he has taken in bringing this message to us.

Seconded.

JUDGE AILSHIE: It may be by a standing vote.

MR. THORGRIMSON: I am very glad to have the opportunity of being here.

JUDGE AILSHIE: I hope you will remain with us during the remainder of the session.

We still have some important business to transact before we have our next address. We want to finish the resolutions. Will you read the next one?

MR. GRIFFIN: Number eight. "Section 7-206 to Section 7-208 inclusive should be submitted to the legislative committee of the Idaho State Bar for simplification and we recommend that the legislative committee consider, as an amendment, requiring that at some stage in the trial to be determined by such committee, written instructions be presented by opposing counsel and given to the court for its consideration, and we also suggest the advisability of giving consideration to providing in our practice that the court give such time as the court may deem reasonable and to be determined by the court, for argument on the part of opposing counsel to all proposed instructions."

MR. OVERSMITH: I move the adoption.

Seconded.

MR. GRAHAM: Does that contemplate legislative action? That could be taken up by the District Judges.

MR. OVERSMITH: Well some won't do it.

MR. GRAHAM: The judges should establish a uniform practice.

MR. HACKMAN: I feel we should pass that resolution. It cannot be left to the judges. I have tried it.

JUDGE KOELSCH: There was a bill in the hands of some judges of the Supreme Court and they called several of the District Judges in to help consider it. I think the bill was given to one of the members of the legislature for introduction but it was not introduced for the reason it was too complicated. The practice that obtains in the Third District is something like this: In a civil case there generally appear one or two main questions, generally one; that also holds good in criminal suits; and that question appears long before the case is over. The way I do is to call counsel in a ask him, "This is the question, now have you any authorities to support or maintain your position?" Then I ask the other counsel. I prepare an instruction and they prepare an instruction. I question both sides and consider both sides, sometimes I have an argument on it. I consider their authorities and from that I get my own instruction which I submit to both sides and ask for their instructions. In this way we have very little trouble. When all of our instructions are ready I always submit a complete set of instructions to both sides and once in a while a suggestion or objection is made or my attention is called to something, the wording or some such thing. I find that the practice is not uniform. I find that in some districts they do not give instructions in civil cases before the argument. We do it always in the Third District in civil cases. There may be some field of discussion there as to whether that should not be done in criminal cases. It has been suggested that the District Judges get together and I believe there is the most urgent call for that; there should be an organization throughout the state and they should meet at the time of the annual Bar meeting. It looks as though Judge Winstead and I will be re-elected because nobody has had the temerity to run against us and I expect as soon as elected to start working toward such an organization. I believe that can be done by rules of court better than legislation. We will run up against snags.

MR. MERRILL: It seems unfortunate that a practicing attorney will go from one district in the state of Idaho to another and find different rules and this is what does happen. It is rather startling, but you can go from one district in Idaho to another and you will find a variation as great as you will find from Idaho to Utah and still they will be practicing under the same statutes. In some places the argument follows the instructions and in other places the instruction follow the argument. There are certain rules in some districts that there are not in others. There should be uniform district court rules, a uniform method in this state of presenting matters to the courts, whether by rule making or legislative enactment is a matter deserving of consideration by this body. The resolution is designed for the purpose of inviting attention of the legislative committee to those particular stautes enumerated, with the object that they give their attention to it. If they conclude the matter could best be met in another way they are to do anything they see fit, but if they think there should be a change they can well do it. The resolution is designed to direct the committee's attention to this particular evil in the practice.

MR. GRAHAM: There should be a recommendation to the District Judges. I am opposed to submitting anything to the legislature that is not necessary. You will go in with half a dozen hills for the lawyers and you will be turned down on all of them. If it can be remedied hy the Judges themselves it is much better. I move the matter be recommended to the District Judges for consideration.

Seconded.

JUDGE AILSHIE: The motion is to recommend this to the District Judges.

JUDGE MORGAN: That is all right but I think there should be a law on this. Even if the District Judges did organize it might not be successful. Some judges would obey the recommendations if they wanted to and if they didn't they wouldn't obey them. It would not require him to follow a uniform practice adopted by the organization. I wouldn't want to undertake which Judge would follow but I imagine we could find plenty of reasons why there should be a law on this subject.

JUDGE AILSHIE: The question is on the amendment.

Voted.

JUDGE AILSHIE: The chair is of the opinion that the amendment is lost, the question is now on the original resolution.

Voted. Carried.

MR. GRIFFIN: Resolution number nine. "We recommend an amendment to our inferior court practice which will provide that where a suit is brought in a justice or probate court and the defendant shall file a counterclaim or cross complaint in excess of the jurisdiction of the inferior court, such cause shall be removed by the justice or judge of the inferior court to the District Court and the defendant shall pay to the Clerk of the District Court the same fees as are now provided by law on appeal.

MR. OVERSMITH: I move the adoption.

Seconded. Carried.

MR. GRIFFIN: Number ten: "In the inferior courts cash bonds are lawful in attachments, replevin and other like cases. We recommend in view of the greatly increased prices demanded by surety companies, that the law be amended in order that U. S. bonds or cash may be used in the District Court in lieu of the bonds now required by law.

MR. OVERSMITH: I move the adoption.

Seconded. Carried.

MR. GRIFFIN: Number eleven. "Courts of justice are misrepresented and caricatured by the motion pictures. We believe that a certain amount of disrespect and loss of confidence in the judicial system, especially among youth, is due to this fact and we recommend a study be made on the part of individual members of the bar of this question and that if such entertainment does tend to bring about disrespect for our judicial system and a lack of confidence, that appropriate action be taken at the next meeting of this Bar.

MR. MARTIN: It seems to me that is too petty for this Association to bother with.

MR. OVERSMITH: I move its adoption.

Seconded.

MR. OVERSMITH: I made some study and I find that the youth have no regard for courts whatever and take the motion picture idea of courts

as being what is really going on in the courts. I think the moving picture companies should cease misrepresenting the courts and I don't think there is a single instance today where you will get as much disrespect and lack of confidence as you will from the movies where they caricature judges, attorneys and officers of the courts. We are in need of a higher respect and a better feeling toward the courts and towards attorneys; we are ourselves losing the respect and confidence of the communities largely, in my opinion, through the misrepresentation in the movies.

MR. GRAHAM: As far as this resolution is concerned we are taking in too much territory. We will be the laughing stock as to what lawyers are trying to reach.

JUDGE AILSHIE: Those in favor of the motion give the usual sign. We will take a rising vote. Yes, 13. No, 24. The motion is lost.

MR. GRIFFIN: Number twelve. "Your committee recommends that the State Bar statute be amended so that the license fees provided for be paid to the Clerk of the Supreme Court and by him turned in to the State Treasurer so that the Supreme Court may know at all times what lawyers are entitled to practice and may prevent delinquent, unqualified and foreign attorneys from practicing in the courts of the state contrary to law."

MR. OVERSMITH: I move its adoption.

Seconded.

JUDGE WERNETTE: Should the Clerk do the collecting?

MR. GRIFFIN: I think not. I am the only person in the state now who knows whether a lawyer is entitled to practice law. If an attorney goes out of this state, the Clerk of the Court has to ask me if he is in good standing. Any foreign attorney who has not paid can go into the Supreme Court and District Court, as far as the Supreme Court records are concerned and he is qualified to practice. They don't know. If these fees were paid through the Clerk of the Court and by him paid to the Treasurer, the court would know whether the attorney was qualified or not.

Voted on. Motion carried.

MR. GRIFFIN: Thirteen: "We recommend that a study be made by the Commission of the pardon power to the end that this power be placed with a board appointed for special fitness for such work.

MR. OVERSMITH: I move its adoption.

Seconded.

MR. PAYNE: Does that involve the necessity for an amendment to the constitution? Will you read it again?

JUDGE AILSHIE: That would involve the appointment of a committee.

Voted on. Motion carried.

MR. GRIFFIN: Number fourteen. "Your committee recommends for discussion at this meeting the advisability of amending the State Bar statute to provide that the annual meeting of the Idaho State Bar may be held at such place in the State of Idaho as the State Bar Commission may designate."

MR. OVERSMITH: I move its adoption.

Seconded.

MR. OVERSMITH: The present statute requires the annual meetings to be held one in the Eastern, one in the Northern and one in Boise in the Western Divisions, every other year. This recommendation comes from Moscow. We found a meeting in North Idaho was so poorly attended that we would rather meet in Boise than have it up there and have nobody come. I move that the Bar Act be amended so the place of meeting be left with the Board.

Seconded. Carried.

JUDGE AILSHIE: The Bar Act provides for an annual meeting and division meetings. The annual Bar meeting alternates in the Divisions. This meeting should have been in the Northern Division but we considered we were substantially complying with the statute. Now I want to ask you, do you want this practice to be continued for the coming year in the matter of selecting a place, such as a summer resort, for your meeting. I would like an expression.

JUDGE DUNBAR: I have greatly enjoyed this meeting. I think it would be fine if it would become an institution to have this annual meeting right here.

JUDGE AILSHIE: As many as are in favor of the Commission exercising its discretion, hold up their hands. It is almost unanimous.

MR. GRIFFIN: Resolution fifteen: "Your committee is of the opinion that the Bar Commission should give consideration to the examination of applicants for admission to the bar, not only on the knowledge of the law but also upon their knowledge of subjects such as arithmetic, United States history and other fundamental subjects."

JUDGE AILSHIE: The chair rules the resolution out of order.

MR. GRIFFIN: Number sixteen. "We recommend that the State Bar Commission formulate a uniform rule for all courts of the state concerning foreign attorneys practicing law in this state. Courts of record should require in every instance the presence of an Idaho attorney on all hearings or proceedings or trials and under no circumstances should an Idaho attorney loan his name unless there is an equal division of fees and before any final judgment or order is entered by any court of record, proof should be required with reference to attorney's fees or some other assurance given to the court that one-half the attorney's fees in the given case or proceeding has or will be paid to a member of this bar."

MR. OVERSMITH: I move its adoption.

Seconded.

MR. HAWLEY: I move we strike out the word "equal." Seconded.

JUDGE AILSHIE: It is moved and seconded that the word "equal" be stricken out of the resolution.

MR. HAWLEY: It leaves in the division of the fees.

MR. GOFF: I think this is very important. It is all right for you attorneys in Boise but suppose you live under the influence of the Federal Land Bank and fourteen other banks in Spokane. Now suppose in the matter of a mortgage foreclosure, the foreign attorney says, "We want you to get a summons issued. We will try the case but we would like to use your name and will pay you $25.00," and the foreign attorney tries the case and asks for $500.00. I have seen many bad effects from an attorney lending his name A man is required to go through certain training in order to be entitled to practice and receive a fee in the state and then some other attorney comes in from outside and collects the fee.

JUDGE MORGAN: We would like this to be a substitute for the motion:

"We recommend to the legislative committee that they secure legislative enactment providing that prior to any non-resident attorney appearing in any proceeding in any trial court or before any board or any quasi judicial body

in this state he must first apply in writing to the presiding officer of such court, board or body for an order authorizing such appearance and such application must be signed by a resident attorney within the confines where such appearance is to be made. We recommend that the legislative committee secure legislation providing that no judgment or decree on contract shall be entered in the state which provides for the recovery of an attorney fee until the amount allowed for such attorney's fee has been deposited with the Clerk of the Court by the party in favor of whom such fees have been allowed, payable to a resident attorney of the State of Idaho who has acted in said case for and on behalf of such party. Further, that no judgment or decree shall be entered in any manner nor such deposit withdrawn until the resident attorney to whom it is to be paid has filed his affidavit with the Clerk of the Court in which he shall swear that the deposit and the whole thereof is for the sole use and benefit of himself or other resident attorneys of the State of Idaho, naming them; that there is no agreement or understanding by the terms of which any part or portion of said fee shall be paid to non-resident attorneys nor any rebate made to the party making such deposit. The making of any division of said fees with non-resident attorneys or any rebate of such fees shall be ground for disbarment."

JUDGE MORGAN: I move the adoption of that in place of the former resolution.

Seconded.

MR. FEENEY: I was directed by the Nez Perce County Bar to see that the matter was brought up concerning the situation existing between Idaho and Washington and Oregon. If I am correct, originally a sort of feud started between Portland attorneys and attorneys in Washington which extended throughout the states. We find Washington also entered Idaho. They have a very strict provision against an Idaho attorney coming into Washington to practice, and almost disbar us from representing our clients. Idaho attorneys are discriminated against in Washington, which is not true of Washington attorneys in Idaho.

MR. OVERSMITH: Will the gentleman yield a minute? I asked Mr. Morgan to draw a proper resolution and we framed this one. I think this matter should go over until this afternoon and if Mr. Morgan will meet the resolution committee this resolution may be entirely changed, and I would ask that the matter go over until we can meet Mr. Morgan.

JUDGE AILSHIE: If there is no objection the resolution will be referred back to the committee for report this afternoon.

MR. HUEBENER: While on this motion can't we get an expression from the President of the Washington Bar.

JUDGE AILSHIE: Let's have this matter go over. This matter will be referred back to the committee for report this afternoon. I trust you will remain until we get through the rest.

MR. GRIFFIN: Number seventeen. "Your committee is of the opinion that neither the attorney general nor any of his deputies should engage in the general practice of law. The Bar Commission can probably take care of this question without legislation."

MR. OVERSMITH: I move its adoption.

Seconded. Carried.

MR. GRIFFIN: Number eighteen: "In territorial days certain fees or commissions for public officers were fixed instead of a salary. When such officers were placed on a salary, fees and commissions continued. We call attention especially to the fees and commissions charged by a Sheriff on executions and foreclosure sales. This is a charge on the debtor and often prevents redemption. We recommend that the legislative committee prepare a proper amendment eliminating such commissions on sale and also that an amendment be drawn eliminating the posting of notices in the precinct in which the real property to be sold is situated.

We also recommend that the statute providing for penalty to be paid on redemption be amended so as to reduce the amount from 10% to the statutory rate of interest."

MR. OVERSMITH: I move its adoption.

Seconded. Motion carried.

MR. GRIFFIN: Number nineteen: "The Idaho State Bar Association wishes to express its appreciation to the State Bar Commission, its secretary and the officers and members of the association who have given unstintingly of their time and thought in the preparation of the program for this meeting, and also the speakers who have delivered instructive talks for the benefit of the members of this association."

MR. OVERSMITH: I move its adoption.

Seconded.

MR. HAWLEY: I move a rising vote.

Motion carried.

MR. GRIFFIN: Number twenty; "It is fitting that we pause in our activities to pay tribute to those of our members who have passed from among us. Since our last meeting the following members have been taken from our ranks: Gardner G. Adams, Boise; Edgar L. Ashton, Twin Falls; James E. Babb, Lewiston; T. C. Coffin, Pocatello; R. M. McCracken, Boise; H. S. MacMartin, Boise; John W. Peter, Pocatello; Joseph H. Peterson, Pocatello; Calvin D. Phibbs, Rupert; H. H. Smith, Moscow; Sidney H. Smith, Sandpoint; and Alfred F. Stone, Caldwell. These men contributed their share toward the upbuilding of citizenship and the development of the administration of the law and it is with sincere regret that we record their loss from our ranks."

MR. OVERSMITH: May we adopt this resolution, standing with our heads bowed for a moment.

JUDGE AILSHIE: Be seated.

MR. GRIFFIN: This is all of the report.

MR. OVERSMITH: Your committee on resolutions has only in view such legislation as the legislative committee feel they can get through. Some of these matters can be put up to the agricultural committee and others of them can be recommendations from the Bar.

JUDGE AILSHIE: The resolution committee will prepare and present at the opening session this afternoon the resolution referred back.

SATURDAY, JULY 14, 1934, 2:00 P. M.

JUDGE AILSHIE:

It is an honor and distinction and a matter of great pride to any organization to see one of its members lift himself from the position of a small town lawyer to the highest pinnacle in his profession and particularly is that true when he attains the distinction and reputation amongst his associates of

being the best constitutional lawyer in the land. We are about to listen to a man who has the reputation of being the best constitutional lawyer in the United States Senate. I take pleasure in presenting to you the Dean of the United States Senate, Senator Borah.

SENATOR BORAH:

Mr. President, Members of the Bar Association, Ladies and Gentlemen: I am going to say something in the beginning, of which you will become painfully aware later. That is that I have not prepared any address worthy of this occasion or worthy of this place. The few days I have had since returning to Idaho have been days which have not lent themselves to preparing an address and I say to you frankly that I am speaking without any real preparation for the occasion. I may also say, notwithstanding the very generous remarks of your President, that while I am a member of the profession and with pride such a member, I nevertheless feel that as a layman I am speaking to the profession. I don't think any man who has devoted twenty-five or thirty years of his life to politics can claim to be a lawyer. It has been said by the President that I have the reputation of being the best constitutional lawyer in the Senate, but that, in itself, is not a very great reputation. Ultimately that life does not lend itself to the study of legal quesions and no one feels, more than a Senator, how inadequately legal questions are discussed in the Senate, and I say therefore again that as a layman I am speaking today to the profession.

There is one matter to which I am going to ask the lawyers assembled to give attention, which has been a matter of great concern to me for the last several years. It is a matter which is of more interest to the profession than to the lay public and yet it must ultimately be of great concern to all people. The Congress of the United States has adopted the habit or practice of writing into practically all of its laws something in the nature of a declaration that an emergency exists. The question which I ask the profession today is, "what difference does it make so far as the law itself is concerned whether an emergency exists or not." Does the declaration in a law that an emergency exists add any additional reason why the law should be sustained should its constitutionality be questioned? In other words, if a law comes before the Supreme Court of the United States and a constitutional question is involved, will there be a different construction placed on the act if there is written into it that it is an emergency than there will be if there is no declaration of an emergency? The question which presents itself is this: What is the virtue, what is the value of embedding into an act of Congress a declaration that it is passed under an emergency? You will recall that only a short time ago the Supreme Court in discussing this matter had this to say: "Emergency does not create power. Emergency does not increase granted power or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions which have always been, and always will be, the subject of close examination under our constitutional system. While emergency does not create power, emergency may furnish the occasion for the exercise of power. Although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed."

With all due deference to the Supreme Court of the United States, is that true? Does the declaration of an emergency in a bill give the Supreme Court of the United States any latitude for saying it was constitutional that the court would not have were it not in the bill? In my humble opinion the declaration of an emergency in the bill neither adds nor takes from nor changes in the slightest the question of the constitutionality of a measure.

The court further says: "The constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions. Thus, the war power of the Federal Government is not created by the emergency of war, but it is a power given to meet that emergency."

Again the Court says: "It is a power to wage war successfully and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties." What are essential liberties as distinguished from other liberties? Who will classify the liberties of this country under the Constitution? The Supreme Court of the United States? There are no essential and no non-essential liberties. All liberties under the constitution are recognized and are essential. When you speak of essential liberties you imply there are liberties under the constitution which an emergency shall take away, a contention which I cannot agree with myself. An emergency does not create power and it does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. That would seem to be the end of the matter. That declaration would seem to me to be a true declaration of the principles of the constitution, yet on page 23 of this opinion the court says: "But an emergency existed which furnished a proper occasion for the exercise of reserved power of the State to protect the vital interest of the community."

This is not a matter of great concern to anyone but lawyers you may think. But I think it is a matter of concern to the public, the people of this country. I have a profound respect for the great tribunal which ultimately passes on all constitutional questions, but if there is anything sacred in constitutional government it is the right of the people alone to change or modify to any extent whatever the Constitution of the United States, and if you say that Congress may, by writing into a law that it is an emergency and that by reason of its being written into the law the Supreme Court of the United States may sustain a law which otherwise it would not, you no longer have a government by the people but you have a government by Congress and the Supreme Court of the United States and therefore this is not only a legal question but a question of general concern to all people of the country.

Let's suppose that a law is coming before the Supreme Court of the United States and its constitutionality is challenged. What is the difference how it came up? Because if the law is challenged it is the duty of the Supreme Court to ascertain if there is any authority under the constitution for the passage of such an act. The question is, do you find anywhere any authority within the constitution for the passage of it? Not only that but if there is a doubt as to its constitutionality the Supreme Court will resolve that doubt. So it seems to me we ought to dismiss from the acts of Congress and the Supreme Court of the United States ought to dismiss this question

of the effect of an emergency upon the constitutionality of an act. If an emergency can control its constitutionality then the Congress of the United States can make the emergency whenever it exists, and that is one power Congress ought not to have even if it does exercise it.

That is all I have to say upon that question.

I have a profound respect for the members of the bar in the State of Idaho and I would be awfully glad if, after thinking this matter over, any of you who have reached any conclusions in regard to it would have your conclusions reduced to writing and sent to me. It is a matter that will be a living important subject for the next few years because if it continues to grow it is going to have a powerful effect upon the construction of the Constitution of the United States.

I observed from time to time that the Idaho State Bar Association passed resolutions endorsing the World Court. I think it fair to my friends, in view of the fact that it is coming before Congress next session, to state to you that I am unable to agree with you in that respect.

I am a believer in an International Court. If an international court be created, as I believe it can be, exercising the powers between nations such as the Supreme Court of the United States exercises between the states, I would support it with enthusiasm, but I do not look upon the World Court as it is designated, as a court. The only real resemblance to a court which it has are the gowns which the Judges wear in passing upon questions.

The advisory jurisdiction of the World Court permits that court to offer its advice or opinion not upon legal questions alone or questions arising under treaties, not upon questions arising under international law, but it permits it to offer an opinion upon any dispute that may arise in Europe, political or otherwise. The World Court in that jurisdiction is controlled exclusively hy a political body. If Great Britain and the United States should have a controversy they could not go to the World Court for an opinion; they could not agree on a certain state of facts and submit it and ask for a written opinion upon it. The litigant could not present it. That jurisdiction only moves when a purely political body, to-wit the Assembly or Council of the League of Nations, calls upon the court to render its opinion. It is in exactly the same relationship to the League of Nations, to the Council and the Assembly, as the Attorney General of the United States is to the President of the United States. The President of the United States may call upon the Attorney General for his opinion on any question—usually it is confined to legal questions—and the Attorney General will render his opinion. The Attorney is the head of the legal department and the legal advisor of the administration in power, and so the World Court is the legal department of the League of Nations.

Is there any escape from that proposition? If there isn't what is the difference between becoming a member of the League of Nations and becoming a member of the World Court, because in each and both instances you are drawn into consultation upon every dispute that may arise in Europe. You remember in the present treaty so-called, it was provided that Austria might not convey away or sacrifice in any respect her independence or interfere with any part of her sovereignty. Germany and Austria entered into a tariff treaty such as we might make with Great Britain or Canada. Austria and Germany were called upon to abandon the treaty. They refused to do so. Then those who were interested in having that treaty declared void, without

the consent of either Germany or Austria, went to the World Court and asked it to pass upon a vital question to both Germany and Austria without the consent of either Germany or Austria. The matter was carried before the court and argued at length. Now that is a striking incident, purely an incident, but striking, that the Judge sitting upon the court for the nations, in every instance in which the nations had declared against the treaty, the Judge found it was illegal. The world recognized when the opinion came down that it was a political judgment and it will be so. They are not passing on a question of litigation; they are rendering an opinion upon a matter of supreme importance to the state and nation and it so happens in every instance the Judges representing France, or the French and the Italian Judge found the treaty was a violation of authority while those other judges found it was not in violation. It does seem to me that it was a most extraordinary decision.

Here was a tariff agreement in which Germany and Austria agreed with reference to certain tariff rights and litigation. That is all there was to it and yet they held that was a surrender of the independence of Austria. Nobody contends our tariff treaties are a surrender of the independence of the United States. You get an idea what they are thinking about if you will read the dissenting opinion of the able Judge of Italy when he said it would not be worthy of attention if it was between Italy and Czecho-Slovakia.

Another matter: We are in the midst of a great economic cataclysm, popularly referred to as the depression. There have been other depressions in the history of the world but none so intense, widespread and universal as this.

This government has done everything it seems to me that a government could possibly do in contending with this depression. Ultimately no one will claim that either Congress or the administration were not alive to the conditions confronting this country. There may be and there will be a wide difference of opinion as to the wisdom of some of the measures adopted, but notwithstanding that, all of these measures indicate the intense desire on the part of the government at Washington to meet successfully the conditions which now confront us. Notwithstanding all that has been done, the conditions in this country and throughout the world is one beyond the power of language to describe. I only want to make one suggestion. In my opinion, and I offer it with a great deal of hesitancy because any man who does offer an opinion must do so in that way, but we will never solve the present economic distress or problem until we deal properly with the money question. I don't believe that there is any other possible way by which to restore the purchasing power of the masses, and without that there can be no recovery, except through a wise modification or change in our monetary system.

There are three facts which establish that: It is now pretty well substantiated that 80% of the human family are living below the poverty line. 80% of the people of the world are at or below the poverty line. It must necessarily follow that the purchasing power of 80% of the human race is reduced to a minimum. Can there be any such thing as reasonable restoration of prosperity so long as 80% of the human race are living on or below the poverty line. Where is their purchasing power and where is our prosperity unless they find it? The second proposal is that we have in the world today what is said to be about eleven billion five hundred million dollars of

monetary gold; 80% of that gold, or the twelve billion dollars, is in the possession of the three leading nations of the world. Even if the gold were distributed, it seems to me wholly inadequate to meet the demands of people for a measure of value or medium of exchange, but bear in mind that 80% is in possession of three of the leading nations of the world. Where are those nations to sell the products of their people? In my opinion that which led to the depression more than anything else was the fact of the gathering of the gold of the world into three of the leading nations of the world and in those nations it went into bank vaults and government vaults and it might just as well have remained in the mine for all the good it is doing. Gold today is so precious and valuable that if a man is found in possession of it he is sent to jail. Can such a money or medium of exchange ever reach the masses of the people?

The third proposition is that nearly half the human family cannot use credit, cannot use currency. They have no banks, they can't carry paper money and they won't use it, so nearly half the human family can use nothing but metal. I think one of the most cruel things in the history of the world was in 1926 when three hundred million Indians who had been using silver for two thousand years, their silver represented the total of their savings, when the bankers of London, actuated by greed, forced upon the three hundred million the gold standard. London would not loan it to them; they could not buy it and so universal poverty prevails throughout three hundred million people. Unless you find a medium of exchange, a standard of value, a measure of value for the human family, they must necessarily go back to barter instead of trade. It seems to me therefore we must meet the question of whether the present monetary system of the world is a system which will permit the human family to come back. I know there are a large class of people, very intelligent people and no doubt sensible people, who believe that we must restore the gold standard and depend upon the gold standard alone as a standard of value. May I ask a question? Suppose we restore it tomorrow. There is no gold except in three nations, there is less than 10c per capita outside of those three nations. How can you build world trade under such conditions? If you could remonetize silver, make it primary money alongside of gold we still would have insufficient metal with which to form the monetary basis of the world, but if we could remonetize silver we would have a broader and wider base upon which to issue the currency of the world, and in that way might meet the situation. People will not starve, they will not die for the sake of the gold standard and some means and some method they will find by which to transact the business of the world; for unless we adopt some system you will face the proposition of irredeemable paper money. I thank you.

JUDGE AILSHIE: I know you have all enjoyed and appreciated Senator Borah's address. We will now have a few minutes recess before continuing with our business.

JUDGE AILSHIE: Mr. Secretary do you have that other resolution now?

MR. MERRILL: I will read it.

MR. MERRILL: This is number sixteen: "We recommend that a special committee be appointed by the Bar Commission to forthwith study the rules and statutes of the states surounding Idaho with respect to the rights of foreign attorneys practicing therein and to further study the question of the division of fees paid local and foreign attorneys in the State of Idaho, and to report to the Commission the results of such study with recommendations, and that the Commission upon receipt of such report is instructed to propose such legislation and/or change of rules as will protect members of the Idaho State Bar from inadequate and unfair division of fees and to regulate the appearance of foreign attorneys in the courts and before the Commissions of the state."

MR. OVERSMITH: I move the adoption of that.

Seconded. Carried.

JUDGE AILSHIE: Is there anything further Mr. Secretary?

MR. GRIFFIN: There is nothing here.

JUDGE AILSHIE: The next thing is unfinished business.

MR. FEENEY: At the request of several I would like to move that this body extend its appreciation to the resolutions committee for the fine work they have done and move we give them a standing vote of thanks.

JUDGE AILSHIE: I believe it is unanimous. The chair joins in the expression of appreciation.

MR. HAWLEY: I think this organization should take notice of the passing from office of a very ardent member of this Bar who has given probably more of his personal time to the organization and its work than any other man. We have passed resolutions, but I think we would be rather ungrateful if we didn't take notice of the fact of the service of the retiring President of the organization and I move therefore that an expression of thanks and appreciation be given to Mr. Owen. Will all members stand.

JUDGE AILSHIE: Mr. Owen, I call on you to witness the evidence of respect and admiration this association feels for you.

MR. OVERSMITH: Before we adjourn there were some members not here when the recommendations were read, the first one. A committee will be appointed to be known as the recommendations committee and that committee will meet probably by May first next year to formulate recommendations for discussion at our next meeting, and those that were not here are urged to get into communication with this committee if they come across anything they think of sufficient importance to bring before the committee. Bring it to the member of the committee from your own district. Any suggestion will be appreciated and be sure and call things to the attention of the member of the committee from your district.

JUDGE AILSHIE: Is there any further business? If there is no further business the convention stands adjourned.

The Recommendations Committee mentioned above and in the first resolution consists of

Carey Nixon, Boise
Finis Bentley, Pocatello
A. H. Oversmith, Moscow

to any of whom members of the Bar should send suggestions.

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