PROCEEDINGS

of the

IDAHO STATE BAR

VOLUME II, 1926
VOLUME III, 1927

Second Annual Meeting
POCATELLO, IDAHO, JULY 19-20, 1926

Third Annual Meeting
BOISE, IDAHO, AUGUST 12-13, 1927

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The Idaho State Bar is organized in conformity to and functions under, statutes of the State of Idaho, found as Chapter 211, Session Laws of 1923, and Chapters 89 and 90, Session Laws of 1925.

Rules for Admission of Attorneys, Conduct of Attorneys, Disciplinary Proceedings, and General Rules, as adopted by the Board of Commissioners and approved by the Supreme Court of Idaho, are published in pamphlet form and may be had upon application to the secretary.

COMMISSIONERS OF THE IDAHO STATE BAR

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

OFFICERS OF THE IDAHO STATE BAR

JOHN C. RICE, Caldwell, President.....1923-25
ROBT. D. LEEPER, Lewiston, President.....1925-26
FRANK MARTIN, Boise, President.....1926-27
A. L. MERRILL, Boise, President.....1927-28
SAM S. GRIFFIN, Boise, Secretary.....1923-

COMMITTEE ON LEGISLATION

1926

B. W. Oppenheim, Boise, *Chairman.*

1927

Jess Hawley, Boise, *Chairman.*

OFFICES OF THE COMMISSION

36 Federal Building, Boise, Idaho

ANNOUNCEMENTS

Attorney's License Fee—$5.00, payable annually prior to July 1, to the State Treasurer, Boise, Idaho.

Meetings of the Bar—The Western and Eastern Divisions will hold Division meetings in 1928 at times and places to be fixed, respectively, by Commissioners Hawley and Merrill.

Annual meeting of the Idaho State Bar will be held in the Northern Division in 1928, at a time to be announced later.

An election of a commissioner for the Eastern Division will be held in 1928.

REPORT OF ANNUAL MEETING

OF THE

IDAHO STATE BAR

POCATELLO, IDAHO, JULY 19-20, 1926

FIRST SESSION

JULY 19th, 1926

9:45 A. M.

PRESIDENT LEEPER: The convention will be in order. I will now ask Reverend Sloan of the Congregational Church of this City to make the invocation.

REVEREND SLOAN: Our Father in Heaven, we recognize that thou blesseth all things and all people with that unchanging love, and we who strive to govern society through laws look to thee for guidance that justice may prevail. Bless this convention to the end that they may find righteousness and right in all of their proceedings. We ask it in the Master's name. Amen.

(The Nation's flag was brought in by color-bearer in uniform.)

PRESIDENT LEEPER: We will now arise and salute the colors.

(Assemblage arises and salutes the colors.)

PRESIDENT LEEPER: I will now call on the Honorable Ben Ross, Mayor of the City of Pocatello, to make an address of welcome.

MR. ROSS: Mr. President.

PRESIDENT LEEPER: Mr. Ross.

MR. ROSS: And ladies and gentlemen: On behalf of the City of Pocatello, I want to welcome the lawyers in convention assembled here, because you are the men who laid the foundation of this country. I appreciate the fact, and you will agree with me, that all of our great documents were written and drawn by members of the bar. The man who wrote the Declaration of Independence was a lawyer. For that reason we welcome you to the City of Pocatello. We want you to see the natural beauties of this city and of this country. I told your Chairman,—or Mr. Merrill, here, that I wouldn't talk to you long. One of the men in the room here said to me, "Ben, we don't want you to attempt any of your oratory on us here." He said, "You are all right when it comes to talking to hayseeds and farmers, but you can't get by talking to learned men," so I said, "Well, I won't attempt to make a speech this morning." He said, "Just tell the lawyers here you are glad they are in Pocatello."

CHIEF JUSTICE LEE: He wasn't speaking truthfully.

MR. ROSS: He said, "Just tell them we want them to see what you have here in the city," and we do.

We are having an Indian Sun Dance just below town at the present time. That is something we haven't had for the last three or four years. For some reason the late Indian Agent prohibited the Indians from holding the Sun Dance. He said that it carried them back to the natural state of the Indians. He wanted them to progress and to think of the conditions of this day and age, so he wouldn't allow them to hold this dance. But it is a wonderful sight, and is only a few miles out of the city, and we would like to have the attorneys and lawyers from the various sections of the state make an effort to see this wonderful sight. It is well worth it.

We have another great institution, and that is the Kraft Cheese Plant. There are only three such institutions in the world, Chicago, New York and Pocatello. We want you gentlemen to go out and see Mr. Kraft make cheese, and we want you to carry this word back to the people, because after all the foundation,—I have said this so many times,—after all the foundation of every industry is advertising, and you boys wouldn't be here today if it were not for the farmers on the farms. We want you to carry this word back to the various communities that it is a fact that Mr. Kraft can't get enough raw product, that the sale of his product is unlimited, that he called his salesmen in from the European countries because he couldn't get enough raw material from the farm to make the finished product to be sent out, so the dairy business in this state is unlimited. When they tell you that the dairy business can't grow, they are telling you something that is not so.

There is another thing we want to say: In the past,—there is a gentleman sitting right here who when he came to Pocatello last March took a bath, said the water was so muddy that he thought Pocatello ought to do something with its water supply. We have the greatest well in the United States. That is quite a broad statement. (Applause.)

JUDGE AILSHIE: I might suggest that it was muddy after he took his bath.

MR. ROSS: We started our pump last Saturday, and we are pumping now 1050 gallons per minute out of the well, which is eighty feet deep, and we can't lower the water in the well. We believe we have a well that will yield three million gallons a day. We have water to take care of a city of two hundred thousand people. If for some reason Pocatello should grow to a city of that size, it would be just a matter of putting down more wells. We want you boys to go out and see it. It would be worth your while to see that water flowing out of the ground. It is one of our scenic beauties.

I told you that I wouldn't make a speech. I just want to say one more word, and that is about service. We are living today in a day

of service. Mac is smiling over there. He is saying to himself, "You think that lawyers don't give service." The average lawyer does figure on giving service. I am not so very old, but I can remember when I went into a store to buy its merchandise, a drygoods store for instance, and the merchant laid out his wares on the counter that I was contemplating purchasing, and a pair of gloves, for instance, he said the price was $1.50. I immediately offered him $1.25, and the rest of the people did the same thing. They didn't have one price. They didn't figure on giving service. That is only twenty or twenty-five years back. That condition existed over the whole country, but now the service clubs are educating the people, and I might say that it might be necessary to educate the lawyers. It is only a few years ago that doctors looked only after people who were sick; they didn't figure on giving service to people who were well. Now the doctors have a different point of view. Now, the lawyers should aim to keep people out of trouble, and I believe you boys are fast learning, and fast adopting those principles, because you are going along with the times, and appreciate the fact that you must give service, which is the greatest thing in the world.

You know, H. E., I told you I wouldn't make a speech, when you asked me not to do it, but I just keep on talking.

I want to say that we are all glad that you are here, and the city is yours. We have had a great many conventions here, and when the W. C. T. U. met here some time ago, I said to them, "Ladies, we are going to throw the keys to the city down a well, and you can do anything you want to do. I doesn't make any difference what you do." Now, I'm going to just chance you lawyers once. I am going to say to you lawyers, that figuratively speaking we are going to throw the keys in the well. If you park your car on the sidewalk, it will be all right. If the policeman should try to arrest you, just tell them, "I'm a lawyer." (Applause.)

PRESIDENT LEEPER: On behalf of the Bar, Mayor Ross, I thank you for your cordial words, and we will try to keep order as best a group of this kind may be able. I don't know that we will deplete your water supply very seriously.

Ladies and Gentlemen:

It is customary and proper that your retiring President should, in his annual address, cast up for your consideration the outstanding events of his administration. This will be particularly important this year, because this is the first time when we are capable of viewing in retrospect any considerable period of operation under the Idaho State Bar Commission Act. As you know, the original act creating this commission was passed in 1923 and it constituted a novel experiment in the control of a professional group. Theretofore, in Idaho and elsewhere, the only organizations which attempted control of the professional conduct of attorneys at law were purely voluntary, with

no substantial power and largely ineffective in so far as discipline was concerned.

The then voluntary association in Idaho, adopting the premise that practice of the law is one affected with such public interest as to warrant the interposition of the police power of the state, and recognizing the feebleness of its own powers and its impotency in the face of manifest abuses by unworthy practitioners, boldly decided to strike out into the unknown and uncharted seas of legislative police control of all lawyers in the state of Idaho, and the 1923 act was the result.

Briefly, this act declared the public interest attached to the profession, provided for a commission to be elected by the members to which it delegates full power to admit, and license to practice, to hear and determine disciplinary matters, to provide and enforce codes of ethics and to hold bar meetings, all subject to revision in the Supreme Court. The act also requires the payment of an annual license fee of five dollars, and makes it a crime to practice without a license.

Pursuant to the act commissioners were elected in each district in the summer of 1923, the first board consisting of Hon. John C. Rice, Hon N. D. Jackson and myself. We met and organized in August of 1923, but as the experiment was new and untried, and the members of the commission were highly doubtful as to the constitutional extent of their powers, the board caused a test case to be filed in the form of an action by Mr. Jackson against Mr. Gallet, the State Auditor, for payment of his expense account. All questions were raised, and the matter rested in the Supreme Court undecided until the early months of 1925. During that time the commission could not function. In the meantime another legislature met in 1925 and the act was amended to meet with certain objections urged by the Supreme Court, which, however, finally approved the act.

Therefore, it was not until the spring of 1925 that the commission was able to act. However, it immediately became active and in a series of meetings promulgated the rules which now constitute the working basis of the commission. We found a heavy task confronting, as we were treading unknown paths and had no precedents to go by. There were three general jurisdictions which had to be covered —admissions, discipline, and general bar government. In drafting our rules, we examined, compared and annotated the rules from every bar organization in the United States, and we believe that we achieved a simple, comprehensive plan of operation which is amply sufficient to cover our needs, protect the public, and which at the same time meets every legal requirement. These rules have been approved by the Supreme Court and have the force of law. We may well be proud that Idaho is a pioneer in this movement known as the integration of the bar, and that many other states now follow in our footsteps.

But after we were organized and our rules adopted, our work had just begun. We found that the matter of admissions to practice

was not organized on any definite basis, and had been carried on by an overworked Supreme Court which of necessity had no opportunity to personally investigate applicants. Many unfit persons had in past years crowded into the profession, lowering its general standards of fitness and character. We found about sixty complaints awaiting our attention against various lawyers in Idaho, some of them charging major felonies, and most of them several years old. We also were forced with the task of searching out all persons in the state who held themselves out as practitioners of the law, registering them and extracting three years' license fees. We also had to organize the district and state bar associations and provide for the machinery of its government.

I can say to you that the commission has performed its work. In 1925 the personnel of it changed, Mr. Merrill of Pocatello succeeding Mr. Jackson and Mr. Frank Martin of Boise succeeding John C. Rice. I am the only member left of the original commission, and I am retiring this year after three years of labor in assisting in the foundation of this splendid organization, confident that our work has been and will continue to be useful to the State of Idaho, to its citizens and to the members of the bar.

The commission from the beginning has taken a high-minded attitude towards its duties. Each of us who has served has been actuated by a sincere desire to keep the standards of the profession high, to exclude those unfit to practice either on educational or moral grounds, to promptly investigate all charges of unprofessional conduct and to justly discipline all those guilty of it. We have realized that the practice of law is not a mere private concern of the lawyer, but is one tied in with the public welfare, extending not only into the courts, but into all lines of private and public business.

In so far as admissions are concerned, we believe that previous standards had not been rigid or high enough, and it had been the observation of all of us that unfit persons had been admitted. We therefore promulgated the present rules and have since required a strict compliance by applicants. We have thoroughly investigated the moral, educational and legal attainments of every applicant since beginning our work, many have been rejected, but we believe justly so. Our first examination was in June of 1925 at Lewiston and we were faced with a group of twelve men, eight of them from the University of Idaho. Eight of these failed and the commission was subject to much criticism. However, we had set our faces forward and would not recede. Our relation with the University of Idaho was particularly delicate, as it was our own state institution which we desired to see prosper. But it was no kindness to the men, nor was it justice either to the school or to the public, to admit unqualified men. We believed that many of these men had approached their law work with an entirely wrong attitude of mind—a law school is no place to summer-fallow athletes—nor do mere numbers mean anything in a profes-

sional school if the calibre of instruction is poor. The blow was a rude awakening to these eight men who failed, but I am happy to state that they all came back like soldiers, and subsequently passed splendid examinations. I have talked with many of them since, fine, bright chaps who will probably ornament the profession in later years, and I am convinced that laxity of standards and slovenliness of professional ideals and requirements never helped any young man who seeks admission to the bar. If a man slips into the practice with wrong ideas and ideals, they taint his entire life and he cannot ever rightly assume his full share as a lawyer. Nor is it helpful to a school to have low standards, mere numbers mean nothing unless they are based upon the possession of high standards and not lack of them. In this spirit the commission has approached the law school of the University of Idaho, and last year we held a splendid meeting with the students and faculty at Moscow attempting to bring to these young men an intimate touch with the practitioners of the state. We have offered them help in preparation, we supplied several instructors last year, but we never have and I trust the commission never will hold out to these men any avenue of admission to practice other than proof of moral worth, and adequate legal preparation.

The University of Idaho is profiting, not suffering, by this attitude. Last year the morale of the law school was most excellent, and under the high-minded and capable direction of Hon. Robert M. Davis himself a graduate of Harvard and a distinguished scholar, it will soon take its place as a professional school which will attract attendance, not by its lack of standards, but by its possession of them. A Harvard diploma is in itself a certificate of character and ability, and while in this far and sparsely settled state we understand the impracticability of conformance with Harvard standards, we at least should go as far in that direction as our conditions permit. We want to build lawyers of integrity, character and learning in Idaho, not merely increase the membership of the bar.

Subsequent examinations have brought their toll of failures and disappointments, and such will probably continue to be the case. Those who fail may always try again, and if they have the character and the ability they will ultimately be admitted. If they do not have these requisites, I say without any unkindness, both for their own sake, and that of the public, they should not be admitted.

When we began our task the bar was thoroughly disorganized. Many were practicing as lawyers who were not admitted to the Supreme Court. Some of these were hangovers from the old days when the District Courts admitted. Attorneys from foreign jurisdictions were practicing in Idaho without compliance. All of these had to be checked up, registered and three years' fee collected from each. This has all be done, and with the exception of a very few who have so far refused to pay the fee, every lawyer in Idaho is registered, paid up in full to date, and our secretary has a complete statistical

record of him. As to those who have not paid, disbarment proceedings will be instituted. We have much disliked to do this and have labored diligently to put every member of the bar in good standing. To me it seems rather small for a member of the profession to take an attitude of non-compliance, when the law appears so beneficial and so necessary to the welfare of the profession.

Disciplinary matters also presented a large and disagreeable task, and the commission has handled approximately sixty of them. Many of them were trivial complaints and were dismissed after investigation. In many others we found clients attempting to use the Bar Commission as a collection agency, and as to these we took the unbending position that the complainant must sign and verify a formal complaint and pursue it to judgment, which usually they refused to do. In others we sent the charges to committees for trial, several of which are now pending. Two judgments of disbarment have been entered. By far the greater number of complaints are based upon appropriations of clients' funds by lawyers, and we have been astounded at the number of complaints which have come in on this score, oftentimes against reputable and in some instances well known members of the bar. Oftentimes the delinquency is due to carelessness and is remedied immediately. Other times it is due to a careless handling of clients' funds and subsequent inability to replace them, because of poverty. While the vast majority of attorneys handle their clients' business with absolute integrity, these few careless or dishonest men bring an undeserved disrepute upon the entire profession. As we have found out, most clients do not care to be mixed up in disbarment proceedings, all they want is their money. It is extremely difficult to discipline these men if the wronged client does not desire to prefer charges or to testify. These are matters for serious consideration of the entire membership, and it is only fair that honorable practitioners keep the shyster, the rogue and the weakling from abusing the profession.

This is a general summary of the work which has been done by the Commission. The organization now is on a permanent basis, and is capable of great work in the future. I believe that the powers of the board should be extended by an amendment so as to permit the expenditure of our funds for all purposes necessary or beneficial to the Bar. This fund is raised from members of the profession and should be expended for their benefit. I would recommend that it be expendable for the work and expenses of committees, such as one to work with the Law School and one on Crime Prevention in co-operation with the National Movement. I would also recommend that this association more closely associate with the National Bar Association and the American Law Institute, and that our funds be expendable for those purposes, including the sending of delegates to the various meetings, for it is only by these national contacts that Idaho can be assured of being in touch with modern movements. All of these

things which I have suggested will be directly beneficial to the bar of the State of Idaho.

The older I get in the practice the more am I impressed with the worth and dignity of my profession, and with its potentialities for public service.

So, also, am I impressed with the heavy responsibilities which rest upon us all. Regard him personally as you will, the member of bar is now, as he always has been, the chief instrument for the expression of social consciousness in the settlement of human affairs. The law is the only profession which devotes itself to the government of men, and by reason of that fact practitioners of the law will always be called upon as advocates of private and public causes, to sit in judgment upon their fellow men, to draft the laws and to expound them. Other men may conceive in the abstract, but to the profession must they inevitably come for the practical carrying out of any social scheme or compact.

By reason of this status must the lawyer be all the more careful of his standards, the more jealous of his integrity, the more solicitous to keep his methods abreast of the times. There is much criticism of lawyers among laymen, which was openly admitted by speakers at our recent National Bar Association meeting. In passing I may say that the lawyers of America are apparently the only professional men in it who have the courage to conduct an examination of conscience in the public, expose their weaknesses to the public gaze, and pray for courage to solve their problems. Most other groups when they assemble spend their time in telling the world how good and great they are.

But it is well to consider these things. The world is in a state of flux and change, and never before has it been so much in need of guidance and assistance. We are confronted with a crime condition which our present machinery is unable to handle. Men are demanding simpler machinery for the settlement of civil differences. Our statute books are flooded with a multitude of laws concocted in the brains of men ignorant of government, and who have no responsibility for enforcement. New inventions have changed the industrial world, time and space have been annihilated. Great new national and international problems press upon us for solution. My hope is that the lawyers of America may be able to sustain the burdens placed upon them, that they may cast off the old dogmas and rules when it is necessary so to do, and adapt themselves to the new conditions which are upon us. If we are to avoid criticism in the future we must look forward to the new day, and meet the exacting requirements of our important and arduous profession.

PRESIDENT LEEPER: We will now listen to the report of our Secretary, Mr. Sam S. Griffin.

SECRETARY GRIFFIN: Mr. President.

PRESIDENT LEEPER: Mr. Griffin.

The Board of Commissioners of the Idaho State Bar have, since the last report made to the meeting of the Bar held at Lewiston, September 3rd, 1925, held five meetings. A resume of the activities of the Board, excluding matters of correspondence and routine matters, of which there are a great many, shows that:

At the meeting at Lewiston, September 3rd, 1925, R. D. Leeper was elected President of the Board and Bar; Frank Martin, Vice-President, and Sam S. Griffin, Secretary. Nineteen complaints against attorneys were considered, of which five were dismissed because complainants failed or refused to verify complaints, two were referred to Prosecuting Committees for further preliminary investigation—complainants reported adjustments and requested dismissal of two; further particulars were required in four cases; two were held for further investigation; in one, Disciplinary Committee was appointed and proceedings instituted; and one case, involving two attorneys, reprimands were given; and in one, no cause of complaint appeared. Arrangements were made to notify all attorneys who were in arrears in payment of license fees. Four applications for admission were considered, one for certificate approved, one rejected for insufficient legal study, one required to make further showing of study and character, and one approved for examination. Places and date of examination was fixed and arrangements made for preparation of examination questions. Consultation was had with Dean Davis of the Idaho College of Law relative to co-operation between the Bar and the College.

On Nov. 23, 1925, the Board met at Boise, and considered and graded examination papers of eight applicants, seven of whom were recommended for admission, and one to be recommended upon further satisfactory showing of good character. Four applications for admission by certificate were considered; two approved, one required to make further showing relative to criminal proceedings in which he was at one time involved, and one rejected because investigation disclosed that he had previously been disbarred in the State of Washington, and not re-instated. Arrangements were made for a new set of examination questions for the next examination. Consideration was given to attorneys who were practicing law contrary to the statute, not having paid license fees and proceedings directed to be instituted if payment not made by December 10, 1925, and Prosecuting and Disciplinary Committees in each Division were appointed to prosecute and hear complaints arising from delinquency. Consideration was given to the status of attorneys who had, under the former statutes, been admitted to practice before the District, but not the Supreme Court, and to their complete admission; also to whether the Organization Act repealed the statutory provisions permitting practice in justice's courts by persons not admitted or licensed. Ten complaints against attorneys were considered; in two action was deferred; one complainant reported satisfactory adjustment and requested dismissal; Prosecuting Committees were directed to prosecute proceedings

in two cases; one dismissed for failure of complainant to give information; in one, request was made of complainant for further data; one referred to a prosecuting committee for investigation, and one withheld for further investigation by a Commissioner. A Legislation Committee was appointed to receive suggestions from members of the Bar relative to needed corrections, changes in or additions to, legislation; the members appointed were B. W. Oppenheim, Boise, Chairman; Noel B. Martin, Lewiston; Clency St. Clair, Idaho Falls; B. S. Varian, Weiser; and James R. Bothwell, Twin Falls.

A meeting was held at Moscow, January 15, 1926, to discuss with the faculty of the College of Law, University of Idaho, co-operation of the Bar and College, examinations and to attend classes; the Board attended a banquet tendered by the Law Association of the College. Two applications for admission were considered, and approved, the necessary showings required at a previous meeting having been made. The applications of four District Court admittees were approved and their admission recommended. Three complaints received attention—one, dismissed because it appeared a foreign, and not the local, attorney was responsible; one deferred, and one referred for prosecution. The status of attorneys delinquent on license payments was considered.

At Boise on April 23, 1926, the Board met, again considered delinquencies in payment of license fees; ordered notices sent to all attorneys of the time within which to pay 1926 license fees; fixed time and place of next examination and appointed the necessary committees; passed upon 15 applications for admission, rejecting two for insufficient legal education; and, in addition to discussion of arrangement for the General Bar, and Division meetings, gave attention to eleven complaints, dismissing three because no cause of action, withholding action on three for further investigation, appointing a Prosecuting Committee to institute proceedings in one; referring one relating to practice by one not admitted for investigation, withholding action at request of complainant in one, and in two, after examination of the record and recommendation of Investigation Committee, entering judgments of disbarment. In one of the latter, involving Otis M. Van Tassel, formerly of St. Anthony, the Supreme Court has approved the judgment of the Board and entered final order of disbarment, in the other, review is now pending before the Supreme Court. A question of ethics submitted to the Board was passed upon.

Again at Boise, June 25, 1926, the Board met, arranged for notices of license fees, and of the election in the Northern Division and of the Division and General Bar meetings. Consideration was given to a petition of the Prosecuting Attorney for Ada County requesting investigation of conduct of officers and attorneys in the conduct of the case of State vs. Whitney; the Board declined to investigate others than the attorneys and for the latter purpose appointed a special committee which has held hearings and will report to the

Board meeting held at this time. Six complaints were considered; one being a report relative to practice by an unlicensed person; one relative to petition for review of a judgment of disbarment; in three Prosecuting Committees were directed to report the status of proceedings; in one the attorney could not be located; and in one, prosecuting and investigation committees were appointed; and directed to proceed with trial. A committee on By-Laws for the Bar and changes in the Organization Act was appointed and directed to report at this meeting. Three delegates were appointed to the meeting of the American Bar Association—study was given the desirability for a Committee of the Bar to investigate Crime conditions and criminal statutes in Idaho, and the program for this meeting of the Bar formulated. Examination papers of fifteen applications were graded and eleven recommended, four rejected.

The meetings of the Board usually consume two or three days, and late into the nights, especially when examination papers are to be graded. In addition to the grading by each member of the Examining Committees, each paper is independently graded by each Commissioner and the secretary. As you know, neither the Commissioner nor examining committeemen receive any compensation. The response of busy members of the Bar to the call of the Board to act in formulating questions, conducting examinations, and grading papers, and to serve upon Prosecuting and Investigation committees has been uncomplaining and enthusiastic, and merits the commendation of the Bar and public. The Board requests me to express thanks to each member of such committees for his services.

The condition of the appropriation and the expenditures since the report at the Lewiston meeting are:

Balance on hand in appropriation, Aug. 28, 1925	$5,202.13
Balance on hand in appropriation July 10, 1926	6,114.95
Expenditures, Aug. 28, 1925, to July 10, 1926,	
Secretary's Salary	$ 550.00
Office Exp., 'phone, telegrams, stamps, etc.	75.00
Stenographer	80.69
Office Equipment	54.00
Stationery, forms, notices, printing 1925 proceedings	318.75
Disciplinary proceedings	22.30
Examinations	208.05
Travel Expense	556.39
1925 Bar Meetings	125.00
TOTAL	$1,990.18

Membership July 1, 1926, being those whose 1925 license fees were paid and who were entitled to practice law in Idaho on that date and judges:

Northern Division	138

Western Division	287
Eastern Division	163
Out of State	12
TOTAL	600

Delinquencies on July 1, 1926, for 1925 or prior years. Those delinquent for years prior to 1925 but paid for 1925 (10) are included in above membership number:

Total delinquents 23

Years and Divisions—

1924 alone—	4 Western
	2 Eastern
	1 Out of State
1925 alone—	2 Western
1923 & 1924—	2 Eastern
	1 Western
1923, 1924 & 1925—	4 Eastern
	2 Western
1924 & 1925—	1 Eastern
	3 Western
	1 Northern
Amount delinquent—	$215.00

PRESIDENT LEEPER: What do you wish to do with the Secretary's Report, gentlemen?

MR. CROWLEY: I move, Mr. President, that the report of the Secretary be adopted.

GENERAL McDOUGAL: I second the motion, Mr. President.

PRESIDENT LEEPER: It has been moved and seconded that the Report of the Secretary be accepted. All in favor will signify by saying "Aye"; contrary, the same. The motion is carried and the report is adopted.

Now, on the Resolutions Committee, I will appoint the following: Dean Robert McNair Davis, Chairman; H. B. Thompson, of Pocatello; E. A. Walters, of Twin Falls.

And on the Elections Committee, I will appoint: C. W. Pomeroy, of Pocatello, Chairman; Turner K. Hackman, of Twin Falls; Hugh A. Baker, of Rupert.

The Elections Committee meets at noon, in this building. The Resolutions Committee can meet at the convenience of the chairman. Any resolution any member wishes to submit should be handed to Dean Davis.

Ladies and Gentlemen: I know of no man in the State of Idaho who has been more intimately connected, not only with the practice of law, from the standpoint of a practicing attorney, but also as a member of the Supreme Court for many years, and as President of

the Bar Association for many years, and as representative of this association for many years,—we all know Judge James F. Ailshie, and it is now with great pleasure I call on him to address you on the subject of Uniform State Laws. Judge Ailshie.

JUDGE AILSHIE: Mr. President.

PRESIDENT LEEPER: Judge Ailshie.

JUDGE AILSHIE: Ladies and gentlemen, members of the Idaho Bar: I notice that the program assigns forty minutes to the remarks that I am supposed to make, and I suppose that I may safely rely upon your feelings as to the length of my remarks. The Supreme Court is always kind enough to say to members of the Bar when they are presenting a case, "You are allowed forty minutes to argue the case, but you are not compelled to take that much time." (Laughter.)

I have been requested to discuss before you the Conference of Commissioners on the Uniform State Laws, and the purposes and objects of that Conference. I suppose that I may safely assume there are a number of attorneys in the act of practicing law who are wholly unfamiliar with that conference, or how it is constituted, or its general working, and that assumption is made, of course, upon the theory that you are busy men, and that you do not pay attention, or a great deal of attention, at least, to those matters.

The Conference of Commissioners on Uniform State Laws was suggested in 1889 by the American Bar Association appointing a committee. The committee was designated a "committee on Uniform State Laws." That committee made investigations and reports to the American Bar Association, and in 1890 the State of New York passed an act authorizing the appointment of commissioners to investigate the subject of the creation of a commission,—a national commission on Uniform State Laws and report to the legislature of the state. That commission started upon its work, and as a result, the first commission met in 1892. That commission represented nine states. From that time the admissions to the conference increased from year to year until in 1912 the commission was represented, or had representatives from every state, and, I believe, the outlying possessions such as Alaska, Hawaii, Porto Rico, and the Philippines, and I think at every meeting since that time practically every state has been represented. Sometimes there would be one or two states not represented. Unfortunately, this year the states of Oregon and Montana were not represented at the sessions of the commission.

The commission meets immediately preceding the meeting of the American Bar Association, and is generally in session about eight days. The conference is not a committee of the American Bar Association, and the American Bar Association has no control over the conference. The conference, as you may know, is composed of representatives, ordinarily three,—some states have five,—and in thirty-three states of the Union those commissioners are appointed under a

legislative act. Idaho, as many of you may not be aware, has a statute authorizing the governor to appoint three members of the commission, and that statute also provides that the expenses of the commission shall be paid for attending the conference, but, unfortunately for those of us who have ever attended, the legislature never made any appropriation for that purpose, and so the attendance has been at the expense of the commissioners. The other states that do not make their appointments under legislative act, are authorized by the constitution which was adopted by the commission, to appoint representatives by the Governor, or by the State Bar Association, in the event that the governor has no general appointive power to appoint members of the commission, so that where the commissioners are not appointed under legislative act, then if the governor has the general appointive power to appoint commissioners, he appointed the commissioners, and upon their being certified they are admitted to the conference with the voting power and right of discussion to debate all subjects. If the governor does not do so, or has not that power, then the State Bar may make the appointment of the commissioners to which the state is entitled.

Now, as to the functions of that body, I may suggest their purpose,—and they have a constitution under which they work,—is to investigate all suggestions that may be referred to them. There is, in fact, a committee of that association on "scope and plan" to which any question that is submitted for consideration by an appropriate committee is first examined and reported on, and that committee reports whether or not it is a subject, as the constitution says, is desirable and practicable to be worked in with Uniform State Laws. In other words, whether the subject is wanted,—with which the country at large is interested so that it ought to be made uniform, if possible, throughout the states, or whether it is a local question, one in which the public generally is not interested, and it doesn't make any special difference whether they are uniform or not. For example, two subjects were referred to our committee a year ago, one was a uniform sanitary bedding act, and the other was a uniform milk containers act. Well, our committee reported that in our judgment it made no difference whether the sheets were the same length in Idaho as they were in Ohio, for example, or not, and it wouldn't make any difference whether they had the same kind of milk containers in New York as they had in Connecticut, or not, and the two suggestions were dropped as impracticable and unnecessary to be considered. On the other hand, the Uniform Aeronautics Act, for example, was reported some years ago as a practicable and desirable thing, and as you are aware, our legislature adopted the act at the last session. That act was approved by the commission two years ago and was submitted to the last legislature and was adopted.

Only one act, I think, has been adopted,—and I may say that there have been submitted since the organization of this commission

thirty-four Uniform Acts for the different states,—in every jurisdiction, and that is the Uniform Negotiable Instruments Act. Now, that is a matter of general interest to everybody throughout the commercial world. The result is that every state in the Union has adopted it; Alaska has adopted it; the Hawaiian Islands have adopted it; Porto Rico and the Philippines have adopted it, so that you have no difficulty wherever you may go in understanding what the negotiable instrument law is.

Idaho stands not at the head of the list, nor, on the other hand, is it very far down the list in its acceptance of these acts. Idaho has adopted eleven of the uniform acts. I can't give them off-hand, but you will undoubtedly recall many of them. No state has adopted all of them. I think the greatest number that have been adopted is about twenty-three. I think either Iowa or Wisconsin has adopted twenty-three of these acts. Some states have adopted only as many as two. Some of the Southern states, for example, have adopted only two. It is dependent, of course, upon the conditions in the state, and how well attached they are to the law that they have already in force. If they have had a satisfactory working law, of course, it is difficult to get them to let loose and adopt something that is entirely different from what they have been working under.

The commission at the session that has just adjourned, which convened on the morning of the sixth of this month, and adjourned, along towards midnight on the evening of the 12th, has submitted the following acts, and I want to call them to your attention for the reason that they are going to intimately concern us. Let me say before proceeding, that after these acts have been adopted and are finally ready for submission to the states by the commission, they are then reported to the American Bar Association. Now, the constitution of the commission doesn't provide, and it has never been so construed, that these acts shall not be submitted to the states if not approved by the American Bar Association, but it is the uniform practice, so far as I am aware, that they have never been disapproved. We had a real fight a year ago in Detroit over some gentleman from New York trying to defeat the Uniform Arbitration Act. I think it was the vilest fight in the American Bar Association a year ago at Detroit. But the representatives of the Commission were successful, and they were more familiar with the subject than those who were opposing it, and the result was that when it came to a vote, the action of the Commission was approved.

Now, as I say, the Commission is not in any way responsible to the American Bar Association; do not get their appointment from them, and yet they are held in high esteem by the Association for the reason that the Association never recommends any uniform law for Congressional action or State action except it comes through the Commission or the Conference, and not only that, but the American Bar Association holds the Commission in such high esteem that they

make an appropriation of anywhere from eight to twelve thousand dollars a year to defray the expenses of clerical assistance, of printing bills and of committee meetings where they have met during the recesss of the Commission in the prosecution of the work, and before I proceed with calling your attention to the acts that are being submitted, let me say this: That Idaho, in my judgment, is not in a very favorable position. I don't like to attend any place where I am under the necessity of rather apologizing for my state. I don't like that kind of thing, and I know you don't. Where I represent a body, or my state, in any manner I like to do my part. We have never contributed from this state a cent toward the work of the Commission. Some of the states make appropriations of anywhere from a hundred dollars to fifteen hundred dollars toward the work of the Commission. The amounts received from the different states by the Commission amount to about five thousand dollars. The actual expense of maintaining the Commission, that is, paying for the printing of the bills,—you must recall that the costs for printing of bills alone are enormous, for the reason we have to send out tentative bills and furnish the whole country with them, and every time an act is amended the bill has to be reprinted, and we have to pay the clerical help, and all that kind of thing. Now, the entire support from the different states amounts to only about five thousand dollars. The rest of it has to come from the American Bar Association as a contribution. I don't want to ask Idaho to make a large appropriation, but I want to ask it to make an appropriation that will show we are in sympathy with the matter, and are willing to share some of the expense of the work, and so I am going to, before I leave here, offer a resolution that the Idaho State Bar ask the legislature to make a standing appropriation of at least one hundred dollars a year. That is as little as we could possibly ask, and while it doesn't begin to share our part of the expense, at the same time it does show we are interested in it, and we are willing at least to pay as much as it costs to print the bills that we get out here. In some of the states the Bar,—and if it were possible under the law, I would ask that this Bar make a contribution,—makes an appropriation. For instance, the Vermont Bar Association from which the president of the Conference comes, makes an appropriation which I believe is two hundred dollars. And so these appropriations come in, and whatever we are short and whatever we fail to get from the states and from the Bar Associations, we have to ask the American Bar Association to give us.

Now, referring to the acts that were submitted and passed upon,—and before I do that I want to say something else about these acts. An act can only originate through a committee that has in charge that subject. For instance, to give a concrete illustration: There has been pending for several years, of which I will speak later because I may want your advice and assistance on it,—there is a Public Utilities Committee, and that committee has been considering for several years a Uniform Public Utilities Act. Now, they gather all the data they can. The reports they make are very interesting. Sometimes those reports pick out a number of what they consider the better acts, the model acts, and then they are annotated, every decision on the subject is incorporated, so that you can find the decisions from the different sections, and paragraphs of the act. That work is carried on. The bill is presented as a tentative draft at one session, and that is gone over, section by section, and suggestions are made. If anything comes along that requires a debate, debate is had upon it, and a shorthand report is kept of everything said on that subject. The committee has the advantage of that for the next session. No bills get through our sessions for final reading and submission to the states until it has been at least read and considered in three separate conferences in three successive years. As a matter of fact most of the bills have been under consideration for five and six years, and have come out and grown up as courts have construed corresponding acts, or as conditions have developed. The automobile act, or code, that is being submitted at this time, has been under consideration for six years, and has been debated each time for six years. All of these acts, gentlemen, have received consideration by a great many men from all over the country, and by repeated discussions and by the gathering of information.

Now, this Conference is assisted by a great many other organizations; for instance, in the automobile act, they have been assisted by the National Traffic Conference; they have been assisted by the Automobile Manufacturers' Committees all over the country; they have been assisted by a committee appointed by Mr. Hoover that has been working on this for three years, and on the final bill Mr. Hoover called a convention of the various committees in Washington last winter, and they had a session for about a week before it finally came before the conference for the last and final reading. So, I say to you, these matters have had more careful consideration, and more thorough debate, than it is possible for any legislature to give, and the personnel of that conference, I might say, is generally men who are now on the bench, or men who have retired from the bench. I think the great majority of them are either active Justices of the Supreme Court or Appellate Courts, or trial courts, or men who have occupied that position.

The Acts that are being submitted at this time are:

First: An Act for Uniform Federal Tax Lien Legislation, a matter in which we are not so greatly interested as other states, but after all, it is a matter of considerable concern. Congress, as you know, has passed a bill providing that if a state authorizes the filing of a lien, then if the Government doesn't do it, that they haven't any lien. That, in that sense, is important. I am not going into a discussion of these questions. Some of you are more familiar, perhaps,

than myself on how Government liens are filed, and when it becomes a lien for fines or forfeitures, or taxes, income taxes, or any of those things. There is a provision for their becoming liens, what Congress has authorized.

Second: Uniform Federal Mortgage Act. That will be submitted. It is rather a comprehensive measure, and, I think on the whole, a very good measure, but it will be rather startling, perhaps, to Idaho attorneys, or any of you, after reading the chattel mortgage act we have, but it is a very comprehensive and detailed measure, and evidently covers everything that can be conceived of in the practice and procedure.

Third: Uniform Act to Regulate Sale and Possession of Fire Arms. That doesn't concern us very much. If you would hear those people from New York and Illinois and the Southern States tell their stories, it would be simply startling.

Fourth: Uniform Act for Extradition of Persons Charged with Crime. That is a thing all attorneys are greatly interested in, and it is very desirable. I will not go into a discussion of the measure. I think it is a very good one, and I think the drafting of it,—it was drafted by a man who was formerly attorney general of the State of Tennessee, General Washington of Nashville, who is chairman of the committee, with members all over the country, and it has been discussed, to my certain knowledge at three different sessions.

Fifth: A Uniform Motor Vehicle Book, consisting of four acts: I will call your attention to these. This act up until this year was reported as one act. Now, the discussion a year ago at Detroit developed the fact that many of us were in favor of parts, but not in favor of others, for the reason that taking a rural state like Iowa and really most of the western part of our country, outside of California, for them it is perhaps too complicated and intricate, and a man is too far from the county seat or the capital to do the registration and things of that kind required before he is allowed to move his car. For that reason I felt obliged to vote against the first two,—what is now the first two acts, so after the debate a year ago, the committee decided upon the suggestion made by a number of members that the Act should be divided into four acts and submitted to the states in that way, so that if a state was not willing, for example, to adopt the first act, or registration act, it might adopt the traffic act and Chauffeur's License Act, or vice versa, and so they made these four acts independent of each other, and so a state might adopt a part of them without adopting all of them, and that is the manner in which the committee finally submitted them, calling it a book, with four acts, and it will be submitted to our legislature.

Those acts are:

First: Uniform Motor Vehicle Registration Act.

Second: Uniform Motor Vehicle Anti-theft Act.

Third: Motor Vehicle Operators and Chauffeur's Act.

Fourth: Uniform Act Regulating the Operation of Vehicles on Highways.

The last two acts I think are excellent. The last one, regulating the operation of vehicles on highways I think is most desirable, and I think it is an ideal act, and that is the expression of every member on the commission. The other two acts appeal to states like Illinois, Pennsylvania, New York and California even as strongly as this last one. I confess they didn't appeal to me very strongly, but they may to you and to the legislature of the state.

These, gentlemen, are the acts that are to be submitted at the approaching sessions of the legislatures.

An act was submitted, and it was the intention to have it passed at this last session, regulating the utilities, clarifying the public utilities code. That had been up at the last session and it moved along fairly well at the present session until we got to a new section that had been inserted since the last session a year ago, and I think that Section, Section 32 of the Act, the head line of that section was "Indeterminate Franchise", but when we read the act, and got done reading it, in fact, as the committee was forced to admit before the debate was over, it was a perpetual franchise, and they admitted it was a misnomer, and that the provision really granted a perpetual franchise. When they did that I, figuratively speaking, exploded, and so did a friend from Nebraska, and so on around, and there was considerable debate went on there for a while. We finally passed a vote that the bill should not be heard on final reading at this session. At this time they took a recess until after dinner, and during the dinner hour evidently they reconsidered it, and after we came back in, they voted to annul the vote by which we decided not to vote on it. Then, of course, as we were to adjourn sometime before midnight, there was more or less filibustering, and the result was the bill was not put on final reading, and will not come up until the next meeting of the Conference.

Now, with me, and I am sure it is true with a great many members of the Conference, it was a question of wanting more information. It was a novel thing to me, and I know it was to others, and of course it was really startling to me, talking about granting a perpetual franchise to a public utilities company, and so the matter has gone over for more light and more investigation, and I suppose of course will come up at the next time.

Now, that is, speaking roughly, the outline of the working of the Commission. There is this thing that I discovered, and I don't need to mention it to you gentlemen who have been dealing with public matters more or less, and have been around the legislatures, and organizations of different kinds, possibly political organization work, but here is what happens: When an important measure is being submitted, a matter of great importance like the Public Utilities Act, to use that as an illustration, of course the interests all gather there,

and you would think you were at a meeting of the public utilities concerns of the country. Their lawyers are there. Mr. Guersey of New York was there, a man I know to be at the head of one of the biggest utilities in the country, and others I might name whose names would be familiar to you from the Pacific Coast, and also from the Mississippi Valley. Now when I say that I am not imputing anything to those gentlemen, you understand, but I say it causes you to look into a matter to see whether or not the other side is being represented thoroughly, and whether the other angles of the question have been looked into and discussed. So it has occurred to me in my membership in that organization, this being my third year there, that it is always important in any of these matters where there are great interests concerned, particularly, to investigate and examine carefully to see that the other side has been represented in the matter. That is what killed the Uniform Mortgage Act that had been up for six years. When they had it up for final passage a year ago, it was defeated. There was a feeling in the Conference, and perhaps well founded, that the great mortgage companies of the east, whose attorneys were around there, had had too much to say in the drafting of the act. For instance, they would cut off the right of redemption. Well, you know to a man from Idaho that is startling. And there were several other things I might mention, but the result was that the act after six years debate, and up for final passage, and on the whole a very fine act, but it had some of the provisions in it, and we could not vote for it, and didn't vote for it, and it was defeated. The result was that the Conference resubmitted the question to a new committee, possibly a new committee was appointed, to consider the subject of a uniform real estate mortgage, and that will be reported at the next session.

So that, in the consideration and discussion of these things, it is just like you would find it anywhere else, you have to look out that the wrong people don't get control, or that something is not injected that is going to be damaging. Now, no one man, of course, can see all those things, and if he did see them, he might think they were all right, and another might not,—you understand how that goes,—but at least when there are so many watching and guarding the things, when it finally does get through it is a reasonably safe measure, I think.

It is my observation of the Conference that there are some of the best minds in the country that are at work on those questions, that have been there ever sinee that Conference was founded. There is a man from Louisiana, the soul of honor, an able lawyer from that state, W. O. Hart, who has been at every session since the Conference has been established, and it is men like him, and others of that type, whom you can rely upon as absolutely conscientious, and think they are doing the things that are right, who have put a lot of thought into the measure.

Now, gentlemen, I don't know of anything further that I could say that would be of interest to you. I want to say this before I close: If there is any member of this Association that would like to ask any questions about the working of this Conference, or anything in connection with it, if I can answer him, I would be very glad to do it. I know it is such that I didn't know much about its workings and how it was constituted, and its purposes until I became a member of it, and it is a matter of very great interest, for this reason: That the legislatures, as you know, and have had the experience in Idaho, even though we never had anybody attend the Conference until I started three years ago, had to undertake these Acts and pass them, or fail to pass them. Now, for that very reason it is important to have your representatives at this Conference, to be there taking a hand in it, taking part in it. It is the spirit of the times to get these laws uniform; there is no question about it. You can find it cropping out every year; you can find it among the members of the American Bar Association, an organization of 25,000 lawyers of this country of whom 2123 were actually registered and present at the last session, the largest attendance that has ever been had.

I may impart this news to you,—it is of interest to me, and I hope it will be of as much interest to you: That notwithstanding serving on this Commission I had the added honor of being selected by the American Bar Association, through the kind offices of Dean Davis of the Idaho Law School, a member of the executive committee of the American Bar Association. I believe that committee is composed of nine members, and it has entire control of the executive affairs of the Association. That Association's receipts right now have reached more than two hundred thousand dollars. I recommend that every lawyer in Idaho become a member of the American Bar Association. You get more than six dollars worth in the American Law Journal, in my opinion. The issuance of the Journal for twelve issues costs, in round numbers, $60,000. The receipts from the advertisements in there,—it is not an advertising medium, it is not turned over to advertising,—but those small advertisements have brought in returns of, in round numbers, $25,000. The executive committee attends to the budgeting, the fixing of time and place of meetings, and it is the first time, as you perhaps know, in the history of the organization that the Pacific Northwest has had a member on the committee. The nearest we ever before approached it was Sioux Falls, South Dakota, or Los Angeles, California, and so I expect to have the pleasure of attending those meetings, at least during the next three years.

Now, if there is any member of the Bar who desires to ask me any question with reference to this Conference, I shall be glad to attempt to answer it, and I thank you for your attention, and I am always glad to meet with the members of the Bar collectively, as well as individually. (Applause.)

DEAN DAVIS: I think it might be proper for me at this time to explain the announcement made by Judge Ailshie. Those of us who got to the Denver meeting from Idaho conceived the idea that the time had arrived for Idaho to be represented on the governing committee of the American Bar Association, and as the Idaho member of the General Council of the Association, it was my happy privilege to place in nomination for one of the three places on that committee, our Judge Ailshie. There were eight or nine nominations for those places, but I am happy to tell you that it was an easy matter to elect Judge Ailshie on the first ballot.

PRESIDENT LEEPER: It is a distinct honor that comes to the Bar of Idaho, and I am certainly glad, Judge Ailshie, that you secured this position; and, on behalf of the Idaho Bar I wish to extend to you our congratulations and thank you for this address this morning.

Mr. Griffin, the next order is the report of the Committee on Legislation.

SECRETARY GRIFFIN: Mr. President.

PRESIDENT LEEPER: Mr. Griffin.

SECRETARY GRIFFIN: There seems to be no member of the committee present, so far as I know. The chairman of the committee mailed this to me.

REPORT

To the IDAHO STATE BAR:

The undersigned, your Committee on Legislation, respectfully present the following recommendations:

I.

ORDER FOR PUBLICATION OF SUMMONS

We recommend that Section 6659 C. S., providing for publication of summons against unknown owners and claimants, and Sections 6677 and 6678 C. S., as amended 1925 Session Laws, c. 43, providing generally for the publication of summons, be harmonized.

For this purpose, we present two alternatives:

(a) Either (and preferably) by repealing the 1925 amendment, and restoring the original provision authorizing the issuance of the order for publication by the court, or by the judge or clerk in vacation; and amending Section 6659 to conform thereto;

(b) Or by amending Section 6659 to conform to the 1925 amendment.

II

ATTORNEYS' FEES IN PROBATE COURT

We recommend that attorneys' fees in connection with the probate of estates be fixed by statute and suggest that the schedule be the same as the statutory fees for executors and administrators.

III.

VACATION OF JUDGMENTS, ETC., ON ACCOUNT OF NEGLIGENCE OF ATTORNEYS

We recommend the repeal of the amendment of 1921, c. 235, permitting the setting aside of judgments and orders based on the failure or neglect of attorneys; or at least that the statute be so amended that, like other applications to vacate, such a motion be addressed to the sound discretion of the court.

Respectfully submitted,

B. W. OPPENHEIM, *Chairman.*
B. S. VARIAN,
NOEL B. MARTIN,
Committee on Legislation.

Dated this 17th day of July, 1926.

PRESIDENT LEEPER: I am in doubt as to just what to do with the report. Should it be referred to the Resolutions Committee?

MR. GRIFFIN: I move you the report be referred to the Resolutions Committee.

PRESIDENT LEEPER: Is there any second to that motion?

(Which motion was duly seconded.)

PRESIDENT LEEPER: It has been regularly moved and seconded that the report of the Legislative Committee be referred to the Resolutions Committee. If there any discussion? If not, all in favor of the motion will signify by saying "Aye". Contrary, the same. The motion is carried. Now, that concludes the program for this morning. Is there anything which you wish to bring up from the floor?

JUDGE AILSHIE: Mr. President.

PRESIDENT LEEPER: Judge Ailshie.

JUDGE AILSHIE: If you are through with the program, I desire to make a motion at this time. I move you that it is the sense of the Idaho State Bar that the legislature be requested to make a standing appropriation of one hundred dollars to be contributed to the Conference of Commissioners on Uniform State Laws, for the purpose of defraying in a small part our share of the expense of maintaining that organization. I would like to hear a second to the motion.

(Which motion was duly seconded.)

PRESIDENT LEEPER: Should this be acted on directly, or should it go to the Resolutions Committee?

GENERAL MARTIN: Mr. President.

PRESIDENT LEEPER: Mr. Martin.

GENERAL MARTIN: We have a law providing for the Governor appointing representatives to attend this Conference.

VOICE FROM THE AUDIENCE: We can't hear you, General.

GENERAL MARTIN: I say that we have a statute providing that the Governor appoint representatives to attend the Conference of these commissioners, and that their expenses be paid, but the legislature has never seen fit, apparently, to appropriate the money necessary to pay the expenses, and I suggest,—I move, as an amendment, we further recommend that the legislature make the necessary appropriation to pay the expenses of the Commissioners attending the Conference.

MR. MERRILL: I second the amendment.

PRESIDENT LEEPER: I am in doubt. Should this matter go to the Resolutions Committee, or do you want to act on it here?

JUDGE AILSHIE: I don't know what your practice is. Either way is satisfactory to me.

PRESIDENT LEEPER: I think it should go to the Resolutions Committee.

MR. HACKMAN: I move, Mr. President, that the matter be referred to the Resolutions Committee?

(Which motion was duly seconded.)

PRESIDENT LEEPER: You have heard Judge Ailshie's motion, as amended by General Martin, and the motion to refer the entire matter to the Resolutions Committee. Is there a second to that motion?

SECRETARY GRIFFIN: The motion has been seconded.

PRESIDENT LEEPER: Is there any discussion on the matter? If not, all in favor vote by saying "Aye". Contrary, the same. The motion is carried. Would you draft the resolution, Judge Ailshie, and hand it to the committee?

JUDGE AILSHIE: Since the amendment isn't mine, I would rather someone else would draft it. I am perfectly willing to draft the part I suggested.

MR. BENTLEY: As Chairman of the Banquet Committee, I would like to ask if there are any persons present who have not made reservations who expect to be present at the banquet tonight?

PRESIDENT LEEPER: What do you wish them to do,—make reservations with you?

MR. BENTLEY: I would like to have them make it known now. I think most of them have made reservations, but some might have overlooked it, and yet intend to be present.

PRESIDENT LEEPER: If there is any one present who has not made reservations for tonight, please stand and make yourself known.

The Elections Committee will meet at twelve o'clock, and you may consult with Mr. Griffin, Mr. Pomeroy.

At 12:30 there will be the round table discussion and lunch at the Bannock Hotel, 75 cents per plate. Is there anything else to come up from the floor?

I will call attention to the afternoon's program. Beginning at two o'clock sharp,—there are programs on the table here for everybody,—we meet; then at 2:05 P. M. will be an address, "Amendments to the Constitution" by F. DuMont Smith of Kansas. We are extremely fortunate in having this distinguished gentleman with us, and you should be here; and I am certain that many citizens of Pocatello will want to hear Mr. DuMont-Smith.

At two-thirty will be an address by Hon. Wm. A. Lee, Chief Justice of the Supreme Court of Idaho, on "Briefs and Briefing."

At three-thirty, will be an address by Mr. Frank Stephan,—I haven't his subject with me. And at four o'clock will be the report of the Elections Committee, and the meeting of the new Bar Commission.

If there is nothing further, gentlemen, we will stand adjourned until two o'clock this afternoon, at this same place.

JULY 19, 1926

2:00 P. M.

MR. CHAIRMAN: Because of the close proximity to the meeting of the American Bar Association in Denver we are particularly fortunate in having with us a number of distinguished guests and I will now introduce to you an ex-president of the Bar Association, a man who is now a Circuit Judge of the Seventh Circuit Court of Appeals of Illinois, Judge Page. It is with great pleasure that I now introduce to you Judge Page.

(Applause.)

JUDGE PAGE: I came up here on business and am going out in the country in a few minutes. It gives me great pleasure to greet you here today and I do want to say that I am very much in favor of Bar Associations. They are great things for the lawyers and for the country. I am very sorry that I can't stay because your chairman has threatened to introduce some celebraties and I am sure I would like very much to see them. I am very glad to have met with you and I wish I could stay through the sessions.

(Applause.)

MR. CHAIRMAN: We also have with us Mr. Sexon of Mississippi, who has been for a long time a member of the Uniform Laws Commission. It is with great pleasure that I introduce to you Mr. Sexon.

(Applause.)

MR. SEXON: We were all sitting at the table together and I found some friends there very much inclined to indulge in coon stories.

I was glad to know that you enjoyed them out here; you can't get into any situation unless you find a coon story fits nicely into the explanation and helps carry it home. I said in a public speech once that when the darkies leave I want to leave, too. We never hear of any trouble between the good negro and the good white; the trouble is always between the bad class of both negro and white. There was once a negro who got into trouble, into very serious trouble; he had killed his brother and was sentenced to be hung. After all the preliminaries, in fact, when they were about ready to adjust the black cap, he was asked if he had anything to say and he answered, "No, I don't know as I have, except that I don't know how you white people feel about this, but it is very embarrassing to me to be here".

Now, it is very embarrassing for me to be here, especially following my friend Page. I am very glad to meet the people here, and in various places, and the more I see of people the more I love my people. I have made it my business to attend the Bar Association meetings and to meet lawyers. I went to a Bar Association meeting in West Virginia and there was a fellow by the name of Joe Wynn and he told this story: He said that he had a dream. He dreamed that he had died and gone to heaven and after going around and seeing most everybody, he said to St. Peter: "Where is Sam Williams?" Now Sam Williams had been an attorney of that State. He said: "I fully expected Sam to be in heaven." St. Peter answered, "Oh, Yes, we have him here alright, but we have to keep him tied up," and Joe said, "Is that so? Why do you have to keep him tied up?" and he was answered, "Why, the old fool wants to go back to Virginia all the time." Now, gentlemen, that is the way it is with me. I want to go back to Mississippi.

We had the ladies at a banquet one evening and Joe kept visiting around the tables a good deal and this is what I heard his wife say to him: "Joe, you are the biggest fool I have ever heard tell of. When you have got all the whiskey you want why don't you ask for sarsaparilla?" and Joe, thinking of the prospect of pleasure of getting all the whiskey he wanted, answered, "Mary, if I got all the whiskey I wanted, I couldn't say 'Sarsaparilla'."

It is a great pleasure for me to be here. I am indeed fond of my profession and I know what this profession means to this community, to the State of Idaho as well as to the State of Mississippi.

(Applause.)

MR. CHAIRMAN: I had the suggestion made to me that we had a number of smokers with us and that they might wish to smoke during the sessions here, so I will declare that in order with the permission of the ladies present.

We were very fortunate indeed in being able to obtain speakers from the membership of the American Bar Association. At this time it gives me a great deal of pleasure to introduce to you the man who is to deliver the next address and whom we will all enjoy hearing so much. He told me that for twelve years he was state senator in Kansas and Chairman of the Judiciary Committee; he was also on the Code Commission of the State of Kansas, and as a climax of his career he has written a law book! It is a great pleasure for me to introduce to the members of the Bar Mr. F. DuMont Smith, Chairman of the Committee on American Citizenship of the American Bar Association, of Hutchinson, Kansas.

MR. SMITH: When I was honored with the request to deliver this address I selected as my topic, "Amendments to the Constitution" because I was familiar with it. I talked on the same subject down in Mississippi and got away without being killed, and since you have heard Mr. Sexon you will agree that it is true that they have very poor speakers in Mississippi.

We have built up in Washington a bureaucracy that has obtained a strangle-hold on the Government of the United States. It is strong because it has control of all the departments and officers. The Congressmen and Senators are afraid to oppose this because of the effect on their constituents. Mr. Coolidge found it impossible to do away with it. This was all brought about to a large extent by the various constitutional amendments. You will understand there is only so much power, and whatever power you give to the central government at Washington must be taken from the States, and individual liberties.

In the last session there were a hundred and four amendments proposed to the Constitution. All of them were infractions of the rights either of the states or of individuals and tended to build up the bureaucracy.

At the outset I may say, I hope you will not say I am guilty of sacrilege, tho' it has been said that it is sacrilegious to question these amendments.

Now, let us consider the distinction between the Federal and the State governments. As you know the Federal Constitution is a grant; the reverse of that is true of the states. When the thirteen colonies declared their independence from Great Britain, these thirteen states each became as an independent sovereign. It is difficult for us to realize that each state was a sovereign power. Delaware could send an ambassador to foreign countries and do anything that Great Britain could do; her power was unlimited.

While the Federal Constitution is a grant, properly speaking, the State Constitutions are restrictions; without these restrictions the states could do almost anything. That fact was recognized, and in 1786 practically all the states had adopted a constitution and practically all had a bill of rights; Rhode Island continued under its original charter. The reason for the demand for the first ten amendments was the difficulty in securing the adoption of the Constitution in Virginia, Massachusetts, New York and Rhode Island and they did not come into the Union until some time later. Nobody at that time, outside of a few members of the Constitutional Convention understood

this form of government; it was new. Very, very few people knew what it was. Not so very long ago, Charles Warren published a new book called "Constitutional Congress and the Supreme Court." He said the Constitution that was adopted in Philadelphia would not have worked without the ten amendments. That was a bitter reflection on the men who framed it. He said, "They did not know what they did." I wrote to him my views and told him in my opinion the amendments were not necessary. The upshot was that he admitted that I was right, and having convinced as great a man as Warren I feel warranted in talking to you.

It is generally supposed that there was a demand for these amendments. Madison doesn't say that certain states demanded these amendments; he said they requested them. In the New York convention where the struggle was the closest and the people opposed the Constitution, it was agreed that New York should approve the Constitution provided that a bill of rights was adopted. Hamilton said that Massachusetts and New York insisted on a bill of rights; nobody could make an open promise because no congress was in existence.

At the first congress there were one hundred twenty proposed amendments. Madison took them and cut them down to seventeen, and while he did not say they were necessary he used the argument that they would do no harm, and that it would tend to bring Rhode Island and North Carolina into the Union. They were sent to the House and there they were cut down to twelve, and ten were adopted. Madison never insisted that they were necessary.

Take the first amendment that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof". Suppose there was no amendment and Congress should decide to have an established church, and should choose the Methodist church and should proceed to keep up the church. Is there a judge that would support that act as constitutional? The inquiry would be answered, that there is no granted power to establish a church. An act like this would be immediately held unconstitutional. It is unnecessary, the same is true of amendments 2, 3, 4, 5, 6, 7, 8, 9, and 10, they are statements that these rights cannot be infringed upon, but these amendments in no way alter the form of the Constitution; they create no office and provide for no office holders; in the truest sense they are not amendments to the constitution; they are academic statements of our ideals.

The eleventh amendment, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by subjects of any foreign state."

This is the amendment which grew out of the case of Chilsolm vs. Georgia, and was in my judgment a great mistake. At that time the people of the state were very indignant that the State of Georgia should be sued by an individual. If you read that opinion carefully

I think you will agree with me that the amendment was a mistake. The idea was derived from Great Britain; first they claimed they could do no wrong, and there was, and could be nothing to sue for. A state is simply a corporation. As a result of that amendment many states have committed gross injustice and there has been no redress: they have violated their obligations.

Amendment twelve, was due to the fright that Jefferson got when Burr received as many votes as Jefferson. If it had not been for Hamilton, they would have elected Burr; as much as they disliked Jefferson they elected him. I have no objection to the amendment.

Amendment thirteen was necessary. While the states had abolished slavery, that is, slavery was abolished by the greater portion of the states, it was wise to have the amendment.

The first paragraph of clause one of Amendment fourteen declares that "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." At that time citizenship was a state question; they provided the test for their own citizenship; each state knew its problems best. We are beginning to see the evil effects of this now. Every person born in the United States, white, black, brown or yellow, becomes a citizen of the United States. While Japenese and Chinamen cannot become citizens of the United States, yet the children born in this country are citizens.

Coming to the next clause "That no state shall deprive any person of life, liberty, or property, without due process of law:" In the Slaughter house case the opinion by Judge Miller, and in my mind Judge Miller was next to Marshall the greatest man that ever sat on the Supreme Bench, in that case,—the legislature had passed an act giving the monopoly of killing animals to a certain corporation of the State of Louisiana, and the butchers brought the action to declare the act unconstitutional. In that case Justice Miller held that the citizenship, the rights of citizenship of the white man was the same as always; that this was simply the black man's charter of freedom and that if the Court adopted that theory that then the Court would have to sit as a board of censors upon every action of the legislature.

In the case of Davidson against New Orleans the question came up as to what due process of law was and Justice Miller wrote that opinion also and he said that it was impossible to give an abstract definition; that it could be defined only by saying that this case is due process of law, and he said that it meant whenever a litigant had his day in Court, and had been confronted with the charges and had had a right of appeal to the highest tribunal that he had due process of law, and that is the shape it was left in.

Judge Field, a very great lawyer, but far from being a perfect character, either as a man or Judge, (that fact was well known) was determined to bring corporations under the protecting mantle of

amendment fourteen. In an opinion written by him he used this language: "This Court has no doubt but that the word person includes corporations". It was so held in the case of Santa Clara County against the Railroad; that was part dictum without any reference to the constitutional provisions. In the case of Santa Clara County against the S. P. Railroad we find that the Court refused to consider that under the fourteenth amendment. He mentioned the fact that this constitutional question had been raised but he said that it was of such importance that the Court would not consider it unless forced to. Mr. Taylor in his work "Due Process of Law", states that there are cases that decide that, but it is not in point. A mere examination of the clause will convince anyone that person cannot include corporations; it speaks of life, liberty and property. Life, of course, is human life. No state shall deprive any person of life or liberty. The general rule is that person would include corporations, but it is clear that what congress was talking about was the individual.

Amendment Fifteen. This was a great mistake. It was also passed as a result of the Civil War and has made the two political parties, one almost entirely sectional; it has forced the people of the south into one party. There are Republican policies in the south, but the people will not join the Republican party so long as the negroes can vote. There has never been a negro elected to Congress in any northern state. The negro has not the mental capacity, and has not the political nature of the white man. That is not to say that the negro should not be a citizen; the mistake was the right to vote; that should have been left to the state, because it could better tell who was fit for that franchise; but it took from the state that power, and made but one test, namely, the age of twenty-one years.

Amendment sixteen. This is the income tax amendment. This was made necessary because Congress, being a bunch of demagogues, repeatedly urged the amendment was necessary because the government should have the right to use its power of taxation in all times of emergency. I think that Congress should have the right to draft the business of the country, and the property of the country just as much as it has the right to draft man power. (Applause.) There is no reason why the Government should have the power to draft my boy and your boy and not draft the property and wealth of the country. I would rather as an emergency measure it should be used, that is, as in time of war and that as soon as it is over it should be dropped. I regard it as necessary but not to be used except in an emergency.

Amendment seventeen. The direct election of Senators. I have my convictions in this matter. We have had a little illustration of what can be done by primary elections in Pennsylvania. If you can hire enough voters you can elect most anybody. The primary in the State of Pennsylvania cost twenty-five times as much as it would cost to buy an entire state legislature twice. Since 1917 there has

been a continual lowering of the caliber and ability of men in the senate. You have a conspicuous exception in Senator Borah of this state; he is one of the three or four men of ability. I swear I can name the others, that is, the men of real ability, he is one of the few; he is one of the most forceful men in the United States Senate. I have been told, however, that if Senator Borah ever found a man who agreed with him on a proposition he would immediately examine his own position to see where it was wrong. Speaking of Borah's qualities, he would be elected by the Idaho Legislature just as readily as by the people, and perhaps more so. The reason for this is that the great common people detest brilliancy, they want a mediocre mind. Capper is an example of what they would do; he is the most typical jackrabbit; I guess I should apologize to the jackrabbit. If some form could be provided so they would be selected by the people and not just in the back room of some one's office and in the grocery store or saloon, then we should have that form.

The Eighteenth amendment: You are all familiar with this amendment. I am utterly opposed to that on purely constitutional grounds, and I am not speaking of my own constitution. I have no hesitation in saying that I am opposed to this amendment.

I am opposed to it because it detracts from the inherent power of the states. We cannot be governed by a central government so far away as ours is today. This again tends to increase the bureaucracy. What will be the ultimate conclusion of the eighteenth amendment I don't know. I am opposed to it as I said absolutely upon constitutional grounds. I am going to tell you a story in connection with this amendment. Ike had been in the habit of buying his booze and paying ten dollars a quart for it. He met his bootlegger one day and said to him: "There is a fellow here in town that is buying his booze for $7.50 and I ought to get mine as cheap as he does. The bootlegger said: "Yes, he is buying booze for $7.50 and it is good booze but it isn't as good as the booze you are getting." At any rate, he bought a case of booze for $7.50 a quart and was telling a friend and his friend told him he better have it analyzed, which he did, and the chemist told him that he could not drink that; he said, "It is poison; you better throw it away right now, it might make you blind." Ike said, "Just a minute. I have got a friend that is already blind, I will sell it to him."

The nineteenth amendment, the equal suffrage amendment. In speaking of this amendment I am once more on delicate ground. We know that women are naturally not of the same political mind as men. The woman votes according to her mind, her likes and dislikes, not politically, and present to her any constitutional amendment that is for the protection of children, as she may think, and she would vote for it even if she knew it would destroy the government. The Constitution provides that two-thirds of both houses may submit amendments. Two years ago there was submitted the twentieth amend-

ment. It provided for the labor of all persons under the age of 18. If that amendment had been adopted, no girl could have washed dishes in her mother's kitchen and no boy could have milked cows without consulting a lawyer to see if it was right under the Constitution for her to wash the dishes and for him to milk the cows.

I submit that this is not the manner in which this great instrument should be warped and disregarded. We should insist that these amendments should be submitted to the conventions elected in each state to act upon that one issue.

I have discussed these amendments with you that have been passed, and they will continue to come. There are two of them that are necessary, only two. I would not wipe out any of the ten amendments but the other seven should be wiped out. I want you all to remember when an amendment is placed before you that you should scrutinize it carefully. If it is intended to increase that herd of parasites or if it tends to build up the bureaucracy at Washington, then vote against it.

I hope you will not consider me rude if I withdraw now. I understand that I am to talk to you again tonight and I am going to ask you to excuse me while I go to the hotel for a rest. I thank you for the attention given me.

(Applause.)

MR. PRESIDENT: I am sure I am unable to express the pleasure you have given us, Mr. Smith, and I am now going to take it upon myself to declare a five-minute recess so that all these gentlemen present may have the opportunity to meet and shake hands with you.

(Recess for five minutes.)

MR. PRESIDENT: The Association has been extremely fortunate in having with it the members of the Supreme Court and we have not been able to ask all the members to address us, but we are to have an address now by Honorable William A. Lee, Chief Justice of the Supreme Court of the State.

CHIEF JUSTICE LEE: I want to say that it is a very difficult matter to follow the very distinguished gentlemen who preceded me. I notice that the front seats are not being used, but I am told by my friends that I have a very rasping voice that can be heard most anywhere.

Mr. President, Distinguished Guests, Ladies and Gentlemen:

I desire on behalf of myself and the court of which I am a member, as well as on behalf of the State Bar Association, to express appreciation for the presence of the many distinguished guests from beyond the state, particularly for the attendance of officers and members of the American Bar Association. I think it appropriate to say, in the words of a distinguished citizen, Mr. Elihu Root, with reference to the American Law Institute, that the American Bar Association is no longer an experiment, it is an institution that is one of the most

potent influences in resisting the encroachments that are being made upon some of the fundamental and basic principles of our system of government, as expressed in the Constitution. It has been equally active in the improvement of many of our laws and the advancement of the legal profession to a higher standard of proficiency and legal ethics. Its influence is world-wide with respect to improvement in the administration of the law. Every lawyer who fully appreciates the duty he owes to his profession, his country and his fellow men will be aided in the performance of such duty by having a membership in the American Bar Association.

Some 2000 years ago, a great teacher said: "It is written, man shall not live by bread alone, but by every word of God." This expresses the great thought that man has a spiritual being that is of vastly greater moment than is his physical being, for it is that which endows him with immortality and the part of his being that is to endure. This being so it is of the utmost importance that he avail himself of every opportunity to develop character and expand his mentality, for after all this must be the one important thing in life without which the others must seem insignificant. Therefore, every association that tends to this end is worthy of earnest consideration.

Your Association has invited me to give my views regarding "The Most Effective Form of Brief and Oral Argument." In attempting to do this I am deeply sensible of the fact that there are many persons present who, by reason of their broader experience and learning, are far better fitted to say something of lasting benefit upon this subject than I can say. However, in view of the position I have occupied for a brief time, I willingly avail myself of the opportunity to express some of the ideas that have come to me by being constantly in contact with this class of work.

No doubt we are all agreed that the real purpose of a brief or oral argument is to instruct and enlighten the members of the court and convince them of the advocate's contention. If this is so it is worth while, in the preparation of a brief or argument, to take into account the peculiar idiosyncracies of the individuals making up such court. Also it may be well to observe that persons who are selected as judges remain very much the same sort of individuals they had previously been, and that such change of position does not of itself metamorphose them into superior beings of infallible judgment. On the contrary, men when advanced to positions of trust and responsibility take with them many of their former habits and modes of thought. If a court is composed of persons of wide experience and great learning in the law much more may be taken for granted in the preparation of a brief, or in the making of an oral argument, with regard to questions of law relating to elementary matters. For instance, let it be supposed that counsel denies the jurisdiction of the court that has rendered the judgment over the subject matter and that it appears upon the record with reasonable clearness that the

court was without jurisdiction of such subject matter in the case, it is only necessary to suggest the question because any court composed of lawyers will instantly perceive that where the court has acted without or beyond its jurisdiction of the subject matter, its judgment cannot rightfully have any more force or effect than if it had been rendered by a bystander or the man upon the street and that every court is bound to deny its power to act and to refuse to do so where it is made to appear that it was without jurisdiction. However, there are decisions by courts of respectable standing that have held that a question relating to the jurisdiction over the subject matter must be raised in a particular manner and at a particular time, and that if this has not been done, the error in usurping jurisdiction is waived. In such instances counsel cannot rely upon a mere statement of the fundamental principle being sufficient but must deal minutely with the elementary principles involved. Hence, in the presentation of any question of law that may be designated as elementary, the extent to which counsel must give consideration to the question or cite authorities in support of his position must necessarily, in a large measure, depend upon the learning and ability of the various members of the court that is to determine the same.

On the other hand, to enter upon an extended consideration of every question of law that may arise in the ordinary action and undertake to treat them in an exhaustive manner, may, and I think often does, tend to obscure the real question and so distract the attention of the court from the controlling issue that it weakens rather than strengthens the argument. It is well, however, to guard against talking above or over the heads of the individuals who compose the court, or to assume that they have the same knowledge and understanding regarding the question that counsel may have after he has given it diligent consideration. The questions that are presented to the court are so varied and often so complex in the facts that give rise to the questions of law that it is not every mind that has sufficient capacity to correctly apply general principles to a given state of facts and is better to err on the side of prolixity and tediousness than to assume that the question is so simple and so well settled that any court composed of persons of average learning and experience will be able to understand such principle and correctly determine the question being presented without the aid of argument or precedent.

You have doubtless heard of the young advocate who was stopped in the course of his argument by the presiding judge of a great court, who asked him if he could not take it for granted that the members of that court possessed some knowledge of the elementary principles of law appertaining to the question under discussion, to which he promptly replied that upon a former occasion he had made that mistake and lost his cause in doing so.

It would be desirable, of course, if every member of an appellate court could have the time or opportunity to carefully examine the entire record in every case presented to the court. This is generally not possible because of the number of cases that the court must hear and determine within a given time. The appellate courts in the several states usually consist of from five to seven members. As often as otherwise, the judges of these courts are selected, in the first instance, not by reason of any exceptional fitness for the position but because they belong to the dominant political party. In many of the states the tenure of office is short and frequent changes occur. The emoluments of the office with the short tenure are not sufficient to always attract the best equipped minds at the bar. It may fairly be said, however, that persons selected as judges are average representatives of the bar in the matter of proficiency as lawyers.

A compilation of the number of cases filed in the appellate courts of the several states, a few years ago, showed that such filings varied from about two to seven hundred cases a year. The average work done by the individual justice requires him to write approximately fifty opinions a year and for each opinion written to examine four additional opinions written by his associates. Chief Justice Robert von Moschzisker of the Pennsylvania Supreme Court, said to me a few weeks ago, in reply to an inquiry, that there were seven hundred cases filed in that court a year and that seven judges were able to keep up the work. About the same number of filings are made in the Iowa Supreme Court and its seven members keep the work up-to-date, but in order to do so it sits in two divisions, with the chief jusice presiding, in all the cases except in those that involve constitutional questions or questions of unusual importance.

Among the less densely populated states, particularly in the intermountain region, the number of cases filed each year are much less than are the filings in older states, but the courts in these western states are required to consider a much wider range of questions in proportion to the number of cases heard than in the older states. The courts in these newer jurisdictions have all the usual questions that pertain to commercial matters, and in addition to that, have a great number of cases that arise out of irrigation, mining, lumbering and the like, which are not common to agricultural states. The Idaho court has had one admiralty case. I call attention to these matters, first, to show that it would be practically a physical impossibility for every member of the court to critically examine the entire record on appeal in every case. I mean by this, to read the entire record, the briefs of counsel and examine all the citations of authority referred to in the briefs. The reading of the cases alone, cited by counsel in their briefs, would frequently require days of time.

The most effective briefs are not necessarily those that are the longest and contain the greatest number of citations. In fact, I think it frequently happens that counsel weaken the force of their briefs by making an excessive number of assignments of error and arguing at too great length many questions that are not of con-

trolling importance. If a justice of an appellate court must write on an average of a case a week and at the same time examine approximately four others written by his associates, during the working year, it is manifestly impossible for him to consider the entire record in each case and examine all the authorities cited in briefs of respective counsel, if such citations are very numerous. I recall, some weeks ago, reading a work written to advise inexperienced counsel of the best method to obtain success at the bar and, among the suggestions made, was one to the effect that as a case proceeded from one court to another ordinarily all the minor issues, both of law and fact, should be eliminated so that upon reaching the court of last resort the question for determination should be narrowed to the smallest compass and the citations not bearing upon controlling issues should be omitted. This rule should apply to the average case. Many judges and lawyers appear to think that the citation of a long list of authorities adds weight to their opinion or brief, as the case may be, and gives it the appearance of being a very profound and learned production. Some years ago, a justice of the Supreme Court of a neighboring state, in describing to me the method of a certain well-known lawyer in briefing his cases, said that if he had a case that was about sheep, he would collect all the books in his library that mentioned sheep. In this connection the judge further said that many briefs submitted to his court were merely lists of cases taken from some former brief the attorney had written or some digest system, and that frequently it was advisable for the members of the court to disregard the brief furnished by counsel and make an independent investigation because it required more time to ascertain that the cases cited were of no value in that particular case than it would take to make an original investigation. In this connection I am also reminded by what was said in an Ohio case, State v. Rose, 106 N. E. 50, which is quoted with approval in State v. Foster (Wash.) 146 Pac. 169:

"A more frequent reference to fundamental principles would make for better law and save much time and energy wasted in reading, approving, discussing, distinguishing, or rejecting cases from the great mass of judicial opinions to be found in the published reports.

'Case law is fast becoming the great bane of the bench and bar. Our old-time great thinkers and profound reasoners who conspicuously honored and distinguished our jurisprudence, have been succeeded very largely by an industrious, painstaking, far-reaching army of sleuths, of the type of Sherlock Holmes, hunting some precedent in some case, confidently assured that if the search be long enough and far enough some apparently parallel case may be found to justify even the most absurd and ridiculous contention'."

The injunction given by the Nazarene about prayer is equally good advice about oral arguments and briefs: "Use not vain repetitions as the heathen do; for they think that they shall be heard for their much speaking."

Counsel sometimes cite, in support of a proposition of law, many authorities from foreign jurisdictions and among them will be found citations from the court before whom the cause is pending. At times this may be unobjectionable or even necessary, but where a question has been decided by the court to which the same question is again being presented, if additional citations from other courts are thought to be necessary, they should follow those from our own court so that if the court is satisfied with its former holding the investigation of authorities on the question need not be further pursued.

I understand that the court of the older jurisdictions do not encourage extended citations from other jurisdictions in support of any rule that is well settled by its own decisions. In any event, doing so has the appearance of saying to the court, you may have doubt about the soundness of your own decisions on this point and I will add these authorities from other courts to convince you that your own ruling on the question is correct.

If there is any mental quality that is predominant with the average judge it is his disposition to regard his own decisions and the decisions of his own court in which he has concurred, as being next to infallible.

Bearing in mind that it is not always possible for every member of the court to examine in detail every record and that a judge must sometimes reach his final conclusions from the impression made upon his mind by the oral argument, by his examination of the briefs of counsel, and by the conclusions of his associates who have more carefully examined the record and authorities, it is of the greatest importance that the argument, whether it be a printed brief or the oral presentation, shall set forth, in the most concise form and in the manner that will be most easily comprehended, the reason counsel offers as to why he should prevail.

Rule 42 of the Idaho Supreme Court, among other things, provides that the briefs of both parties shall begin with a succinct statement of so much of the ultimate facts, as shown by the record, as will fully advise the court of the nature of the action and the issues raised, referring to the transcript by folios. Clearly, what is intended by this rule is that this statement shall be a clear, explicit, nonpartisan statement of the ultimate facts as reflected by the record, which have given rise to the controversy. It should not attempt a detailed statement of all the evidence but should be limited to the ultimate facts, and where counsel disagree as to what these are the different viewpoints should be indicated. While this statement should be as brief as the circumstances permit, it should be sufficiently complete and accurate and, where possible, in the order of the sequence of the happening of the things referred to so that the judge writing the opinion may use the same as his statement or prelude to the decision. Of course, every judge, before writing his opinion, reads the reporter's transcript of the evidence and sometimes it is necessary

that all members of the court do so. But even in such case it is particularly important that the brief of appellant contain a complete and concise review of the ultimate facts necessary to an understanding of the case. It should be free from repetition and sufficiently complete to enable persons of ordinary understanding, who read the same, to know what has given rise to the controversy. Nothing relating to a brief or to an oral argument, is more objectionable than to have the writer launch into a discussion of the law claimed to be applicable without first having stated the ultimate facts and circumstances which have given rise to such action. How can any one tell whether he agrees with the argument on the questions of law being considered, unless he knows something of the facts to which this law is claimed to apply? It sometimes happens that in the oral argument counsel will omit to tell the court what the case is about or make such an incomplete statement that the force of his argument is lost, because the members of the court are not sufficiently advised about the facts to understand whether the discussion of the legal questions has any application to that particular case or not. A judge may listen to a discussion of an abstract principle of law and fully agree with it, but unless he has been first informed respecting that particular case to which it is to be applied, he may wholly fail to comprehend what relevency it may have. Counsel who brief and argue the case have usually tried it in the court below or, at least, before preparing the brief, have familiarized themselves with the record and are familiar with the various events out of which the action has grown. The names of the parties and their relationship to the action are familiar to them and they too often proceed upon the theory that the court has this same knowledge when, as a matter of fact, its members have never before heard of the case beyond reading the title upon the call of cases to be heard.

The rules of this court further provide that the brief on behalf of appellant shall contain an enumeration of the errors relied for a reversal and, in addition to this, a statement of the points and authorities relied on to support the same. I think it would be a matter of surprise to many lawyers to know how frequently the assignments are insufficient to raise some of the most important questions presented by the record and which are being relied upon for a reversal of the case. It is not advisable to iterate and reiterate the assignments by merely stating the same proposition in a different form. This is done, of course, out of an abundance of precaution. But assignments cannot be too brief and few in number where they do in fact present all of the alleged errors relied upon and frequent repetitions of the same in slightly different words tends rather to confuse than to aid the court.

The time allowed for oral argument is forty minutes. Ordinarily it should not be occupied by merely reading the brief or in attempting to review the reporter's transcript of the evidence. The

most helpful oral argument is one that gives to the court a clear and concise statement of the facts as counsel claims them to be, accompanied by counsel's statement that an examination of the record will sustain such claim, followed by a statement of the principles of law claimed to cover the situation, and a showing by counsel that the citations of authority in support of his propositions of law do, in fact, sustain his position.

It ought to be apparent to every advocate that the utmost that can be done by an oral argument is to so state the facts of the case and the general principles of law applicable thereto in such manner that when the members of the court, days or weeks thereafter, reach the case for final determination, they will clearly have in mind counsel's position, and if they have been impressed with the correctness of his contention and an examination of the record confirms his claim as to the facts and the law, he has won his case. On the other hand, if the record discloses that his statement as to the facts are biased and partisan and that his points of law are not sustained by the citations given, his argument will have failed of its purpose and is of little or no benefit to the court, because it must then take up a consideration of the case upon its own account.

MR. PRESIDENT: We will now have an address by Mr. Frank Stephan of Twin Falls, "The Right of the Prosecuting Attorney to Comment on the Failure of the Defendant to Testify."

MR. STEPHAN: I have some hesitancy in reading this paper because I read it once before at Boise, and I assure you that I will not feel embarrassed if any of you folks have heard this before. When I turned this paper over to Mr. Griffin I thought I was through with it, but I was called up last Saturday and told I would be expected to read it.

In considering this question perhaps one's first inquiry is whether a statute adopted by a state permitting the prosecuting attorney to comment on a defendant's failure to testify would in any way conflict with Amendment 5 of the Federal Constitution wherein it is provided that no person shall be compelled in a criminal case to be a witness against himself, but this question has been settled by the Supreme Court of the United States in a long line of decisions holding that the first ten amendments to the Federal Constitution are not operative upon the state. The United States Supreme Court has also determined in the case of Twining v. New Jersey, 211 U. S. 97, with only Justice Harlan dissenting, that the rule of law prevailing in the state of New Jersey permitting the court and counsel for the state in the trial of a criminal case in a state court to comment upon the failure of a defendant to take the witness stand and testify in his own behalf and permitting the court to instruct the jury that an unfavorable in-

ference may be drawn against the defendant from his failure to testify in his own behalf is not an encroachment upon the rights set out in the fourteenth amendment under the due process clause or under the clause prohibiting abridgment of rights of a citizen of the United States.

The right against self-incrimination and its early development is discussed in that decision and the following excerpt may be helpful in properly analyzing the question under consideration:

> "Nothing is more certain in point of historical fact than that the practice of compulsory self-incrimination in courts and elsewhere existed for four hundred years after the granting of Magna Charta, continued throughout the reign of Charles I, gained at least some foot-hold among the early colonists of this country, and was not entirely omitted at trials in England until the eighteenth century. * * * We think it is manifest from the review of the original growth, extent and merits of the exemption from compulsory self-incrimination in the English law that it is not regarded as a part of the law of the land of Magna Charta or the due process of law which has been deemed an equivalent explanation but on the contrary, is regarded as separate from and independent of due process. It came into existence, not as an essential part of due process but a wise and beneficent rule of evidence developed in the course of judicial decision. This is a potent argument when it is remembered that the phrase was borrowed from English law and that to that law we must look, at least for its primary meaning. * * *
>
> "It has already appeared that prior to the formation of the American Constitutions, in which the exemption from compulsory self-incrimination was specifically secured, separately, independently and side by side with the requirement of due process, the doctrine was formed, as other doctrines of the law of evidence have been formed, by the course of decision in the courts, covering a long period of time. Searching further we find nothing to show that it was then thought to be other than a judicial and useful principle of law. None of the great instruments in which we are accustomed to look for the declaration of the fundamental rights made reference to it. The privilege was not dreamed of for hundreds of years after Magna Charta (1215) and could not have been implied in the 'law of the land' there secured. * * * We think that the exemption from compulsory self-incrimination in the courts of the states is not secured by any part of the Federal Constitution. Mr. Justice Harlan dissenting."

But it is my understanding that the provisions of Amendment 5 of the Federal Constitution do prohibit the government in a criminal action for the violation of a Federal statute from calling the defendant to testify for the government and against himself and the defendant's security under that amendment is further protected by a Federal statute which provides that "In the trial of all indictments the person so charged shall, at his own request but not otherwise, be competent as a witness and his failure to make such request shall not create any presumption against him."

Without the latter statutory provision, however, it would undoubtedly be perfectly proper for a jury in the trial of a Federal case to

draw the inference of guilt from the defendant's failure to testify in his own behalf. Nor does it necessarily follow that the privilege against self-incrimination, as provided in the constitutions of all of the states except New Jersey and Iowa should prohibit the drawing of an inference against one on trial in the state court for a crime, who avails himself of the privilege and does not testify in his own behalf. In other words, a state may provide in its constitution that

> "No person shall be compelled in a criminal case to be a witness against himself"

and yet undoubtedly by statute authorize counsel for the state to comment on the defendant's failure to testify in his own behalf and also authorize the trial court to instruct the jury that an inference of guilt may be drawn from such failure on the defendant's part. However, all of the states of the Union with the exception of Georgia, New Jersey, Ohio and South Carolina have by proper legislation prohibited comment and an inference of guilt.

In the case of State v. Gruber, 19 Idaho 692, the Supreme Court of Idaho has said that the trial court should instruct the jury in a proper case that no presumption can be raised against the defendant by reason of his refusal to testify.

For a long time under the Common Law no defendant, either in a civil or a criminal prosecution, was permitted to testify in his own behalf. He was regarded as a party in interest whose bias necessarily rendered his testimony unworthy of consideration. So long as the rule prevailed under the Common Law practice the worst of criminals could almost with impunity shield himself behind his lawyer's eloquent explanation that his client had "a perfect defense" but that the law had "sealed his lips." Then ostensibly for the benefit of the innocent accused the old rule was changed so as to permit a defendant to testify in his own behalf. That rule is in this country universally regarded as a very marked improvement over the old rule prohibiting the defendant from offering an explanation of his case. And while the rule permitting defendant to offer an explanation of his case and privileging him to remain silent was adopted particularly for the benefit of the innocent accused it has been impossible to extend to him the intended benefits of the rule without giving the guilty accused a shelter to which he was not entitled. And so zealous have we been in seeing that the innocent accused is denied none of the benefits intended for his protection that we have freed the one innocent man and have also come near to the point of permitting the ninety-nine guilty to escape.

Jeremy Bentham as early as 1872 strongly criticized the privilege. And according to no less an authority than Wigmore, who favors the privilege:

> "In less than three generations nearly every reform which Bentham advocated for the law of evidence has come to pass.

And we might almost regard his condemnation of any rule as presumably an index of its ultimate downfall."

Bentham characterized the argument for the privilege as the *"Old Woman's Reason,"* the gist of that reason being:

"It is hard upon a man to be obliged to criminate himself."

He characterized another reason for the privilege as the *"Fox Hunter's Reason."* He says:

"This consists in introducing upon the carpet of legal procedure the idea of 'fairness' in the sense in which the word is used by sportsmen; the fox is to have a fair chance for his life. He must be given leave to run a certain length of way for the express purpose of giving him a chance for escape."

Mr. Justice J. F. Stephen had outlined the true history of the privilege in 1857 in his essay on the Judicial Societies Papers. His summary of the history shows that the rule of privilege "arose from a peculiar and accidental state of things which has long since passed away and that our modern law is in fact derived from somewhat questionable sources though it may no doubt be defended." In 1883 Justice Stephen in his history of the criminal law, in contrasting the privilege against self-incrimination with the Continental system which prevailed in France and which permitted a prosecutor to "examine suspected persons secretly and without informing them even of the accusation or evidence against them, taking depositions behind their backs and keeping them in solitary confinement till every effort had been made to extort a confession from them" and permitting the magistrate in the course of the trial to question the accused and demand explanations from them, quoted an experienced civil officer who had remarked: "There is a great deal of laziness in it. It is far pleasanter to sit comfortably in the shade, rubbing red-pepper into a poor devil's eyes, than to go about in the sun hunting up evidence."

Chief Justice Appleton of the Supreme Court of Maine, who was a disciple of Jeremy Bentham, in 1871 in the case of State v. Cleaves in commenting upon the privilege stated:

"The defendant in criminal cases is either innocent or guilty. If innocent he has every inducement to state the facts which would exonerate him. The truth would be his protection. There can be no reason why he would withhold it and every reason for its utterance. His declining to avail himself of the privilege of testifying is an existent and obvious fact. It is a fact patent in the case. The jury cannot avoid perceiving it. Why should they not regard it as a fact of more or less weight in determining the guilt or innocence of the accused? The silence of the accused, the omission to explain or contradict, when the evidence tends to establish guilt is a fact—the probative effect of which may vary according to the varying conditions of the different trials in which it may occur—which the jury must perceive and which perceiving they can no more disregard than one can the light of the sun when shining with full blaze upon the open eye. The embarrassment of the prisoner, if embarrassed, is the result of his own previous conduct, not of the law. If innocent he will regard the privilege of testifying as a boon justly conceded, if guilty it is optional to testify or not, and he cannot complain of the election he may make."

In the year 1901 the Wisconsin branch of the American Institute of Criminal Law and Criminology recommended that the Wisconsin constitutional provision that no person shall be compelled in any criminal case to be a witness against himself, be abolished on the ground that it had outlived its usefulness and described the constitutional provisions as a hiding-place for crime and one that should be destroyed.

1. In the year 1912 the constitution of the State of Ohio was amended so as to provide as follows:

"No person shall be compelled in any criminal case to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel."

This amendment became effective January 1, 1913. After the above amendment had become effective and the practice it inaugurated had been tried out for several years a questionnaire was sent out to various prosecutors throughout the State of Ohio. The questionnaire contained the following questions:

1. How many criminal trials were conducted in your county during the year ending September 1st?
2. In how many of these trials did accused take the stand in his own behalf?
3. Do you believe that the change which permits the prosecutor to comment on the failure of the accused to testify is a wise one?
4. Would you favor a provision requiring accused to testify against himself even when called by the State?

Answers were received from 52 counties, including all of the counties which have cities of any considerable size. According to Walter T. Dunmore of the Law School of Western Reserve University, these prosecutors reported that they had conducted 1658 criminal trials during the year. In 1507 of these cases the accused took the stand and testified in his own defense. Without exception each of the 52 prosecutors reported that he favored the provision of the Ohio constitution which permitted an inference and comment and many were very emphatic in stating their approval. Fifteen prosecutors were in favor of requiring the accused to testify against himself as a witness for the state, while 37 were opposed. The reports from all of these counties showed that 90 4/5 per cent of all cases which actually came to trial the accused took the stand in his own behalf. The four most densely populated counties in each of which more than 100 criminal trials were conducted reported a total of 744 cases, in 725 or 97 2/5 per cent of which the defendant elected to testify. In the eleven counties having 50 or more criminal trials each, there were con-

ducted 1129 cases and in 1082 or 95 4/5 per cent of the cases the defendants took the stand. The prosecutor of the county, in which Cleveland is located and which is therefore the most densely populated in Ohio, reported that his office had conducted 375 cases during the year; that all except three defendants took the stand and that the three who did not avail themselves of the opportunity of testifying were convicted and all three of these defendants subsequently admitted their guilt.

Quoting Mr. Dunmore: From the above statistics it appears that when comment is permitted upon the failure of the accused to testify the defendant usually takes the stand in his own behalf. Should he fail to do so the prosecutor is in a position to urge the jury to make an inference against the accused in a way which is extremely detrimental to his chance of securing an acquittal. It is sometimes urged by those favoring the right to comment upon the defendant's exercise of his privilege that an inference is certain to be made by the jury and it is impossible to avoid it, while, on the other hand, those who disapprove of drawing an inference from the defendant's failure to exercise his privilege have likewise pointed to the same result, contending that without a statutory provision entitling an inference to be drawn, the jury is certain to draw such inference and that a statutory provision authorizing such inference is therefore unnecessary. But there is a very practical difference between the bare inference which a jury may make in face of the court's instruction that the failure of the defendant to testify in his own behalf shall not be construed against him and the inference driven home as an admission of guilt by a skillful prosecutor, and in the absence of any instruction on the part of the court against any inference.

Mr. Dunmore calls attention to the fact that it may be said that the fact that prosecutors unanimously favor the permission of comment is not at all surprising since these men are ordinarily seeking convictions and naturally have little sympathy with obstacles in the way of obtaining the necessary evidence. But in that regard it is interesting to note that of the 52 prosecutors of Ohio who were in favor of an inference being drawn from the defendant's failure to testify, 37 were opposed to self-incrimination by compelling the defendant to testify for the state and against himself.

Under the practice of permitting an inference in Ohio the prosecution is forced to obtain sufficient evidence to make out a case to go before the jury before it can possibly be in a position to profit by the inference. The prosecution is not tempted to go to trial without sufficient evidence, with a view to the establishment of the case from defendant's own testimony. The innocent defendant is therefore not prejudiced by reason of the fact that the prosecutor has relied upon his expected testimony and has therefore made a careless examination of other sources of proof. Without any testimony from the accused, the state must introduce sufficient evidence to cause the Grand

Jury to return an indictment. So too, in the trial before the petit jury the State must introduce sufficient evidence, independent of the testimony of the defendant, to warrant the case going to the jury. Unless the State is in a position to, and does, prove all of the essential elements of the case, independent of the defendant's own testimony, the case would be subject to a directed verdict. Although the defendant may be practically compelled to take the stand after the State has submitted its case, yet he is not subjected to the same danger or hazards that he would be subjected to were the constitutional privilege against self-incrimination abolished.

And according to Mr. Dunmore in Ohio it appears that under the new practice the prosecutors' preliminary examinations seem no less thorough and the trial no less dignified than under the old practice. The innocent defendant is deprived of no essential protection and the guilty accused is deprived only of a shelter to which he was not in any way entitled.

In 1921 the committee on Criminal Law and Criminalogy of the Illinois State Bar Association recommended the repeal of the Illinois statute prohibiting counsel for the state from commenting upon the failure of the defendant to testify in his own behalf.

In addition to the arguments which appear in the foregoing for and against the rule of privilege which at this time obtains in practically all of the states there are many others.

Without going into a prolonged discussion some of the arguments in favor of permitting counsel for the State to comment upon the failure of a defendant in a criminal case to testify in his own behalf may be summarized as follows:

1. The purpose of the trial of a criminal case is to determine the guilt or innocence of the defendant of the crime charged. If the defendant is not guilty of the charge it would seem he should be determined to take the stand and explain why he should not be convicted.

2. In civil suits the fact that the defendant has made no denial of the plaintiff's claim is one of the most formidable weapons to be used in an argument against him and it is difficult to understand why there should be a distinction between civil and criminal cases in that respect.

3. While jurors ordinarily do not expect a defendant to give a detailed account of himself they do expect the defendant to deny his guilt and to give them an opportunity to size him up.

4. In the vast majority of cases where the defendant fails to take the stand it is because he is guilty of the crime charged.

5. The guilty deserve no immunity.

6. The embarrassment occasioned to the timid, the weak and the proud by being compelled to explain criminal charges against them is not a sufficient reason for extending the rule of privilege to all defendants charged with crime.

On the other hand, some of the arguments against adopting the rule permitting counsel for the State to comment upon the failure of a defendant in a criminal case to testify in his own behalf may be summarized as follows:

1. The rule prohibiting self-incrimination provided for in Amendment 5 of the Federal Constitution and incorporated in all of the constitutions of the various states except two, and the rule against permitting the court and counsel for the State to comment upon the failure of the defendant to testify in his own behalf differ only in degree and to permit comment would be practically to do by indirection that which is prohibited from being directly done.

2. While the guilty deserve no immunity the innocent do need protection.

3. The arguments for the rule permitting comment are based upon the assumption that the defendant is guilty but when one assumes the defendant to be innocent those arguments are shorn of all reason.

4. To permit comment by court and counsel for the State might encourage the prosecution to trust habitually to compulsory self-disclosure as a source of proof.

5. The privilege which now generally exists cannot be enforced without to some degree protecting crime, but that protection is a necessary evil, inseparable from it, and not a reason for its existence.

6. To justify the forcible arrest and public trial of any citizen the State should have sufficient evidence, independent of any inference to be drawn from an exercise of the privilege, to justify a conviction.

7. Silence is not always evidence of guilt. It is only evidence of guilt where the circumstances demand that the accused explain. In all other cases silence can amount to no more than suspicion, and suspicion is not such evidence as will entitle the State to a conviction.

8. In no case where the defendant is innocent of the crime charged does silence become evidence of guilt.

9. If the privilege as now generally existing, is denied and comment permitted by the court and counsel for the State there would be serious danger of reaction upon our jury system.

10. To deny the present privilege and permit comment by the court and counsel for the State would overcome the presumption of innocence, which apparently has become one of the basic principles of our society.

11. If the defendant chooses to rely upon witnesses other than himself to satisfactorily explain the charge against him and such witnesses explain the charge sufficiently to raise a reasonable doubt in the minds of the jurors or entirely explain the charge against the defendant, no presumpeion of guilt should arise from the mere failure of the defendant to take the stand in his own behalf.

From the experience that I have had in prosecuting criminal cases and from the feeling that I have long cherished that our present system of criminal procedure including our practice of extending to the defendant the right to testify in his own behalf or the right to explain the charge against him by witnesses other than himself or by documents, etc., or remain silent at the time of trial, if freed of certain of its technicalities would be a very effective and commendable procedure. I am not prepared to say that I favor the abolishment of our present rule of the privilege and enacting in lieu of it a rule which would permit the court and counsel for the State to comment unfavorably upon the defendant's failure to testify in his own behalf.

Our present system of criminal procedure is far from being a perfect system but I do not believe that it would be very much improved by adopting the rule permitting comment, while on the other hand, it is my firm belief that without striking at the features of the system that appear to me to be more or less fundamental in character it may be made a more effective system by eliminating many of the technicalities which the criminal so generally takes advantage of to defend himself in his course of crime. And it appears from the crime waves that have swept over the country in the past few years that we have not kept pace with the development of events, particularly in meeting the new problems that are so regularly presented to us, by specialized and organized crime. As an argument, not for any particular change but for a general improvement of our present system, I desire to call attention to the following facts gathered from reliable statistics:

That America is the most lawless nation on the earth. In 1922, 9500 persons were killed in crimes of violence in the United States. In 1923, 10,000 were killed. In 1924, 11,000. Compare these figures with the facts in other countries, especially in England and Wales. In the year 1921 there were 63 murders and 86 other homicides committed in all England and Wales including city and country districts. During the same year there were 237 homicides committed in the City of New York. In the year 1923 there were 58 murders committed in all England and Wales and there were in the same year 93 homicides other than murder, making a total of 151 homicides throughout those two countries. During the same year there were 389 homicides committed in the city of Chicago. England and Wales had at that time a population of 38,000,000. Chicago's population was slightly less than 3,000,000. In 1923 there were 42 murders committed in London with a population of 7,500,000, against 262 murders in New York. In the City of Memphis, Tennessee, there were nearly as many homicides in the year 1923 (113) as in all of England and Wales (151) although the population of that city is but 170,000 compared with England's and Wales' population of 38,000,000. There were 54 more homicides committed in Philadelphia alone in 1923 than in the entire dominion of Canada. Robbery is 36 times as prevalent in New York as in London. In Chicago it is 100 times as prevalent as in Lon-

don. In 1921 there were 2558 robberies reported by the Chicago police alone, more than 12 times the number reported in all England and Wales. In 1923 more than 12 times as many people were robbed in Chicago as in all the dominion of Canada.

The murderer in the United States has a three to one chance that he will escape arrest and he is therefore free to commit other murders after the first. The chance of escaping arrest for burglary and other crimes are even better. Even after the murderer is arrested he has a twelve to one chance of escaping conviction and his chances of the death penalty if convicted are 100 to 1.

The total cost of crime in the United States has recently been estimated to be from three billion to ten billion dollars a year depending upon whether direct or indirect losses are included. England, 75 years ago, found herself facing the same difficulties that America is facing today, but through freeing herself from a tangled maze of technicalities and striving for a swift and ready justice for the offender, has raised herself from the level of one of the worst crime-ridden countries in the world to a position where she stands foresquare to the world as the country in which crime is at its lowest and the enforcement of the criminal law at its highest.

JULY 20, 1926

10:00 A. M.

REVEREND BARNUM: Almighty God, in whom we live and move and have our being, grant us the favor of thy presence as we begin the deliberations of the day, and while we are gathered here for the consideration of those things which make for truth and justice. Let us have minds that are keen and alert to know the truth that the truth may make us free from all prejudices and narrowness and all bias; let us as we live in this world day by day be strong in body that we may exercise the duties of citizenship. Let us be actuated by high and noble motives, let us put aside all jealousies and personal strife and let us all strive after justice and equity, and things of common good which is our great aim. Let us be free from the stain of greed and prejudice in the courts of law, the legislative and executive departments of our government and in our civic affairs, we ask this in the name of Jesus Christ, our Lord and Savior, Amen.

MR. MERRILL: A meeting of the Bar Commission was held yesterday for the purpose of reorganizing the Bar Commission, and now I take great pleasure in introducing to you the President of the State Commission, Mr. Frank Martin, of Boise, who will act as the presiding officer of the convention during the remaining sessions.

MR. MARTIN: At this time we wish to tender our thanks for the services rendered in assisting us, and to say to you that I deem it an opportunity to render what service I may to the cause of our

profession. It was not within the arrangement that I should preside today, the retiring president was to preside today and while I was to be introduced to you only, conditions have arisen whereby I must preside.

This Bar organization is new; we have been rather feeling our way along, and it is the intention to continue to do so. We feel that the attorneys generally have given it thought and consideration, feeling that it may be made of great importance, not only to the bar itself but to the public. We feel that we may be enabled to render more public service and to assist more greatly in those things that will tend to give good conditions to our state, and we know that organized as we are that we may render assistance to the profession generally, and we may be able, in years to come, to raise the standard of the association of the legal profession of the state so as to give better service to the client, and also serve a three-fold purpose, serving public interest, professional interest and interest of the client. This association is destined to be of service, and will be, not only by punishing and excluding from the ranks the unworthy, but to protect the worthy and conscientious members of the profession.

As I am on the program for a short paper this afternoon I shall not say more this morning.

We are fortunate this morning in having a new man with us, new as far as Idaho is concerned, to discuss with us a new subject. The subject to be discussed by this speaker is one that is of recent origin, but has grown rapidly in importance. The speaker that we are so fortunate to have is well qualified to speak on this subject. He rendered service to the Government in the Air Service during the world war, and now he is starting on his second year as Secretary of the American Bar Association and is a practicing attorney of the City of Chicago. It is with great pleasure that I introduce to you Mr. William P. MacCracken. (Applause.)

MR. MacCRACKEN: Members of the Idaho Bar Association: I can assure you that it is with a great deal of pleasure that I am here this morning. I had started to prepare a paper for this occasion, but unfortunately, or possibly fortunately, my duties as Secretary of the American Bar Association were so arduous during the past few weeks that I have not had time to complete it.

This reminds me of a story which may be familiar to some of you: There was a man in Colorado who lived several miles from the closest settlement, and in the pre-war days he made a trip to town to sell some cattle. After he had transacted his business and spent most of the proceeds, he bought a gallon jug of whiskey and started home. As he journeyed along he partook of the liquid refreshment. About half way home he discovered that the jug was empty. Sitting down under a tree he pondered whether he should return to town for the purpose of filling his jug, or leave it there empty. As he was deliberating on this most important question he heard a

little hissing noise, followed by a rattle. Looking around he beheld a rattlesnake ready to strike. Pausing for a second in his astonishment, he said: "Strike, darn ye, strike! I couldn't be better prepared if I had two weeks notice." Unfortunately, I am in the reverse position. I had the notice, but I could be much better prepared.

My friend Oscar Worthwine met Judge Taylor in Boise as the Judge was leaving to attend this meeting. The Judge mentioned the fact that I was to be on the program, and Oscar said: "Oh, I know him. He was a classmate of mine, and to me he is just Bill MacCracken." And I want to be just Bill MacCracken to this meeting, because I assure you I feel very much at home.

Turning to the subject assigned to me on the program, Air Law, I think it would be helpful if I mention some of the uses of the upper air and touch slightly upon their development. By use of the upper air I mean such uses as are made of it independent of any fixed contact with the earth's surface. This excludes telegraph wires, over hanging eaves, branches of trees and similar objects which are dependent upon a contact with the ground for their support. This discussion will deal with the use of the air independent of a supporting contact with the earth's surface.

It was something over a century ago that we first had an example of such a use on the occasion of the first free balloon ascensions made in France. This method of aerial navigation was first demonstrated in this country shortly after George Washington was inaugurated as the first President of the United States and was witnessed by him just outside of Philadelphia. The free balloon was used for military observation during the Civil War and since then has been used primarily for sport and as attractions in connection with amusement enterprises. They have never been developed as a commercial transportation medium.

In the latter part of the nineteenth century Marconi demonstrated the possibility of transmitting code messages through the air space without the use of wires. In the brief space of time which has elapsed since this invention, the art has developed to the point where broadcasting is heard all over this country and even between the continents of Europe and America and between America and Australia. You are all familiar with the active career of the late Theodore Roosevelt as a speaker. It has been conservatively estimated that more persons heard the voice of President Coolidge at the time he delivered his inaugural address than heard the voice of Theodore Roosevelt in his entire lifetime.

Not only are they transmitting the voice through the air, but also photographs, and it was my privilege a few months ago to go through the laboratory where the apparatus is being developed which will transmit through the air space not only moving picture performances, but actual events which take place within the range of the projecting apparatus. The receiving set used in connection with this

invention is very similar to the ordinary receiving set with which practically all of you are familiar, except that instead of having ear phones or a loud speaker, the receiving set is attached to a device which reproduces the picture or event on the silver screen. There are those who predict that not only will the upper air spaces be used for the transmission of photographs, messages, programs, moving pictures and actual happenings, but also for the transmission of power and heat. Such developments are of the utmost importance, not only commercially, but politically. They are bound to bring the peoples of the world closer together and result in better understanding among them.

I have spoken largely about the use of the air as a means of communication. Let me call your attention to some things which have been accomplished in the field of aerial navigation. The Wright Brothers made their first flights in a heavier than air machine less than twenty-five years ago. Prior to that time Count Zeppelin of Germany had developed his airship which was capable of carrying goods and passengers over a fixed course on a reasonably satisfactory schedule. However, both the Zeppelin and the airplane were regarded primarily as auxiliary equipment for the use of military forces until after the World War. During the four years of that war both the Zeppelin and the airship underwent remarkable development. Their use being wholly military resulted in perfection of those characteristics which are primarily important in time of war, such as speed, maneuverability, and utility for the various special purposes desired in armed conflict, little attention being paid to the commercial features, such as safety, comfort of passengers, capacity for carrying a commercial cargo, and cost of operation.

These commercial features, however, are now receiving attention. Already the safety feature has been raised from one fatality for every 138,600 miles flown by the United States Air Mail during the three-year period 1918 to 1921 to one fatality for every 1,250,000 miles flown during the year beginning July 1, 1925, and ending June 30, 1926.

The original Wright plane was barely able to carry the pilot and a very meagre supply of gasoline. Airplanes have been constructed with a capacity of carrying from two to three tons of cargo as well as their fuel supply. These are rather exceptional, but there are many airplanes in everyday use capable of carrying from one to two thousand pounds of cargo.

There is a popular conception that American aviation is far behind Europe. Aircraft operators in this country are flying more miles, carrying more pounds and earning more revenue than all the lines of Europe together. There is not another line in the world that is doing what the United States air mail service has been doing for the past two years between Chicago, Illinois, and Rawlins, Wyoming, namely, flying at night on regular schedules. A year ago this serv-

ice was extended to provide for night operation between Chicago and New York. In addition to our transcontinental air way extending from New York to San Francisco, there are in operation ten feeder lines and three independent lines operated by private contractors. It is less than a year from the time the Post Office Department first advertised for contract air mail bids. These operators commenced carrying mail only. Already two of them are providing a regular passenger service and it is expected that others will do so in the very near future. Thus you can see clearly that the upper air space is coming to play an important part in the commercial life of the present and succeeding generations.

In taking up the legal problems which have been presented in connection with these scientific accomplishments they naturally divide themselves into three parts: First, the right to use the air; Second, liability for damage occasioned by such use; and, Third, Government regulation of its use.

Long before any use was made of the upper air space similar to what has been described, jurists have given expression to the old maxim, "Cujus est solum ejus est usque et cœlum," which freely translated, means, he who owns the ground owns to the depths and to the skies. No one seems to know just where this maxim originated and there have never been any cases which decided just what title each landowner had to that particular spot known as the earth's center. It is doubtful if any use has been made of the ground in excess of two miles below the earth's surface. As far as the air is concerned, nobody has built over a thousand feet above the earth's surface. This maxim probably originated when one landowner asserted his right to trim off the branches of his neighbor's trees when they hung over his property. There is some reason to believe that this pronouncement was made by a court, although it may have originated with a text-writer. At any rate, it has not been applied to a situation where one is flying over the land of another without interfering with the use of the surface and the air space immediately above the surface.

There are three cases in this country in which that question was raised. The first was a Pennsylvania case in which an aviator was arrested for trespass under a statute passed some fifty years ago which provided that by posting one's land with notices warning trespassers to keep off the owner had a right to file a complaint and receive one-half of the fine without proving any damage to the land. The complaint was sworn out by a landowner who had posted his land as required by statute. In the lower court the defendant was fined and on appeal the judgment was reversed. The opinion held, first, that no trespass had been committed, and, second, that if it had this particular statute was not applicable inasmuch as it was intended that the defendant should have warning not to come on the complainant's land, and that in this case the defendant could not possibly have read the notice from the air.

Another case arose in Minnesota, involving solely the question of aerial trespass under the common law. In this case the trial court decided against the landowner, holding that the English maxim which was relied upon by the plaintiff had never been applied to this particular situation, and that it was entirely contrary to the spirit of the common law to handicap this useful means of transportation by requiring aviators to secure a right of way before flying over land of a private individual.

A similar case was decided last week in Lincoln, Nebraska, in which the court held against the contention of the landowner. In this case the plaintiff claimed special damages by reason of the airplane disturbing his poultry and preventing their laying.

In view of the fact that millions of miles have been flown in this country during the past twenty years without any landowner successfully contesting the right of an aviator to fly over his land, we may well assume that this right has been definitely established by common usage. Of course, it is possible for an aviator to make himself a public nuisance. If he insists on flying low over your premises, diving at your cattle so as to frighten them, endangering life and property on the ground, there can be no question but that the common law would afford a remedy.

The Conference of Commissioners on Uniform State Laws in drafting the Uniform Aviation Act declared in favor of the so-called easement of flight. The Federal Congress has declared in the Air Commerce Act of 1926 that air space above the minimum safe altitude of flight as prescribed by the Secretary of Commerce shall constitute navigable air space and shall be subject to a public right of freedom of air navigation in interstate and foreign commerce when conducted in conformity with the requirements of the Act.

In all probability some day a case will go to the Supreme Court of the United States involving this question, but it would seem in the light of this legislative enactment, the reasoning of the courts in the cases referred to, and the fact that countless numbers of landowners have acquiesced without objection, their holding would be in favor of the public right of air navigation.

In connection with radio there is an entirely different situation with reference to the right to the use of the air, in which two questions present themselves: First, the right to use the air for broadcasting purposes, and, second, the right to use the air over one's own property for the purpose of receiving programs without interference.

The original case which presented the first question arose in Illinois. The owner of a receiving set filed a bill to enjoin an amateur radio operator from sending code messages which interfered with the plaintiff's reception of the programs he selected to hear. He alleged defendant was serving no useful purpose and that his actions in broadcasting constituted a nuisance. Unfortunately this case has

never been brought to trial and is still pending on the defendant's demurrer.

Some few years ago I owned an electric automobile and had a mercury charging set for use in charging the batteries. Through some trick that I can not explain this charging set did not interfere with my radio receiving set, but seriously interfered with the set of one of my neighbors across the street. Needless to say it was not the cause of any litigation as we worked out an understanding that permitted him to turn off the charging device, provided he would start it again when he was through using his radio. However, it will serve to illustrate a situation that might give rise to litigation in the future.

Under the original Radio Act passed by Congress the Secretary of Commerce was given power to license broadcasting stations. For several years this power was construed to give the Secretary the right to refuse a license if in his opinion it would substantially interfere with another station already licensed. Several years ago, however, the Federal Court held that the Secretary had no such discretion and that upon a proper application being filed the Secretary could be compelled to sign a license to any applicant, and that mandamus could be invoked in the event of his refusal to do so. This did not result in great confusion, however, because the broadcasters permitted the Secretary to assign the wave lengths and apportion the time when they might be used. Recently, however, one of the broadcasters became dissatisfied with the time allowed and the wave length assigned and appropriated another wave length, disregarding entirely the time allotment. The Secretary brought a criminal action against the broadcaster and the matter was heard in a Federal Court on an agreed statement of facts. Judge Wilkerson in his opinion held that the Secretary was without power to assign wave lengths or to divide time and that once a broadcasting station obtained a license they might use it in any way they saw fit. If this decision stands, anybody who wants to may apply for a license and if refused can compel the issuance of one by mandamus, and once the license is issued make use of it in any way he desires.

There were two bills before Congress when they adjourned last month, one of which provided that the Secretary of Commerce should have the right to assign wave lengths to broadcasting stations, and that as long as the station complied with the regulations of the Department they would be permitted to use that particular wave length. In other words, it established what is known as a proprietory right in wave lengths.

The other bill provided that wave lengths should be assigned for only a three-year period and could not be re-assigned to the same party if there were other pending applications which could not be granted because of the insufficiency of available wave lengths. If enacted into law this would mean that once a broadcasting station

was set up the probabilities would be that after three years of use it would have to be dismantled or transferred to some one else who secured the license. This would seriously retard the investment in broadcasting stations and would curtail expenditures on the programs because of the relatively short period of time that the station would be in existence. Any legislation on this subject is bound to present novel questions which in all probability will have to be passed upon by the Supreme Court of the United States before they are finally determined.

This gives you a general view of the situation as far as radio regulation is concerned.

Turning again to aeronautics, the last Congress passed what is known as the Air Commerce Act of 1926. This act authorizes the Secretary of Commerce to inspect and license aircraft and to examine and license pilots and mechanics. It requires that all American aircraft and pilots engaged in inter-state or foreign commerce as defined by the Act must be so licensed. It also authorizes the Secretary of Commerce to promulgate air traffic regulations which shall be binding upon all civil and military aircraft of the United States. When this Act is put into effect there will be no occasion for state regulation of aeronautics except possibly requiring the licensing of planes and pilots who are not licensed by a Federal authority. The Act authorizes the Secretary of Commerce to establish airways, provide air navigation facilities and in general to foster and permit air commerce and the aircraft industry. It expressly prohibits the granting of an exclusive right to the use of any airway or air navigation facility. The air lanes and Federal aids are to be free to every citizen who wants to use them.

I did not take the time to discuss with you the question of the liability of the aircraft operator for accidents which may be occasioned either to passengers, cargo, employees or other persons. Some interesting questions have already arisen and more will undoubtedly be raised.

In conclusion I would like to quote a few lines written by Tennyson. The era that he dreamed of has dawned and most of us will live to see many of the things which he described as realities:

"Men my brothers, men the workers, ever reaping something new:
That which they have done but earnest of the things that they shall do;
For I dipt into the future, far as human eye could see,
Saw the vision of the world, and all the wonders that would be;
Saw the heavens filled with Commerce, argosies of magic sails,
Pilots of the purple twilight, dropping down with costly bales.
Heard the heavens fill with shouting, and there rained a ghastly dew
From the Nation's airy navies grappling with the central blue:
Far along the world-wide whisper of the south wind rushing warm,
With the standards of the people plunging through the thunder storm;

Till the war-drum throbbed no longer, and the battle-flags were furled,
In the parliament of man, the Federation of the world."

THE CHAIRMAN: I wish to extend to you Mr. MacCracken, the thanks of the Association, for the very interesting and instructive address you have given us.

In hearing the next address we are fortunate in hearing a very distinguished member of the profession and a member of the Commission, Mr. Potts.

DESIRABILITY OF THE FEDERAL SYSTEM OF SELECTION OF JURY

The subject assigned to me, "Desirability of the Federal System of Selection of Jury," is so worded as to imply that the method used in the Federal Courts in selecting juries is desirable as compared with some other system or method followed in other courts. Presumably the comparison made is with the practice in the State Courts in Idaho. In discussing the subject I shall use as my basis the present practice of selecting a trial jury in the United States District Court for the District of Idaho as compared with the mode of selecting trial juries in the District Courts of the State. The language in which the subject is stated requires me to take the affirmative of the question. Fortunately, I am able to do this without doing violence to my personal views. I am in accord with the opinion of most lawyers who try jury cases in both the Federal and State Courts that the trial juries in the Federal Court are usually of a higher standard of intelligence and ability than similar juries in the Courts of the State. This opinion is not without foundation. It is quite generally recognized that the average trial jury in the Federal Court is composed of men of larger caliber than are usually found on juries in the State Courts. This may be partially due to the fact that juries in the Federal Court are selected from a larger territory and as a result men of higher standing in the community and broader experience in business affairs are more readily secured for jury service. However, this is not the sole reason for the difference, nor do I believe that it is the principal reason.

The qualifications prescribed by law for jurors in both courts are the same. Section 275 of the Judicial Code provides that jurors in the Courts of the United States shall have the same qualifications as jurors of the highest court of law in the State. The qualifications prescribed by statute in Idaho are that a juror must be a citizen of the United States, an elector of the county, in possession of his natural faculties, and not decrepit, possessed of sufficient knowledge of the English language, and that he has not been convicted of a felony or misdemeanor involving moral turpitude. There is the further provision that a trial jury consists of twelve *men*, so

that in neither State nor Federal Courts in Idaho are women qualified to act as jurors. Any one who is competent under the laws of the State to be a juror in the State Courts possesses the necessary qualifications to act as a juror in the United States Court. If not qualified as a juror in the State Courts he can not be accepted as a juror in the Federal Court. The legal qualifications are identical, consequently the difference in the caliber of the juries in the two Courts is not due to any difference in the qualifications of jurors fixed by law. It must be due to some material difference in the method of selecting the jury.

At the very inception of the selection of the trial jury we find a marked difference in the method prescribed by the Federal statute and that fixed by the laws of the State. The first step in the selection of a jury in the Federal Court is the appointment of a Jury Commissioner by the United States District Judge. The law requires that he shall be a citizen of good standing, residing in the district in which the Court is held, and a well known member of the principal political party in the district opposing that to which the Clerk of the Court belongs. The names of not less than 300 persons possessing the requisite qualifications for jurors are placed in the box alternately. The law places no restrictions upon the names selected, leaving their choice entirely to the judgment and discretion of the Clerk and Commissioner. They are subject only to the control of the Court, in whom the power is vested to direct that jurors shall be returned from such parts of the district as will be most favorable to an impartial trial and to avoid unnecessary expense.

The jury list from which trial juries in the State courts are drawn is compiled by the Board of County Commissioners of the county at their first regular meeting in each year. The law requires the Board to make a list from the poll lists of the several precincts in the county, last returned to the Clerk, containing a sufficient number of persons legally competent to serve as jurors, so that the jury list will provide at least 50 jurors for each term of the Court required to be held in the county for that year. Ordinarily this means that from 100 to 150 names must be placed on the jury list. In making up the list the County Commissioners are directed by statute to take the names of such only as are not legally disqualified or exempt from serving as jurors and who are of fair character, approved integrity and sound judgment. As nearly as possible they should select a number from each precinct in proportion to the number of its qualified voters. They are prohibited from accepting or rejecting any person because of his political or religious affiliations or beliefs. The names thus selected are placed in a jury box by the Clerk and constitute the regular jurors for the year.

At first glance it might be assumed that the men selected by the County Commissioners for jury service would be equally as capable of performing their duties as those selected by the Clerk of the United

States Court and Jury Commissioner. The County Commissioners of any fair-sized county should be able to find from 100 to 150 men on the poll lists who have just as high qualifications to act as jurors as could be found in a division of the United States District Court. If the County Commissioners actually chose men of fair character, approved integrity and sound judgment as directed by law, nothing more could be asked. The defect in the State method is not so much in the law itself as in its practical workings. County Commissioners are often not too well qualified to determine who would make good jurors. They are frequently influenced by considerations other than the character, integrity and sound judgment of the prospective juror. The desire to reward a supporter, recognize a friend or pay a political debt sometimes has more influence with the County Commissioners in determining who shall be placed on the jury list than the capability of the men selected. This is more apt to occur when times are hard and jury fees thankfully received. Again, other men are chosen because they need the money and the jury fees may help keep them from becoming county charges. In almost every county there are some men who apparently have no other occupation than jury service. We recognize them as habitual or professional jurors, and expect to hear their names called at practically every term of court.

The Clerk of the United States Court and the Jury Commissioner are not influenced by the considerations which affect County Commissioners in making up their jury lists. They endeavor to secure names of representative citizens who are qualified for jury duty in their district. The names placed by them in the jury box usually represent a high average of intelligence. It naturally follows that when 40 or 50 names are drawn out of the box to form a trial jury, the method used in selecting the names in the first instance is reflected in the jury empaneled to try the cause.

However, the Clerk and the Jury Commissioner do not always select ideal jurors. They do not have sufficient personal acquaintance throughout the district to enable them to choose men whom they personally know to be possessed of superior qualifications. They are compelled to secure the names of prospective jurors from other sources. In at least one division of the Idaho District, the Federal Court juries have not been of the same high standard in recent years that they were in times past. This condition is doubtless due to the failure of those who furnish lists of names to the Clerk and Commissioners to exercise the same degree of care in their selection as that formerly used. It has also been intimated that greater zeal has been shown in securing jurors, who by reason of their natural inclinations, will be inclined to favor the Government in liquor prosecutions than to obtain jurors who are qualified to decide important civil cases. In the State Courts when a jury will be required at a term of Court, the Judge makes an order that a certain number of jurors be drawn from the jury box. The Clerk of the Court is required to notify the

Sheriff and Probate Judge of the time when the drawing will take place, and at that time the names are drawn by the Clerk in the presence of the Sheriff and Probate Judge. From the names in the box he publicly draws out as many as have been ordered and one of the attending officers is required to make a list of the names drawn. Whenever a jury is not drawn in the regular way or a sufficient number fail to appear, the Court may order a sufficient number to be drawn from the box and summoned, or may direct the Sheriff to summon a jury on open venire. The Supreme Court of Idaho has held that the selection of a jury on an open venire is valid and within the discretion of the Court. It appears from the holdings in State v. Barker, 13 Idaho, 65; and State v. Steen, 29 Idaho, 337, that the provisions are in the alternative and that the trial court has the power to disregard the orderly method provided by law for obtaining a jury panel and to have all juries summoned by the Sheriff on open venire. Fortunately this power is seldom exercised. If such a course should be followed by any district judge as a general practice or except in cases of necessity, it would be a gross abuse of judicial discretion in fact, even though sanctioned by law and judicial decision.

In the Federal Court there is no such alternative provision. If there are not sufficient jurors in attendance to complete the panel the Marshal or his deputy shall, by order of the Court, select jurymen from the bystanders sufficient for that purpose. The provision in the State statute in this respect is that when there are not enough competent jurors present to form a panel, the Court may direct the Sheriff or other proper officer, to summon a sufficient number of persons having the qualifications of jurors to complete the panel from the body of the county or from the bystanders.

In the Federal Court there is a limitation on jury service. Section 286 of the Judicial Code provides that no person shall serve as a petit juror more than one term in a year. If, when a juror is called, it appears that he has been summoned or attended said court as a juror at any term held within one year prior thereto, that is a sufficient ground for challenge. In the State courts there is no such limitation. A juror *may* claim an exemption if he has been drawn and served as such within a year. This is a personal privilege and unless he desires to claim the exemption there is nothing in the law to prevent him from serving on a jury at every term of court.

The jury panel for the term is now complete. The next step in the procedure is to select the jury to try the cause. Here we find a marked difference between the practice in the Federal Court and that in the State courts. Until quite recently the practice was practically the same in both courts. The only similarity that now remains is in the functions performed by the Clerks in drawing the names from the box and in the trial of challenges for cause, which are tried by the Court without the aid of triers.

In the Federal Court the Judge conducts the examination of the jurors as to their general qualifications and fitness to try the cause. The attorneys are permitted to ask specific questions concerning matters which have not been covered by the judge. In actual practice very few questions are asked by the attorneys. In the State courts the antiquated practice of long drawn out examination by the attorneys is still followed.

The examination of the jury in the Federal Court is not regulated by statute. The manner and scope of the examination is entirely within the discretion of the judge. In this district there is no rule of court regulating the examination. As far as I have been able to ascertain the same condition is true as to the State courts. The examination of the jury is subject to the direction of the trial judge. There appears to be no reason why the District Judges in the State could not conduct the examination of the jurors the same as is done by the Federal Judge.

That the Federal method is preferable to the State practice is beyond question. It expedites the empaneling of the jury by eliminating an unnecessary amount of repetition as well as a large number of useless inquiries. It results in the selection of a jury equally as capable of trying the cause and as free from bias or prejudice as the jury selected in the State court after an endless interrogation by the attorneys. It tends to improve the administration of justice. In actual practice the examination of the prospective jurors by the attorneys for the litigants develops into a sparring for advantage. Each side seeks to create a favorable impression on some phase of the case by the power of suggestion. Some attorneys go so far as to partially try their case in the examination of the jury. All such chicanery and subterfuge are eliminated from the trial by depriving the attorneys of the opportunity to resort to such practices. This part of the trial of a law suit at least is made more nearly what it should be, viz.: an honest inquiry into the fitness and impartiality of the jurors to try the particular case.

The examination of the jurors by the judge relieves the conscientious trial lawyer of a burden which has been placed upon him by the traditions of the profession. The necessity of conducting a lengthy examination of the jury has become so generally accepted that a lawyer hesitates to curtail his questions through fear of being charged with dereliction of duty. This is particularly true in the trial of more important criminal cases. In a murder case tried some time ago the attorneys were severely criticized by some of their brother lawyers because a jury was secured in a few hours and all the usual questions hallowed by long usage were not asked. It was taken for granted that the case was not thoroughly tried because the empaneling of the jury was so speedily completed. As long as the attorneys are permitted to interrogate the jurors without proper restraint, the abuse of the privilege will continue. The true solution is for the judge to

conduct the examination of the jury without the assistance or interference of the attorneys. Although it is beyond the scope of my subject, I may add that it would further the administration of justice for the judge to take a more active part in the conduct of the trial after the jury has been selected than is usually done in State courts. The trial of a law suit has become too much of an exhibition for the display of the abilities of opposing counsel—a theatrical performance in which the best actor secures the plaudits of the multitude and occasionally the verdict of the jury.

THE CHAIRMAN: This afternoon we will have an address by the Dean of the Law School, and also one by Judge D. W. Standrod, a very able lawyer from Pocatello, and now, Judge Edgington not being here, this concludes the program we had arranged for this morning

May I ask that the members of the resolutions committee meet in this room. The members will please meet the Chairman in this room.

I know that you all would be pleased to meet Mr. MacCracken, and I will ask Mr. MacCracken if he will remain a few moments so that the members of the bar may have an opportunity to meet him.

(At which time an adjournment was taken until two o'clock in the afternoon.)

FOURTH SESSION

JULY 20th, 1926

2:05 P. M.

PRESIDENT MARTIN: The meeting will come to order. It is a very fortunate thing for the Law College of the University of Idaho that it has as its Dean a man who mixes with, and likes to mix, with the members of the profession in the state. Dean Davis has been an active and interested member of this Association in all of its affairs. We have found that he is most willing and eager to work with the organization and the members of the Bar for the advancement of our profession, and invites our assistance in helping to make his Law College stronger and better. Under Dean Davis the Law College of the University of Idaho is taking a very enviable position among the Law Colleges of the American Universities. Its standards are recognized as deservedly high, and we expect even greater advancement under the able management of Dean Davis.

We are fortunate in having him with us this afternoon, and Dean Robert McNair Davis will address us on the subject of "Legal Education." I take pleasure in introducing Dean Davis. (Applause.)

DEAN DAVIS—Mr. President.

PRESIDENT MARTIN: Dean Davis.

DEAN DAVIS: And ladies and gentlemen:

I cannot refrain at this moment from commenting upon the fact that we are privileged to hold our meetings in this beautiful Memorial Hall erected by the people of Pocatello and Bannock County to commemorate the lives of those who gave the last full measure of devotion to public service, and I believe those whose lives are commemorated by this beautiful edifice died believing that they were performing a service for the advancement of peace and justice, and since it is the function of the legal profession to establish and administer justice, it is altogether proper that the meetings of our Association should be held in a building dedicated as this one is. I have long believed that peace will be established only as a result of the establishment of Justice, whether that peace is between individuals or between classes, or hetween nations. In my studies I have not been so much interested in pursuing peace, because I do believe that peace is only a result of the establishment of Justice.

Now, I suppose, ladies and gentlemen, that I should make an apology for appearing before you without a manuscript. Some eighteen years ago I began to establish the habit of attending Bar Associations. During those eighteen years it has been my privilege to attend many meetings of that kind, both state and national. It happens that this is the fourth Bar Association meeting that I have attended in the past eleven months. Just before I left home two weeks ago to go to the meeting of the American Bar Association at Denver, I rceived a letter from our efficient and courteous secretary, Mr. Griffin, asking me to reduce to writing what I might wish to say to you here, and in my reply to him I told him that I would try to utilize the time while traveling on the train to Denver, and I have a sort of rough draft of a manuscript in my grip. Since arriving at Denver ten days ago I have had no time to think further about it. Therefore I crave your indulgence if I come before you informally.

Now, I am sure none of you are unmindful of the fact that during recent years there have appeared in our magazines and newspapers all over the country innumerable articles in criticism of our administration of justice, and those criticisms have been leveled not only at the administration of our criminal justice in our criminal courts, but also at our administration of civil justice, and those of us who attended the meetings at Denver not only of the American Bar Association but also of the Conference of Bar Association Delegates, found running through all the proceedings one predominating note, and that is a criticism of the functioning of our legal institutions in America at the present time. Somehow I feel that this criticism is deserved, and if we are to find the causes, and then to find the remedy and apply it, of course that must be done by the legal profession, and it must be done by all three branches of the legal profession. You know there are three distinct branches of the legal profession now, the Bench, the Bar, and the Teaching Profession in the Law Schools, and if we, the three branches of the legal profession are not able to

find the causes and the remedy and to apply that remedy, then I think there is no way of curing the condition which is so much criticized today in our legal institutions.

I feel that legal education, the subject assigned to me here today, is a fundamental thing in all of this discussion. The subject which is assigned to me is large enough to include anything which anyone might wish to discuss at a Bar Association meeting. I think we should in our legal education consider what it is that we wish to accomplish. What should our product be? What is it we want to send out from the law schools? In other words, what is legal education? What is the function of a lawyer? I think we must ask ourselves, first, "What is law?" and then ask ourselves what is the function of law, and it seems to me we need in our education to go more and more into the theory or philosophy of law and the science of law. I think our education heretofore has dealt largely with the art of practicing law. That is, we have put our emphasis heretofore upon the technique of the legal practice, rather than upon the science of law. Of course, we know that we should understand something of the origin of law. We should know something about how it develops and works, and we should know surely what is its purpose. We should have that bigger conception of the whole machinery of justice and of the whole legal profession.

There is nothing more vital and fundamental in the life of the people than its legal system; it is absolutely the very basis of civilization. I am sure that all through history there have been different conceptions of the purpose of law, and the purpose of our legal system necessarily has had to differ from time to time according to the conditions of society as it has evolved. I think we could say that in the beginning of civilization the fundamental, single dominating purpose of law was to preserve the peace. There were very definite statements as to the assessments or fines and amercements for every act that would be a breach of the peace. That was the dominating purpose of the legal system in primitive times, to preserve the peace, to avoid bloodshed, to avoid personal violence. As society developed, the purpose was broadened to the protection of property. The theory of the protection of property developed, and then another purpose was added, the protection of the transactions of men, contracts and obligations of various kinds.

As showing the purpose of primitive law, I think we could refer to the present condition of International law. The one dominating purpose in International Law today is to preserve peace. That is the one outstanding controlling thing in International Law. International Law, as you know, is in its primitive stage. There was no such thing as International Law until a few centuries ago. The peace of Westphalia in 1648 marked really the beginning of International Law. So we can take that as a modern example of the purpose of primitive law, the preservation of peace.

Then, passing on from the primitive period in the development of our legal system, we find an element providing for protection not only of the person, and the life of the individual, but also of property, and transactions. But with the fall of the Roman Empire in the West there came a retrogression in civilization, a lapse back again to the primitive condition of the dark ages, and then again for centuries, the dominating purpose of the legal system was the preservation of peace between individuals, and the avoidance of bloodshed. Out of this came another period in our civilization in which a different conception, or a different end or purpose of law developed, and that was the Feudal System, in which the primary purpose and end of law was to keep men tied in their relationships to each other,—the relationship of lord and tenant. This was conceived to be the best method of attaining the general security. That was the foundation of society through the latter centuries of the middle ages. Then the purpose was to hold the man in his groove. The Feudal System called for certain military and other services by the man, or tenant, to his overlord, and in turn it called for protection by the overlord to his man, or tenant. That, for four centuries, at least, in England was the primary fundamental conception and purpose and end of the legal system.

Then we passed gradually out of that into a new period in legal history, when the primary purpose changed, when the whole conception of society changed with the developments following the discovery made by Columbus, and those who followed,—the age of discovery and exploration and colonization. A totally different theory of society developed out of the necessities of the time. And a legal system has got to fit into the society of the time; it has got to be established in the light of the purposes of that society. So all through those centuries of exploration and colonization, the predominating idea of the legal system was to give to the individual as much absolute freedom as possible, consistent with that same absolute freedom of other individuals. That was the day of adventure; that was the day when men broke away from the relationships of the Feudal System in which they had been held in their grooves. So the predominating purpose of all of the legal system of another four centuries was that individuals should possess freedom, to do their own will and be free. That was the period of "laissez faire"—let it be. Don't regulate. Let each man work out his own salvation, free from any regulations so far as possible. And as the culmination of this theory there came the great industrial system, the great captains of industry, the great explorers of natural resources, the great managers of big business,—that was the culmination, really, of that period of four centuries of freedom where the individual was the center of the legal system. The legal system through those four centuries was based upon the theory of the preservation of the individual, his personal liberty and freedom.

Then out of that period gradually we have moved into a new period in which the whole legal theory is developing a different conception. We have come out of that period of individual freedom where the individual was the center, to a point where society now is the center around which our legal system must be built. I think we could say in our own country the beginning of this new era or period in which we now live could be marked by the Granger cases back in the seventies. The case of Munn vs. Illinois probably marked the beginning of the new period in which we now live, in which the Supreme Court said that an individual, or a corporation, is not free to do absolutely as it pleases in fixing charges for service theretofore unregulated. That is, you are now subject to regulations for the benefit of society as a whole. Munn vs. Illinois was followed by other Granger cases, the Budd case, and the Brass case, and other cases. Another step in the development of the period in which we are now was the Interstate Commerce Act. Congress for a century had left dormant its power to regulate commerce among the several states, but in 1887 it took up this dormant power and passed the Interstate Commerce Act, showing the time had arrived for the regulation and for the curtailment of this almost unlimited freedom, which, of course, was proper when the population was small and contacts were not numerous or complex, when there were new worlds to explore and develop. But with the increase of population, with the filling up of new lands, with the more intricate civilization, with the complicated organization of society, it became necessary more and more to regulate, and so the Interstate Commerce Act marked just another step, and then came, a few years after that, in 1892, the Sherman Anti Trust Law, which simply marks another step in the development of the era of regulation and curtailment of the absolute individual freedom that we believed in for centuries.

I might say that this Government, this American Republic, is necessarily an outgrowth of that period of freedom. Our Declaration of Independence marks the spirit of that era, of the meaning and conception of the legal system of that time. The government of George the Third did not encroach so very much. It wasn't any great hardship, really, upon the people, and yet those people accustomed to that freedom, resented and resisted whatever encroachmnt there was upon what they considered their rights. They were not willing to be subject to that kind of regulation.

Coming on down two decades later we find the establishment of the Federal Trade Commission, as another step in this process of regulation. We have lived, the older ones of us, at least, partly in the old era of individual freedom where the legal system was aimed at the preservation of individual rights, and now we are living in the beginning of this new period in which the conception of the legal system emphasizes the rights of society, at the expense, considerably, of that individual freedom.

I don't know but that we could explain upon this basis some of the recent amendments to the constitution of the United States, and the legislation thereunder, and perhaps we could understand our own times better if we would review the legal theories through these different periods. Those of us who are just between the two eras in legal conception have a feeling that our individual freedom is being interfered with, and yet law for the preservation and protection of society as a whole must sacrifice to some extent that individual freedom which we have so long exercised. At least that would explain the psychology, the social psychology of our time to some extent.

So we are living in a new time, in a new period of legal history, the purposes being different from those of any time in the past. Naturally our legal education must be made to fit the society of the time. The Legal system grows out of the economic and social and industrial forces at work among us. It is largely the product of those forces, and in turn it is for the purpose of regulating and adjusting all of those contacts, and the more multiplied the contacts of human beings become, the more multiplied and developed and intricate the legal system is likely to be.

We might go back and trace somewhat the development of legal education in our own country. I will not go outside of America. You know legal training and preparation of lawyers who are to be at the Bar, or on the Bench, or in the law faculties, must be made to fit the conditions of the time. Back in the Colonial days the preparation was by apprenticeship. The young man was apprenticed to a lawyer, and he went in as an apprentice, and he imitated his master; that is, by a process more or less of imitation he became a lawyer. He did the way the master did. He was trained in the technique of law. That was the big thing, the technique. He was not trained very much in substantive law, and, indeed, it was hardly necessary in our simple civilization of that time. So that was the first step in our legal education, apprenticeship, where the apprentice observed the work of his master, where he copied pleadings, and various legal papers until he attained a reasonable proficiency. He could see how his master did; he went with him to Court and watched him, and so he became a lawyer.

Then, in 1784, the year after the signing of the treaty of peace with Britain, there was established the first venture in legal education. That was the little private school of Judge Tappan Reeve in Litchfield, Connecticut, in which he received a group of young men, not as apprentices, not to imitate him, but to be instructed through lectures. That was the beginning of a new period in legal education, and led to other ventures by private enterprise of that kind during the next thirty-five years and, of course, continued on through the nineteenth century, but that was only the link that led up to the legal instruction by the universities.

Harvard University, in 1817, established a law school which was the outgrowth of a professorship of law. That was the substantial beginning of legal education in Universities. However, the law school did not function very much for several years after that, until the appointment of Judge Joseph Story as professor of law in 1830. As you know, Judge Story was then on the Supreme Court of the United States. That was the beginning of a new period in legal instruction. The system of private instruction and even of apprenticeship also continued practically throughout that century. There were many other great teachers of the type of Joseph Story. Greenleaf in that same faculty, and Washburn, and Parsons, those great men are all known to you. They produced those books that you have read, as a part of their preparation for lecturing to the young men in the law school. That was the period in which the teacher prepared the course and handed it to the young man, ready made practically. That is, the student didn't have much digging to do for himself. It was done for him.

Then a new period in our legal education came when Parsons had grown old and resigned from the Harvard faculty, and there was brought to the faculty Christopher Columbus Langdell. Any parents who gave their boy that name must have expected him to be an explorer and discoverer, and indeed, Christopher Columbus Langdell was the originator of our present system of education. He was appointed to the Harvard Law Faculty in 1869, and came in January, 1870. The coming of Langdell marks an interesting point in legal education. That is, Story and Greenleaf and Parsons and Washburn were not primarily teachers of law; they were primarily doing something else; Story on the bench; those other men in the practice, and somewhat incidentally they were teaching, but Langdell was to be a teacher and to devote all of his time to the work of legal education. Furthermore, the coming of Langdell marked the beginning of a different system of study. Story, Greenleaf, Parsons, and those other men, as I said, had been making the course for the students and handing it to them ready-made. Langdell said, "We are going back to the source. We will give the young men the cases themselves, and let them dig out the law. We will give them an opportunity to express their own opinions, and what they think about it in the class room, so there will be discussion. It will be a reasoning process, an analytical process. The young men will be given an opportunity to use their own minds, to say whether a thing is sound or unsound." That was Langdell's idea, that a young man ought to exercise his own powers of reasoning and come to his own conclusions by his own processes through proper guidance and be able to say, "That is sound," or "That is not sound." That is Langdell. That, of course, has become the universal method by which a student applies his mind to this great thing we call the common law, made up of numerous single instances actually litigated. So there has come out of that a distinct

branch of the legal profession, and that is the teaching branch. I believe it must continue to be a distinct and separate branch of the profession. No matter how eminent may be a practitioner or a judge, primarily that is what he is, and ordinarily he does not make the best teacher, at least, while he is pursuing his practice, or sitting on the bench.

Now, as I have said, we are in a new period of living, of legal institutions, when the center of gravity has shifted from the individual, and the protection of the individual, and absolute freedom of the individual, to a point where the center of gravity is society, and the protection of society's rights, and the individual more and more must recede, as much as we regret it, and our legal system must adopt the shape to preserve and protect and develop the social interests of the people, so I think that in our legal study that instead of emphasizing as we have in the past, the art,—I might call it the technique of practice,—we must emphasize more and more the science of law. A lawyer who is going out into the practice, and later to become a member of a Court, or possibly into a legislature in the forming of statutes, must understand the great forces that are at work developing our social institutions, and that is why I believe that we must enlarge what we call our pre-legal education. We must give to the youngster before he comes to the study of the professional law an understanding of our institutions, how they came about and developed and grew into what they are, and what the real problems of this great human race may be in its social contacts, the great problems of capital and labor, the great problems of the regulation of industry and the carrying on of our enterprise. We have got to get away from the individualized view to the broader comprehension of what it is all about in its totality. Surely the legal system is so fundamental, so interwoven with every phase of the life of the people, that one cannot understand the legal system without understanding the manifold relationships of people in society. So, for my part, I hope we can lay a big foundation for our young men before they undertake their professional studies, so that they may come to us with some understanding of the development of our American institutions, to go no further than that, although I think we have got to go back behind our English history to find our beginning.

It was Mr. F. DuMont-Smith, who in presenting a report to the American Bar Association last week said, "In teaching constitutional law in our law schools we do not teach the constitution. We only pick out a few phases, the commerce clause, taxation, due process, and so-forth." Now we are obliged to presuppose in teaching constitutional law that a student has had a prior training in constitutional history, and in the understanding somewhat of the development of this Government, and of that constitution, because in teaching the great subject of constitutional law, we can't take enough time to go back and lay that foundation, but in teaching immature students, I find that I

do have to go back and lay a foundation which they should have had when they came to us.

It was Mr. Potts, our newly-elected Commissioner, who last night at the banquet emphasized so well the importance of precision and exactness in education, the training of people to do things exactly, to be precise, to get facts. Now, in this whole discussion of the correcting and improving of our legal system, the first thing that must be done, of course, is to get the facts, and it takes trained minds to get facts. We must diagnose our case, so to speak, find out what is the matter with us, and then be able to prescribe the remedy and then be able to apply that remedy and carry it on.

Oh, it is pitiful to find how lacking some of our young people are,—maybe we were as bad when we were youngsters,—but how lacking they are in precision, in the ability to write a correct sentence, in the ability to state a thing as it is. I have a youngster whom I am trying to train to get the thing as it is, and to tell it just exactly as it is. I wish I could gather together the high school principals and the high school teachers and talk to them about putting on a little pressure for exactness and precision in high schools.

There are two kinds of pre-legal studies, and I always try to talk to all of our young men before they go into the law school. "First, young man," I say, "take those subjects which will develop the precision of your mind, mathematics, physical science, language, not forgetting the English language. Get your mind sharpened. Get a whetted, keen, precise mind, then after you have your mind sharpened and whetted to a fine edge, then with that improved tool, as it were, go out and get your information, or background, which is a necessary preparation for legal study." So I would say to the high school teachers, in looking forward to University training for some of their pupils, at least, do insist upon some accomplishment down there in the high school which will fit a youngster to do accurate work.

Rome was not built in a day, there is no short cut to great accomplishment. No one has ever yet discovered an easy way to become a real lawyer. By a real lawyer I mean one who senses the true function of his profession in establishing and administering justice in a complex society, one who looks upon the profession as a channel through which society may be served, one who is not self-serving and mercenary, one who has an understanding of the purposes of organized society, of its institutions, of its problems, of its successes and failures, one who has a mind to know and a conscience to do that which will advance the human race not only in material things but in spiritual things as well.

Now I have rambled on, ladies and gentlemen. I did not know just what I was going to say when I came in, but those are some of the things that we must do in legal education, to develop a precise mind, to develop an informed mind which understands our social institutions, our industrial relationships, our economic problems, and all

that, and then to build upon that foundation a knowledge of the professional law, and then, best of all, the science of law, its meaning and its functions in society, and what it really signifies in controlling individuals and groups as they live in contact with each other. That I think is going to be the emphasis in legal education from this time forward. I appreciate the attentive hearing you have given me. (Applause.)

PRESIDENT MARTIN: I am sure, Dean Davis, the Association appreciates very much your able address on this question.

After I introduce the next speaker, I will ask the Vice-President, Mr. Merrill, to take the chair.

The next speaker is one who, from the period in the history of Idaho when it was just emerging from what might be called the pioneer state, to the present time, has been prominently connected with the legal business, the social and official life of the state, eminent as a lawyer, more eminent still as a trial judge on the Bench, prominent in the business affairs of the state, and connected with its official life in many ways. Judge Standrod is eminently fitted from his storehouse of experience to address us on the subject assigned to him, "The Idaho Lawyer, His Work and Worth." I deem it an honor to have Judge Standrod with us, and to have him address us on this occasion. I take great pleasure in introducing to the Association, Judge Standrod. (Applause.)

JUDGE STANDROD: Mr. President.

PRESIDENT MARTIN: Judge Standrod.

JUDGE STANDROD: I fear the people will be rather disappointed after listening to the splendid compliments paid me by the Chairman.

Before I begin, I wish to congratulate all those who have had anything to do with calling and carrying on this convention. I think we have all been delighted, refreshed and benefited by this meeting. A congregation of lawyers should mean something. I try to impress more and more upon the lawyers the important position they occupy in society. It is needless to say what that position has been in the past. I noticed a few days ago a noted judge of Chicago in a speech in New York declared that lawyers were the trainers of the soldiers of the Revolutionary War, that the soldier boys had to resort to the learning and experience of the lawyers in order to become members of the army.

We have a great deal to say about the lacking of lawyers in some respects, and, of course, there are a great many defects in the characters of lawyers, and yet there is no class of individuals in whom the people place the implicit trust that they do in lawyers. Your client gives you the most sacred papers, the most valuable papers he has. He turns them over to you without the request of a receipt, or any recognition of your having received them from him. Lawyers make the laws; people depeud upon the lawyers for their laws.

I think I have told this story before, but it impressed me when I was quite a young man: When the old grange idea became quite prevalent and populous in my state,—and of course it evolved into a political organization and took a prominent part in politics that year, and as a result there was only one man went as a member of the State Legislature who did not belong to the grange, and he was a lawyer from my own town, a very able lawyer, a man who would have graced a Senator's toga, so far as that was concerned, but he always avowed that it was the finest legislature that the state ever had, the secret of which was that he wrote all of the laws passed at that session of the legislature. As I say, people look to the lawyers for the laws, and we should in these meetings that we have, try to become impressed with what our profession means to the state and to society.

This paper is, as I say,—I fear it might be disappointing, and after the introduction by my old friend, General Martin, I fear I am more impressed with the idea that it may be disappointing.

(NOTE: Judge Standrod having requested that his paper be not published, it is, with regret, omitted.—The Secretary.)

ACTING PRESIDENT MERRILL: I am sure, Judge Standrod, that we are all in one accord appreciative of the very excellent and charming paper which you have rendered.

Ladies and gentlemen, the next address is to be given by the Honorable Frank Martin, who is President of the Idaho State Bar Association. General Martin, whom you undoubtedly all know, is a man of very wide experience, particularly in this state. He has served in a political capacity as attorney general of this state; he is a lawyer of eminence; he is a man of stability and character, and a man who has been actively identified with the development of this state for a great many years. His work upon the Commission has been very thorough; he has applied to that service the same degree of ability and of energy that he applies to everything else he undertakes. I am sure you will be very much interested in listening to his address on the subject, "Requisites for Admission to the Bar."

General Martin. (Applause.)

GENERAL MARTIN: Members of the Bar Association: Before taking up my paper which I have prepared, might I refer to the fact that the practice of law has always been so regarded by the nations and states that before one could undertake that calling, special preparation and special fitness must be shown. Not only must the lawyer show the training requisite to properly advise his clients, but he must show that standard of character which entitled him to be entrusted with the high duties that the state said pertained to his calling. He was not only not permitted to practice law as a business, but he must lay aside the business part of it in a way that he must realize that it was not merely a business, but a profession with an honored history, and a standing to maintain; that he had duties to

the state; to the public; that he had particular duties to that arm of the Government, that force of the Government, the Judicial Department; that he must not only maintain the right; that he must not only use honest methods to conduct his litigation, but that he must protect and defend the courts, one of the main departments of the Governments of Nations. I do not mean that courts should not be the subject of honest and fair criticism, but no lawyer should forget his professional duty so far that he should not immediately come to the defense of the courts of his state or his nation when they are improperly or unfairly criticised, and no lawyer should forget that is one of his duties.

(Paper read by General Martin. NOTE:—Through an unfortunate misunderstanding the reporter failed to report Mr. Martin's address, which cannot, therefore, appear herein.)

(Applause.)

PRESIDENT MARTIN: The next order of business is the report of the Resolutions Committee, and the report of special committees. Is the Resolutions Committee ready to report?

DEAN DAVIS: We are ready.

PRESIDENT MARTIN: We will take up the report.

DEAN DAVIS: Your committee has considered the motions submitted by various members of the Association, and those which were presented in due form have been unanimously approved by your committee. (Reads:)

"We, your Committee on Resolutions, beg leave to report as follows, and move the adoption of the following resolutions:

Signed by:

ROBERT McNAIR DAVIS, *Chairman.*
D. C. McDOUGALL,
E. A. WALTERS.

"No. 1—Whereas, it is of public importance that an act be passed by the Legislature of the State of Idaho defining what shall constitute the practice of law;

"THEREFORE, BE IT RESOLVED, that this Association advise the enactment by the Legislature of the State of Idaho of such an act, and that a committee of three members be appointed by the President of the Association to draft such an act and present it to the proper committee for consideration by the Legislature."

No. 2—"Be it resolved that it is the sense of this Association that the Legislature be requested to make a standing appropriation of One Hundred Dollars per annum to the Conference of Commissioners on Uniform State Laws to help in a small way to defray the state's share of the expense of holding the sessions of the said Conference; and the Legislative Committee of this Association is hereby instructed to draft an appropriate act and secure, if possible, its passage through the Legislature to carry this resolution into effect."

No. 3—"Whereas, the Legislature of the State of Idaho has provided for appointment by the Governor of three Commissioners on Uniform State Laws, and

"Whereas, a proper discharge of the duties of said commissioners compels them to attend the conference of said Commissioners on Uniform Laws each year, and the laws of the State of Idaho provide for their expenses being paid, and

"Whereas, the said Legislature has never made an appropriation for such expenses;

"Therefore, be it resolved, that it is the sense of this Bar Association, that the Legislature of the State of Idaho should appropriate sufficient money to pay the expenses of said Commissioners to attend the sessions of said conference."

No. 4—"Due to the fact that the expense entailed upon the citizens of the State is very considerable where appeals are taken to the Supreme Court and the amounts involved are small and also to the fact that the Supreme Court is overburdened with appeals, this Association recommends that section 7152 of the Idaho Compiled Statutes be amended by adding a new section thereto in substance as follows:

"Provided, that where the object of a suit is the recovery of a money judgment and the amount involved is $500.00 or less, that an appeal can only be taken in the following manner: After procuring a transcript as provided for in Sections 7166 and 7167, there shall be prepared and attached thereto a petition setting forth the ultimate facts involved in the case and points of law relied upon by the appellant for the reversal of the judgment appealed from, said petition to be addressed to the Supreme Court and presented to the Court or to one of the judges thereof.

"Upon a consideration of said petition and the record in the case, an appeal may be granted by the Court or one of the judges thereof. Should one of the judges refuse to grant such appeal, the appellant shall have the right to present his petition to the Court in term and have said appeal granted or refused by the Court."

No. 5—"Be it resolved, That we express our great appreciation of the magnificent reception accorded us by the City of Pocatello and, especially, by the Bar of Bannock County. The members of the Bar of said county have, by their untiring efforts, rendered this one of the best meetings held within the history of the association. We thoroughly appreciate their untiring energy and the manner in which they have contributed of their valuable time, as well as talent, in making this meeting an entire success and one which marks a forward step for progress in the affairs of this Association. We especially express our appreciation and thanks for the magnificent banquet which the members of the local Bar tendered on Monday night at the Bannock Hotel. This reception is the outstanding social event, and such

courtesy and kindness tends to make popular and affords a means of increasing the attendance at these association meetings."

MR. GRIFFIN: There is a supplemental report to this effect: "We, the members of your Committee on Resolutions, report back to the convention the report of your Committee on Legislation without recommendation. The report of your Committee on Legislation has doubtless received the care and attention of such committee, and we do not feel that we can further advise this convention as to the advisability of following or accepting said report."

And this is signed by the members of the Resolutions Committee.

PRESIDENT MARTIN: Gentlemen, you have heard the report of the Resolutions Committee. There are five resolutions. I know we are all in accord with Resolution No. 5, which expresses our appreciation of the treatment accorded us, and a motion is now in order adopting Resolution No. 5, expressing this appreciation. All in favor will signify by saying, Aye; contrary, the same. It is so ordered, Mr. Secretary. Now, gentlemen, we have four other resolutions contained in this first report. What is your pleasure as to taking them up separately?

JUDGE WALTERS: I suggest that the Secretary re-read each resolution separately, and the proponent of the resolution, if present, then discuss the same, and his reasons for proposing it to the committee, and that we vote on them separately.

PRESIDENT MARTIN: The Secretary will read them, please.

JUDGE WALTERS: That is just a suggestion.

PRESIDENT MARTIN: If there is no objection, we will follow that order. Hearing no objection, the Secretary will read them, one at a time.

(Whereupon Resolution No. 1 was read by the Secretary.)

PRESIDENT MARTIN: Gentlemen, that resolution was drawn by myself. We have an act making it a misdemeanor to practice law without a license, but we have no statute defining the practice of law, of what it consists. Our Commission is very often confronted with the question of construing whether or not a man is practicing law, on the complaint of someone else, and it was my thought in preparing that resolution and presenting it to the committee, that we might be able to obtain from the legislature a definition of the practice of law, so as to remedy that difficulty.

MR. MERRILL: I move you, Mr. President, the adoption of that resolution.

(Which motion was duly seconded.)

PRESIDENT MARTIN: It has been moved and seconded that we adopt Resolution No. 1. Is there any discussion or remarks? Are you ready for the question? All in favor vote by saying Aye; contrary, the same. It is so ordered, Mr. Secretary.

You may read the second resolution, Mr. Secretary.

(Resolution No. 2 read by the Secretary.)

PRESIDENT MARTIN: Gentlemen, this resolution was drafted by Judge Ailshie, who has left us. You heard his explanation when he made his address before you yesterday morning, that the states generally contribute to the expense of this work. What is your pleasure?

GENERAL McDOUGALL: Mr. President, I move the adoption of this resolution.

(Which motion was regularly seconded.)

PRESIDENT MARTIN: It has been moved and seconded that the report of the Resolutions Committee on this resolution be adopted. Are you ready for the question? Any remarks? All in favor say Aye; contrary, the same. The resolution is adopted.

You may read Resolution No. 3, Mr. Secretary.

(Whereupon Resolution No. 3 was read by the Secretary.)

PRESIDENT MARTIN: That resolution does not, of course, affect so much the legal profession. The Legislature of the State of Idaho passed a law authorizing the Governor to appoint three commissioners to attend the Conference of Commissioners on Uniform Laws. The statute now in existence provides that they have their expenses in attending the conference paid, but the legislature never made any appropriation for that purpose, as I remember it. I think of the three, perhaps, Judge Ailshie is the only one regularly attending for the last four years. It is a question of policy,—or propriety, rather, whether this Association should take up the recommendation of an appropriation for this matter or not. What is your pleasure, gentlemen?

MR. MERRILL: Mr. President.

PRESIDENT MARTIN: Mr. Merrill.

MR. MERRILL: I think that we perhaps don't fully appreciate the value of the services of the men on the Uniform State Laws Commission, the untiring work which they do, and the real profit that it is to the state. It is a movement that we can't overlook throughout the entire United States, to make uniform a great many of the laws. Whether we like it or not, that is a matter that has gained considerable momentum, and we will probably hear more about it in the future than we have heretofore. I remember a year ago at Detroit a very lively discussion in the convention relative to a matter of this very thing, and it taught me the lesson of the value of the state's representatives being at the Uniform Laws Commissioners' meeting, and looking out after the interests of these western states. The particular thing to which I call attention is the uniform act which had been proposed by the delegates from New York, particularly, and some of those other eastern states. The delegation from Chicago was likewise in favor of it. It had to do with the matter of taking judgments upon credit claims where the merchandise had been purchased from wholesale houses in the east and shipped to western states, and

to states far from the point of origin. It was a very drastic matter of legislation in favor of those eastern centers. It would react very seriously against the western and southern sections. It was the western and southern men who defeated it, and it seems very, very wisely so. Had it not been for the work of those men in opposing it, that bill would have been proposed, and it would have been adopted by a number of states, and the force of the states who had adopted it would perhaps have been felt on our own legislature, and it is just possible that such legislation would have been enacted here. It is, of course, of primary importance that that sort of thing be killed early in the proceedings. We can't expect the members of that commission to attend to these duties and spend a week or ten days of their time at some far-off point working for the interests of the profession and the interests of the state without their expenses, at least, being paid. I think it is unjust to ask them to do it year after year, and I think the state should,—and I think this body, really, ought to recommend that the act be further carried,—that the legislature should carry out the provisions of the original intendment by making that appropriation. It is only a small amount, and the good derived therefrom would be inestimable.

GENERAL MARTIN: What is your pleasure, gentlemen?

MR. POTTS: I do not under-rate the importance of the Uniform Law Commission, but I question the advisability of this Association asking the Legislature to make an appropriation for the expenses of three delegates, or representatives, from the state. I think the more practical proposition would be to secure an amendment of the law providing for one representative instead of three, and attempt to secure an appropriation for the expenses of that one delegate. I furthermore believe that the great work which is being done by the American Law Institute is of equal, if not of greater importance, than the Uniform Laws Commission, and this state, or this Association, should have a representative in attendance at the important sessions of the American Law Institute, and while it might be attempting too much, I would much prefer to see the act amended, or an attempt made to amend it, by providing for one representative at each of those meetings, one meeting each year, with the expenses paid, rather than three representatives at the one which this resolution covers.

PRESIDENT MARTIN: Do you care to make a motion to amend the resolution to ask for a change of the law to one commissioner, and an appropriation for his expenses?

MR. POTTS: It would be difficult to frame a resolution. That is the thought.

PRESIDENT MARTIN: That amendment could be put in by the Secretary, or that thought.

MR. POTTS: At this time I will confine the amendment to that phase of the matter, to the effect that the resolution be amended to

provide that this Association recommend an amendment to the Act providing for one Commissioner, and attempting to secure the appropriation for his expenses.

PRESIDENT MARTIN: Is there a second to that motion?

DEAN DAVIS: I wanted to make this remark: that perhaps we should not abolish the three, the triplicate Commissioners, but we might provide for the payment of the expenses of one. It might be desirable at times to have three present, or as many as three, even though we pay the expenses of only one. I should regret to see the number reduced to one.

PRESIDENT MARTIN: What do you think of that, Mr. Potts?

MR. POTTS: It has been developed here that at no time, I think Judge Ailshie stated, that the state had never been represented until he attended the Conference some three years ago, and I assume that there has been no other representatives at any of the meetings since that time. It seems to me it might lead to some confusion to have three commissioners and have provision made for the expenses of only one. If it is not objectionable on that score, I have no objection to the suggestion.

PRESIDENT MARTIN: You have heard Mr. Potts' motion. What is your pleasure?

MR. McDEVITT: I would like to ask at this time,—I don't know whether the Commissioners have that arrangement made,—but supposing they were only going to provide the expenses of one Commissioner, how would the Commissioners, three of them, arrange as to which one should attend?

PRESIDENT MARTIN: You mean of the three the Governor appointed?

MR. McDEVITT: yes.

PRESIDENT MARTIN: And if the expenses of only one were paid, you mean. I don't know how they would arrange that. The Governor might designate the one to receive the expenses.

MR. SATHRE: Isn't there some provision whereby the Chief Justice of the Supreme Court of this State attends some of those conventions with his expenses paid?

PRESIDENT MARTIN: Not that I know of,—the American Law Institute?

JUDGE TAYLOR: Some philanthropist has provided some fund,—I don't know where or how,—by which one representative of the Court of last resort, presumably the Chief Justice, attends at Washington the annual meeting of the American Law Institute,—

PRESIDENT MARTIN: That is a private fund?

JUDGE TAYLOR: That is a private fund which will expire,—contemplated to expire within a few years, but that only makes provisions for the Chief Justice's car fare and sleeper. I think it is just transportation,—I am not sure. For several years one of the members of the Court has gone to attend that, but there has been no

appropriation by the state. If I went I would like to have some appropriation for it, and I don't have any expectation of attending for a long time, but I think it is due the member of the Court who goes that his expenses be somewhat compensated.

MR. POTTS: You refer to the American Law Institute?

PRESIDENT MARTIN: Yes, the American Law Institute.

JUDGE TAYLOR: Yes.

PRESIDENT MARTIN: That was established by a fund from private sources.

MR. POTTS: Yes.

PRESIDENT MARTIN: And the work is carried on and paid for by this private fund. That is a matter that might continue, or might not.

MR. SATHRE: It seems to me, Mr. President, that the resolution as read should be passed. I believe the Uniform Laws Commission is probably one of the greatest commissions that we have pertaining to laws of that kind, and it is not only that, but it is a matter of importance not only to the lawyers of this state, but to the entire citizenry of the state, and I can see no good reason why it wouldn't be proper to ask for the bill set out in the original resolution, and, therefore, Mr. President, I move you the adoption of the resolution as read.

MR. TYLER: I second the motion.

PRESIDENT MARTIN: It has been moved and seconded that the resolution as read be adopted. Are there any further remarks? Are you ready for the question? All in favor of the motion, say Aye; contrary, the same. It is so ordered. The resolution is adopted. I wish to say that it has been the hope of the Bar Commission that we might get the law amended in relation to the use of funds,—that is, the special fund received from the licensing of attorneys so that fund could be used, enough of it, to send a representative to the meetings of the American Law Institute. The legislature in passing the law restricted the use of our funds, and if we could have a liberalization in that regard, we would have money enough in that fund to do that.

JUDGE TAYLOR: Does the constitution of the American Law Institute provide for the recognition of such a representative?

PRESIDENT MARTIN: We were invited to appoint one, so I assume that it does.

JUDGE TAYLOR: I assume that it does in some way.

PRESIDENT MARTIN: I have not investigated.

JUDGE TAYLOR: I think there is a slight distinction between one who has a vote, and one who may participate.

PRESIDENT MARTIN: I never made any investigation of their constitution and I don't know as to the formation of the Institute. I only know that we were requested by them to appoint a representative from Idaho, and I assumed by that he would at least have the power of discussion.

DEAN DAVIS: The Deans of all of the standard law schools of America are ex-officio members of the American Law Institute. I was quite interested in Mr. Potts' motion adding that to our resolution. I do think that Idaho should be represented each year at the regular annual meeting of the Institute, and I wish that part of Mr. Potts' motion had been retained. It should be represented there.

PRESIDENT MARTIN: If we could get an amendment to the Bar Association Act, we could supply the expenses in that way. We thought that would be a better proceeding than asking more from the legislature. In other words, we ask an appropriation from the Legislature for representation on the Uniform Law Commission, then if we could get our law amended, we could supply the expenses from that fund, possibly, for a representative to the American Law Institute. Is there another resolution, Mr. Secretary?

(Whereupon Resolution No. 4 was read by the Secretary.)

JUDGE WALTERS: That resolution was proposed by Mr. Hackman of the Twin Falls Bar, and he will doubtless speak in relation to it. May I say, prior of Mr. Hackman's speaking, that he is of the Virginia Bar, and when he came to Twin Falls several years ago to practice law, he, in common with the rest of us, became impressed with the fact that decisions are a little slow in the Supreme Court, that it is a long time between the appeal from the District Court, and the result in the Supreme Court. In common with some of the rest of us, he, I think, has become convinced that the only way to remedy that is by limiting the amount of work in the Supreme Court; in other words, they can do so much, and no more. If every case can be appealed to the Supreme Court in the enthusiasm of the lawyer, or the stubbornness of the client, we will never have any relief in the Supreme Court. This resolution has to do with limiting the work to be entailed on the Supreme Court. Mr. Hackman suggested this method, and I commend it to your earnest consideration.

PRESIDENT MARTIN: Gentlemen, you have heard,—

MR. HACKMAN: Mr. President.

PRESIDENT MARTIN: Mr. Hackman.

MR. HACKMAN: In the first place, I hesitated to dictate that paper this morning. If it was to be presented to the legislature, it must be more carefully drawn, and other sections of the code taken into consideration, so it will harmonize with the amendment of the particular section I have reference to. As Judge Walters made mention, I came from Virginia, and I might say this for your information: All cases, either in Law or Chancery, are only carried to the Supreme Court on appeal by a petition. You have to petition the Supreme Court in all cases, and they grant you or refuse you your appeal. The result of that was that in Virginia, when I came out here nine and a half years ago, they only had, from 1775 up until I came here about 101 volumes of Virginia Reports. They held down the number of cases that went up. Now, out here we are getting a great

number of volumes of reports. The courts are burdened, and it has never seemed right to me that the Court should be burdened with cases involving a small amount where there are no law questions involved. Judge Lee, when I was talking to him not long ago, said, "Yes, we had a case involving just one animal, a steer or something of that sort, involving thirty-five or sixty-five dollars, that we had to go through with." I believe this: That if the code of this state is amended in principle along the lines I have suggested that it will save a vast amount of work for the Court, because with rules they an adopt in this matter, the attorney wanting the appeal can tersely state his ground without arguing them, and present them to the Court. A judge of the court can then look over that in a comparatively short time and can tell whether he believes there is any merit in it, whether the attorney has made a prima facie showing that would entitle him to an appeal, and if it isn't shown, refuse the appeal and save it being presented to the Court. No one is absolutely deprived from appealing. The judge of the District Court can't act arbitrarily because the amount is small. I therefore have suggested this amendment of the code.

PRESIDENT MARTIN: Mr. Hackman, let me ask a question, please. What would be the objection from your viewpoint of not permitting an appeal where it is purely a matter of money or damages in a case,—where it is only a question of money of not permitting any appeal at all, where the amount is five hundred dollars, or less?

MR. HACKMAN: It is this, Mr. President: That in our Virginia practice, or under our Virginia constitution, you could not appeal where the amount was less than $500.00. When the constitution was amended in 1900 they reduced it to $300. Now, we lawyers there often found that the Circuit Judges, as we call them,—that the Circuit Judge would be rather arbitrary where such a small amount was involved, and a poor fellow couldn't get redress, and he would be very anxious to appeal to the Supreme Court. Now the Circuit Judge would feel that he would be likely to be reversed if he wasn't fair in regard to a case, and for that reason I figure a man,—whatever the amount involved,—ought to have an opportunity to present his case to the Supreme Court.

PRESIDENT MARTIN: That applies to questions of law. The man that has a five hundred dollar case and has a jury trial on the facts, he should not be permitted to have an appeal, unless he might have a law question to be reviewed. That would be lessening the work.

MR. HACKMAN: I have no objections to that, personally. To be perfectly frank with you, I was afraid if I put it that way, it might be too drastic, and there would be too much objection raised to it?

MR. MERRILL: I was wondering why that couldn't be handled by a writ of certiorari. My reason is, that writ is an old established writ, and there would be considerable precedent for follwing it, and the lawyers generally would know how to handle it, rather than to proceed upon a new field, and I was wondering, furthermore, why it shouldn't be enlarged to take in not only money judgments, but other judgments, such as judgments in claim and delivery that only involve a small amount of money. I am particularly anxious to see this passed, and there are several reasons. I think, in the first place, it is rather a shame to have five members of the Supreme Court, and two or three lawyers, spending their time on a case involving a small amount of money, and no particular principle. The economic waste to the state is quite tremendous, and something ought to be done to curtail it. I am furthermore particularly anxious to see some sort of a law like that passed, because I am in the Supreme Court now for the third time in the same case, representing the respondent each time, with an automobile case that involves $350.00, and I would like to see a law passed to prevent it from going there again. But I really feel, seriously, gentlemen, there is a great economic waste in small litigation in the Supreme Court, and it would render a great service to the Court, and likewise to the people at large, if we could adopt something like this.

MR. McDEVITT: I don't like to suggest anything,—a young lawyer hates to, especially when men like Mr. Hackman and others have suggested this sort of legislation, but I would like to know whether this act would decrease or increase the labors of the Supreme Court. Perhaps I have misunderstood, but, at any rate, it seems to me the bill provides first that the appeal be directed along a certain procedure, that is, be directed to an individual judge, and further presupposes that the person who takes the appeal is either bone-headed, I think the term was, or his attorney was enthusiastic. If that individual judge refuses to grant the appeal, then the entire appeal is directed to the Supreme Court again, over and above the usual course of procedure which we now have. It seems to me that you are, in addition to our regular procedure, you are adding another procedure. You are burdening each individual judge with a petition, and instead of lightening the labors of the Supreme Court, you are burdening the entire Court; instead of relieving the labors of the Court on five hundred dollar cases, or less, it appears to me you are adding to their burdens.

MR. HACKMAN: The suggestion is there, that you prepare a bare petition and present it to Judge Taylor, if you wish. If he refuses to grant the appeal, then in term time you can present it to the entire Court. That is a matter with the Court as to how many may wish to look over the petition. Other members may want to examine the petition.

JUDGE TAYLOR: Mr. President.

PRESIDENT MARTIN: Judge Taylor.

JUDGE TAYLOR: I think I could state to you that such a proceeding or such a provision would naturally lessen the work of the Court. I just wanted to say that the courts are in need of defense, as your very eminent president told you in his address, that it was the duty of the Bar to rush to the defense of the Court, but he immediately embarked on another subject, having said that you should rush to the defense of the Court when improperly accused, or something wrong said about them, and he didn't even start to say there had been anything wrong said about them, thereby proving that everything said about the Court was true, and it probably was. I didn't have the opportunity yesterday to say,—and I think I speak for five members of the Court,—I speak for one, I know,—that we welcome your criticism. I give to you the right to file anything so far as I am concerned, attacking anything I have written, said or done, and you can attack it publicly without filing anything, then you won't be going on paper at any time. But we are in need of help along these lines. I am going to talk fast, because I don't want to take your time. I am more anxious, perhaps, to get out of town than some of you are possibly, because I want to travel to Twin Falls tonight, but when the record of the Court was mentioned, I happened to have in my pocket data on the last two or three years of the Court, and while I won't read it at length, I will say that on January 1st, 1925, a year ago last January, there were 230 cases pending on appeal in the Supreme Court. Boise Division had 122 of those; Pocatello Division 76, and the Northern Division 32. At this last term of Court in the Northern Division when we came to set the calendar we had 36 cases; we set 24 of them, which leaves a few for the next term of Court. Perhaps the same ratio of appeals obtains there as in the other jurisdictions, and I am taking it from the total number of cases, that we won't quite complete the Northern Division in the fall term. The Boise Division has been sorely neglected. Now, just to indicate to you what we have done: We have disposed of,—had on the 15th of July,—108 cases this year. That is approximately six months, a little over. There are thirty-one cases pending before us, some of which have been submitted to District Judges for writing the opinion, and some of which, due to the necessary length of the opinion, will not be out when we take our vacation, but I will say that twenty of those cases will be out. That will be 128. If we do as well in the five months following vacation, we will dispose of two hundred cases during the present year. But while we were disposing of 120 of those cases, there were 138 appeals filed. Or, in other words, we have lost eighteen, when we thought we were making a pretty good record in the disposition of cases. I don't know whether Brother Merrill objects to his case being up the third time because of what may be the decision, or whether the merits are on his side, but I remember that that case was up once before I went to Supreme Court, and I want to correct him at this point. He said there was $350.00 involved. That was

the ultimate price fixed on the automobile, I believe, but there was just about a hundred dollars involved in the case. Somebody claimed a lien of $100, and they were contesting about which party should pay the $100. As he said, it has been up twice, and is now back the third time. Judge Adair told me of a case which happened in his district where there was a thirty-five dollar steer involved. They litigated it through the District Court and into the Supreme Court, and the parties probably lost $500 apiece on that case.

I had in mind this: That if this resolution could be adopted, that we recommend to the legislature the adoption of the spirit of this resolution, except that appeals be denied in cases on questions of fact where the amount involved is less than $500.

PRESIDENT MARTIN: I think that is proper.

JUDGE TAYLOR: I think we have perhaps such a law in Wisconsin. I want to tell just one more joke on myself: When I first came to Idaho I had a fifty-dollar claim and delivery case involving some hogs. I lost out in the Justice Court, and several weeks afterward, I met my client, and he said to me, "Don't you speak to me or I will bust you right in the face." I didn't speak to him for several years. About ten years afterward I had occasion to draw some of the papers in the case of Dover Lumber Company vs. Case, and was rather friendly with Case. He came in on the other side, and he said to me one day: "Do you remember when you tried that hog case ten or twelve years ago?" I said, "Yes, and I never understood what made you so mad." He said, "I told you to appeal that case and you told me it couldn't be appealed." I came from Wisconsin where that case couldn't be appealed, and I had not looked up the law here. He said, "I thought you were crooked, but I afterward found out you were just a damned fool." (Laughter.)

JUDGE WALTERS: I think we could devote an entire session of the Bar Association meeting to a discussion of this kind, if we wanted to formulate the principles of a law of that kind. After a practice of the law in this state of almost a quarter of a century, I have convinced myself this is the only way we can obtain relief in the Supreme Court. By no other method can it be done. We must limit the amount of work that Court is called upon to do, and some method of this kind should be devised. May I say this: This thing has been discussed in Bar Association meetings before by myself and by others. We have gotten up and aired our notions about it. We have gone away feeling good, and nothing has been done, nothing accomplished. Now, that should not be. There should be some method devised here and now at this time. I do not think we could find, nor would we have, that under-current, in my opinion, on the part of the farmer members as to an act of this kind. Even among laymen very, very generally indeed, do you find discussions as to the fact that our courts are slow, the District Court, as well as the Supreme Court. Right recently there has been considerable discus-

sion right in my own country in this connection, and that is with reference to the Jurkovich case. The laymen don't understand; we think we do. It is up to us to provide the suggestions and to follow the thing through to conclusion, and only by this method do I think we can get somewhere. Now, Mr. Hackman has suggested this,—done in a hurry, I know. It is his idea based on his experience in Virginia. There might be some better method; some better way, but to bring it formally before this Association,—I don't think a motion has been made yet, Mr. President,—and if this will stand the parliamentary test, I move that we adopt this resolution in spirit and refer it to the Legislative Committee for their further report to the president and the other two members of the Commission, to be brought formally before the Legislature.

PRESIDENT MARTIN: May I call your attention to this fact: This resolution provides that a person desiring to appeal shall have a transcript prepared. He has to prepare a transcript in order to ascertain whether the Supreme Court will let him have an appeal.

JUDGE WALTERS: That may be one thing right there that would tend to discourage the appeal.

PRESIDENT MARTIN: It has long been my idea that an appeal in the small matters should not be permitted at all; in other words, when a man tries his case and it is decided against him on a question of fact, these small cases, so far as the questions of fact are concerned, he should be ready to quit. If the Court has ruled against him erroneously, he should have an appeal. Is there a second to Judge Walters' motion?

MR. MERRILL: I second the motion.

PRESIDENT MARTIN: It has been moved and seconded that we approve this resolution in spirit, and that a committee be appointed for drafting an appropriate act to carry it into effect. That is your motion, Judge Walters?

JUDGE WALTERS: Yes.

PRESIDENT MARTIN: Any remarks?

GENERAL BLACK: I don't want to delay the session, but I think the latter part of the motion is the most important. Bar Associations and other organizations innumerably pass resolutions, and they are in favor of them,—and I am in favor of this one,—but the thought comes to me that they do not present at any time in the Legislature an appropriate bill to carry it out. I think the last part of this will do more toward getting results than the other, that is, a committee of lawyers who will devote the necessary time to take those statutes and strike at the ultimate end, which is to limit the work of the Supreme Court, and limit the amount of appeals, and I want to add my hearty support to the proposition with the idea that it will be carried out in some manner like that.

PRESIDENT MARTIN: Any further remarks?

JUDGE WALTERS: A committee of how many?

PRESIDENT MARTIN: I suppose three. Are you ready for the question? All in favor, say Aye; contrary, the same. The motion is carried. That disposes of these resolutions. We have the report now of the Legislative Committee which the Resolutions Committee returned without recommendation. They felt the report had been well considered by the Legislative Committee, and that it was needless for them to consider the recommendations. The Secretary will read the report of the Legislative Committee, please.

SECRETARY GRIFFIN: (Reading) "To the Idaho State Bar: The undersigned, your Committee on Legislation, respectfully present the following recommendations: First: *Order for Publication of Summons.* We recommend that Section 6659 C. S., providing for publication of summons against unknown owners and claimants, and Sections 6677 and 6678, C. S., as amended 1915 Session Laws, c. 43, providing generally for the publication of summons, be harmonized.

"For this purpose we present two alternatives:

"(a) Either (and preferably) by repealing the 1925 amendment, thus restoring the original provision authorizing the issuance of the order for publication by the Court, or by the judge or clerk in vacation; and amending Section 6659 to conform thereto;

"(b) Or by amending Section 6659 to conform to the 1925 amendment."

PRESIDENT MARTIN: You have heard the reading of this recommendation. What is your pleasure?

MR. POTTS: I move the recommendation be adopted.

MR. TYLER: I second the motion.

JUDGE TAYLOR: It occurs to me that this Bar Association doesn't want to go on record as basing their conclusion that the repeal of one measure would restore another. I think the language of that is of doubtful import, and I have carried in mind a few holdings of the Supreme Court of Idaho, and other states, that the repealing of one statute does not restore another.

PRESIDENT MARTIN: I suppose that meant "and restore."

JUDGE TAYLOR: I didn't suppose the Bar wanted to go on record on that resolution in quite those words.

SECRETARY GRIFFIN: Do you desire to amend it by putting in "and" thus?

MR. POTTS: If it refers to an appeal, no appeal is necessary. All that is required is an amendment of one statute or the other to make them conform.

MR. MERRILL: Mr. President, I offer an amendment by changing "thus" to "and".

PRESIDENT MARTIN: How will it read with that amendment?

(Recommendation No. 1 read by the Secretary with the proposed amendment.)

PRESIDENT MARTIN: That will be all right. Is there any objection to that amendment? Mr. Secretary, it is ordered amended.

GENERAL BLACK: I should like to ask the members this question: Why should an order for the publication of summons ever be required to be made by the judge? Now, it isn't one of those orders that the judge would sit down and consider and say, "Well, I will grant the order," or, "I will refuse it." It just requires the attorneys to run around and hunt up the judge, or to walk over to the court house, and not find him there. If it was any matter where there was any discretion to be exercised, I would say to leave it to the judge, but under the 1925 Session Laws, and that part which is applicable, it is so much more convenient for attorneys to prepare the necessary affidavit, which is the foundation of the order, and have the clerk alone issue the order, as they do now, in all cases.

GENERAL MARTIN: In other words, that the law provide for the publication of summons by so amending or changing it, that the clerk in all cases would sign the order?

GENERAL BLACK: Yes.

MR. MERRILL: Why have an order at all? Really, it is the most useless thing in the world, particularly where the clerk signs it. Why not let the clerk issue the summons on the affidavit? That is the practice in many states. I had occasion to find out rather recently that it is the practice in Utah.

JUDGE TAYLOR: Wouldn't you be deferring your finding of jurisdiction until after you had spent fifty or seventy-five dollars on publication, and all that, and then the Court would determine your affidavit wasn't sufficient and you haven't any jurisdiction. I might answer very briefly, Brother Black, in one way: I had a very short experience on the District Court Bench, but I found this: That orders were presented that didn't even comply with the statute, in the facts they put before the judge. If they put the same lack of facts before the clerk, and he signs up the order for it, and there is no judicial discretion exercised on the facts, the Court comes in and says that the clerk was entirely in error, that you didn't have enough facts, and refuses to grant you a default,—and that has been my experience in some courts. The lawyers are not as careful in drawing their affidavits and orders as the gentlemen who have spoken in favor of this measure. Mr. Black will probably not fall down, but the average lawyer falls down on the facts he puts before the clerk or the Court to get his order of publication. That is my experience as a practitioner.

GENERAL BLACK: There are certain prescribed facts which you have to put in your affidavit. Why wouldn't it be proper to recommend and have drawn a regular form of the affidavit for the publication of summons, like our written form of summons is prepared, and put it into the statute, then when they prepare and present that affidavit, they couldn't go wrong?

PRESIDENT MARTIN: Isn't it a fact, General Black, that the attorney has to take the responsibility of complying with the statute? The attorney should take that responsibility himself. I don't know that the legislature should pass laws making it too easy for men to practice law.

GENERAL BLACK: If Judge Taylor looked at the affidavits, he is probably about the only judge that ever looked at them. Of course, if we had judges like that we might rely on the judge, and it would be quite a little bit easier for the attorney, but I never saw a judge look at an affidavit, and if a lawyer made a mistake, he made it any way, and it is no defense that the judge signed the order, if the attorney made a mistake in the affidavit.

JUDGE TAYLOR: I might answer Mr. Black with this: I don't suppose down here a lawyer would make such a mistake, and there wouldn't be any necessity for it, but I do find some such lawyers up north that do make mistakes,—not Mr. Potts, however.

PRESIDENT MARTIN: If the lawyer makes the mistakes, shouldn't he take the responsibility?

JUDGE TAYLOR: But the Court isn't permitted to cuss him.

MR. POTTS: I do not want to prolong this discussion, because it can be carried to quite an unreasonable length, but it is very easy to say that such and such should be the case, and it is a very different matter when it comes to the practical questions when presented. Prior to the amendment of the 1925 Session Laws, our District Judges had adopted the practice, possibly initiated by Judge Taylor, of carefully scrutinizing every affidavit presented to him for constructive service. They found it necessary to do so in order to avoid the embarrassment and difficulties arising when after the publication of summons was completed and application was made for judgment, they were compelled to turn down, to refuse the grant the judgment on the ground of defective process. One of the judges in our district told me that on being called into another district he had, while there only a few days, the very unpleasant duty in two cases presented by attorneys, of refusing to grant decrees based on constructive service, because of fatal defects in the affidavits. Now, it is a practical proposition, and I believe that the proper practice is as it was. Those matters should be presented to the judge, and the judge should scrutinize them, and should know before he grants the order for publication that the essential averments required by statute are contained in the affidavit.

PRESIDENT MARTIN: What is your pleasure, gentlemen? Are you ready to vote on the motion? The motion is on the adoption of the recommendation of the committee as amended. Are there any further remarks? If not, all in favor of the motion, vote by saying Aye; contrary, the same. It is so ordered.

SECRETARY GRIFFIN (Reading):

Recommendation No. 2: *"Attorneys' Fees in Probate Court.* We recommend that attorneys' fees in connection with the probate of estates be fixed by statute and suggest that the schedule be the same as the statutory fees for executors and administrators."

MR. POTTS: I move that resolution be laid on the table.

MR. KATERNDAHL: I second the motion.

PRESIDENT MARTIN: Are you ready for the question? All in favor, say Aye; contrary, the same. It is so ordered. You may read the next recommendation, Mr. Secretary.

SECRETARY GRIFFIN: (Reading): Recommendation No. 3. *"Vacation of Judgments, Etc., on Account of Negligence of Attornews.*

"We recommend the repeal of the amendment of 1921, c. 235, permitting the setting aside of judgments and orders based on the failure or neglect of attorneys; or at least that the statute be so amended that, like other applications to vacate, such a motion be addressed to the sound discretion of the Court."

PRESIDENT MARTIN: You have heard the reading of this recommendation. Are you ready to dispose of it? Is there any motion in connection with that?

MR. KATERNDAHL: In view of the fact that there is nobody interested, I move it be laid on the table. My thought in doing that is that I don't believe in sending a lot of recommendations to the legislature that we really don't want, and don't need.

PRESIDENT MARTIN: I think you are right.

MR. TYLER: I second the motion.

PRESIDENT MARTIN: It has been moved and seconded,—

MR. McDEVITT: I move that it be further recommended that this recommendation be addressed to the sound discretion of the livestock commission.

PRESIDENT MARTIN: Are you ready for the question, gentlemen? All in favor, say Aye; contrary, the same. It is so ordered.

SECRETARY GRIFFIN: The Chamber of Commerce of Boise has requested me to invite the Idaho State Bar to meet at Boise, where the Chamber of Commerce and the City of Boise will be glad to welcome all of you. I suppose that should be referred to the Commission for its consideration.

PRESIDENT MARTIN: The Commission will consider the invitation in fixing the place of the next meeting. Is this all of the recommendations, Mr. Griffin?

SECRETARY GRIFFIN: That is all.

PRESIDENT MARTIN: Now, gentlemen, will you authorize the president of this association to appoint any committees necessary in regard to the drafting of these bills and presenting them? I suppose it could be done in one motion. Some of these recommendations carry the provision that the chairman appoint a committee, and some do not. It might be necessary to have several committees.

SECRETARY GRIFFIN: I move that the President of the Idaho State Bar be authorized to appoint such committees in connection with the resolutions and recommendations as may be necessary to carry into effect the recommendations of this meeting.

PRESIDENT MARTIN: Is there a second to that motion?

MR. TYLER: I second the motion, Mr. President.

PRESIDENT MARTIN: It has been moved and seconded that the president be authorized to appoint such committees as may be necessary to draft bills and carry out the recommendations of this meeting. All in favor, say Aye; contrary, the same. It is so ordered.

Is there any special committee, Mr. Secretary, to report, other than this Legislative Committee?

SECRETARY GRIFFIN: No special committees.

PRESIDENT MARTIN: Is there any matter any member wants to bring before the Association before we adjourn? Then, if not, we are ready to adjourn, sine die, and may I say to you before going home, that the Commission desires to be of service to you, and we invite the cooperation of the members of the profession in working for the interests of the legal fraternity, and I believe much benefit could be obtained by us if we can get our lawyers generally interested in the work of this Bar, and a larger attendance at the meetings. The courts are perfectly willing to co-operate with us, and realize the advantages that may accrue from these meetings and discussions, and are willing and ready to arrange their calendars so that lawyers may attend these meetings. May I ask each one of you in your respective localities to talk with your brother attorneys, about this organization and urge them, as well as yourself, to attend our meetings. On behalf of the Commission I desire to tender you our thanks for your attendance here, and in helping to make this meeting a success.

MR. KATERNDAHL: I arise to a point of information: I was wondering whether or not the proceedings of the meetings are printed and distributed?

PRESIDENT MARTIN: They are; a copy to each member. And I would suggest to the Secretary, if there is no objection, that he give all possible aid to the newspapers in giving publicity to all actions of the Association at this session.

If there is no further business, the Association stands adjourned.

MINUTES

MEETING OF WESTERN DIVISION IDAHO STATE BAR

June 28th, 1926

BOISE, IDAHO

The Western Division of the Idaho State Bar met at the Federal Court Room, Boise, Idaho, June 28, 1926, at 10:00 A. M., Frank Martin, Commissioner, presiding.—Present, 45.

W. G. Bissell, Gooding, addressed the meeting on Uniform Rules in District Courts, stating that in but four districts did it appear that any rules had been promulgated, and that apparently, except in Bannock and Ada Counties, where the courts sat continuously, and there were two District Judges, the despatch of business did not require rules. That in view of the different conditions existing in the districts of the state, it was doubtful if uniform rules would be found desirable.

Frank L. Stephan, Twin Falls, addressed the meeting upon "Should the State Be Permitted to Comment Upon the Failure of a Defendant in a Criminal Case to Testify"? Mr. Stephan's very able paper is attached to this report, and it is suggested that it be included in the publication of the Proceedings of the Idaho State Bar. The topic resulted in considerable discussion and comment.

At noon the meeting place was transferred to the Orange Room of the Owyhee Hotel, where after lunch, attended by 60 attorneys, the program was continued by an address by D. L. Rhodes, Nampa, on "Appellate Divisions of District Courts," arising out of a suggestion that by creating such Divisions the Supreme Court docket might be relieved. Mr. Rhodes concluded after citation of the Constitution of Idaho and other states having similar provisions, and authorities, that such divisions could not be created by Act of the Legislature, and, if desirable, could only be secured by an amendment of the Constitution.

Frank D. Ryan, Weiser, presented the subject, "Legal Aid to Destitute Persons", particularly with reference to the limitations on the duty of attorneys in giving free services to such persons.

Jess Hawley, Boise, one of the delegates of the Idaho State Bar to the meeting of the American Bar Association, desiring to ascertain the present attitude of the Bar toward the Bar Organization Act, so that he might report thereon to the Conference of Bar Association Delegates, where consideration was to be given to such legislative acts, proposed the following resolution:

"RESOLVED, That we record the Western Division of the Idaho

State Bar as favoring and endorsing generally the law and principle thereof under which the Idaho State Bar exists".

Which, upon motion duly made and seconded, was unanimously adopted.

Discussion was had of the 1925 statutes prescribing issuance of orders for publication of summons by the Clerk of the Court against known defendants, and the unrepealed statute requiring issuance of such orders by the Court against unknown owners and heirs; also as to whether a deputy clerk could issue such orders. The request was made that the Legislative Committee of the Idaho State Bar give consideration to a remedy for the situation.