Idaho State Bar

PROCEEDINGS

of the

IDAHO STATE BAR

Volume XI, 1935

ELEVENTH ANNUAL MEETING

Proceedings of the

JUDICIAL SECTION

First Annual Meeting

Volume I

Hailey, Idaho, July 11, 12 and 13

IDAHO STATE BAR COMMISSION

By_____, Secretary

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Officers of the Idaho State Bar

COMMISSIONERS

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

OFFICERS

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

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

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

Annual License Fees ($5.00) are payable by all practicing attorneys to the State Treasurer prior to July 1, each year.

Election of Commissioner, Western Division, will be held in 1936.

RECOMMENDATIONS COMMITTEE

CAREY NIXON, Boise
ROY L. BLACK, Pocatello
A. H. OVERSMITH, Moscow

Proceedings Had at Annual Meeting of the Idaho State Bar

Held at Hailey, Idaho, July 11th, 12th and 13th, 1935.

AFTERNOON SESSION,
JULY 11, 1935, 2:00 P. M.

MR. GRAHAM: Gentlemen of the Bench and Bar, the time has arrived for the holding of our annual session. This is the end of Judge Ailshie's term of office had he remained on the Commission. Having been elected to the Supreme Court, he resigned, and I am filling out the unexpired term of the Judge, as president. I want to call your attention briefly to a few things that the Commission is trying to do. Our object and aim is to do everything possible and feasible to strengthen our organization for the Bench and Bar. Don't forget this fact, the Bar represents one distinct branch of the government. With that in view we ought to make ourselves most influential in functioning for that branch. During the last year or so we have been trying and aiming to get more interest manifested by the members of the Bar and Bench. The Supreme judges are the administering officers of our branch of the government, and unless we can work with them and through them, we are not going to accomplish the results desired. With the aid of Judge Koelsch we formed the "Judicial Section of the Bar" and they started to function this year, and bad their meeting yesterday, discussing ways and means of improving the procedure. In due time that branch of the Bar will make its report and the subject will be open for discussion. I think that is going to strengthen the Bar by reason of the fact that the district judges and Supreme court judges are present at the meeting. The simple fact that they are here and that they came as a body is going to strengthen our Bar attendance. The members of the Bar are anxious to have them, and I am proud to say that the Judicial Section is now in a fair way of functioning with some power and force.

We inaugurated the rule in the last year or so that when a complaint is of sufficient importance to justify a hearing, we are going to order open hearings, so that the individual complained against will have to make up his mind that he has got to face public opinion. That in my judgment is going to be one of the most effective deterrent forces against violations of the rules, and that has proved most effective in the hearings which we have had. We have made the rule to hold open hearings so that the public would know that the Bar was trying to clean out its own house.

Another feature; I have watched the progress of the Bar organization for the last five or six years, have attended the meetings, and I have been on the Commission for two years. To be frank with you, I am not satisfied with the progress we are making. We may be making some advances, but it is too slow. How are we going to improve that? The only way is to arouse the members of the Bar, and if they are not aroused let's get some force, some method whereby we can compel them to come in and participate. I have concluded that

we must co-ordinate the State Bar with local Bar Associations. I notice in the American Bar Journal that the state of Connecticut has adopted a plan of a legislative body, that would meet the day before the annual meeting, with representation from all the counties and all the Bar organizations. That plan might work here in small counties without a local Bar Association. The Commission might adopt a rule to give, for instance, Jerome county—there are only three or four members of the Bar in Jerome County—one representative; give other small counties likewise one representative, hoping thereby that they would take interest enough to come to the Bar meeting. In the larger counties where there is Bar organization we could permit one delegate to every fifteen members belonging to their association. That will help work up the interest in the State Bar. But we have also to work out some plan whereby the members, the local Bar, can force the members in. For instance, down in my county we have about thirty-five lawyers. We have a very active hunch down there. When we hold meetings we will have from twenty to twenty-five members present at a luncheon, and we meet once a month, but the ten, twelve or fifteen members of the Bar who don't attend are the members that should attend. I hope that some plan may be worked out so that if they don't come in voluntarily, we can compel them to come in.

What do you want? If the members of the Bar will get the idea that they are not going to get any more out of this State Bar than they put in, then we will get somewhere, but if they think that fifty or sixty members of the Bar are going out and do all the work for the other five hundred, they are going to be mistaken. At the present time to me the State Bar is the most important thing for the members of the Bar and the court. With the conduct of the legislative branch of our government, both state and national, the public are thoroughly disgusted. With the action of the executive, the same way. The only bulwark for protection for us is the judicial branch of our government, and it is up to the members of the Bar to see that that branch is sustained in these trying times.

I feel so keenly and so earnestly the work that lies before us that I have difficulty in expressing myself. I hope that some plan can be devised at this meeting, wherehy we can strengthen our organization. I thank you.

SENATOR HEDRICK: Mr. President, and members of the State Bar: I take this opportunity on behalf of Mr. VanWinkle, Mr. Condie and myself, who are the only lawyers in Hailey, to say that we are mighty glad that you selected Hailey for the place of meeting at this time. While you are here if you will just get the atmosphere you will find that Hailey is a nice place to hold your meetings; we will try to entertain you while you are here and if any of you get in trouble Mr. VanWinkle and myself will try to straighten it out for you. We are glad you are here.

MR. GRAHAM: The American Bar Association has created what is known as the "Junior Bar Association," with the idea of getting more interest manifested by the junior members of the Bar. Robert Ailshie of the State Bar, who has been named by the American

Bar Association to try to arouse the interest of the members of this state, wrote me and asked what I thought of the Junior Bar Association in this state. I told him that I was opposed to a Junior Bar Association separate and distinct from the State Association; that our membership would not warrant any such an organization. I did suggest that if he could get enough of the junior members of the Bar, we could then create a Junior Bar system or section to function the same as do the judges, meeting the day before, and then report to the State Bar meeting on the next day, hoping therehy that we could get the junior members of the Bar to take a keener interest in what is going on.

Anybody who has any thought on any subject may have a very valuable suggestion to offer, and for that reason in the discussions which are to take place we hope that each and all of you will take keen interest and express yourself.

The next thing on the program is a report of the secretary, Mr. Griffin.

MR. GRIFFIN: It is unfortunate that every year you have to listen to statistics, but perhaps they will give you some idea of what the Board is doing, or trying to do.

A review of the year's work of the Board shows seven formal meetings. Until January the Board consisted of James F. Ailshie, President; John W. Graham and Walter H. Anderson. Upon the resignation of Judge Ailshie, because of his election as Justice of the Supreme Court, A. L. Morgan, of Moscow, was appointed by the Board to fill the unexpired term, and he has since served upon the Board. John W. Graham filled the unexpired term as President.

The Board, in accordance with the directions of the Bar at the 1934 annual meeting, appointed a Legislative Committee, John A. Carver, Chairman, Recommendations Committee; Carey Nixon, Chairman, Survey Committee; J. L. Eherle, Chairman, and committee on Practice by Foreign Attorneys; A. L. Morgan, Chairman, with each of which the Board met, and each of which will present reports at this meeting. The report of the Recommendations Committe was mailed to each member.

Publication of 1934 Proceedings was had, and distributed; the Trust Fund of the Bar was audited; two examinations were prepared, given and graded; the Program for this meeting formulated and distributed; election of a Commissioner for the Northern Division at this meeting was called; study and revision of rules relating to admissions, conduct and discipline undertaken, particularly with respect to admission of attorneys on certificate from other states, grading of examinations, filing date of applications, and reinstatement of disbarred or suspended attorneys. Action was directed and taken against attorneys delinquent in payment of annual licenses, with the result that two attorneys were ordered suspended from practice, suhject to approval of the Supreme Court. A Judicial Section of the Bar was ereated with Hon. Chas. F. Koelsch as Chairman, and this section met yesterday and a report of its activities will be presented here.

Four applications for admission on certificate were presented, and after investigation three recommended; the fourth is pending. Thirteeu applied for admission by examination; two were examined and passed at an examination at Boise in December; ten were examined at Boise and Moscow in June, of whom eight passed and two failed. One application has not been acted upon.

Nineteen complaints have been given consideration by the Board; seven were dismissed by the Board after adjustment or because no cause appeared; three were dismissed after preliminary investigations by committees; one was a review by the Supreme Court of the Board's order of suspension, in which the Court increased the period of suspension to one year. In one the Board directed payment to a client, and, after approval of the Board's order by the Court, the attorney failed to comply, whereupon contempt proceedings were instituted and resulted in compliance; one was a contempt proceeding against a layman for unlawful practice of law by drawing wills and conducting probate proceedings, in which the defendant was by the Supreme Court adjudged guilty and fined; one was application for reinstatement by an attorney previously disbarred—the Board appointed a committee which answered the petition and the Board fixed a time and place for hearing of witnesses; thereupon the petition was withdrawn, and the Board has directed the preservation of testimony for future use if necessary. A member of the Board conducted a hearing on July 8, 1935, of one complaint; four complaints, one involving an alleged extortion letter said to have been written by an attorney in connection with contemplated divorce proceedings, are yet undisposed of.

The condition to July 1, 1935, of the funds appropriated is as follows:

APPROPRIATION

Receipts from licenses		2,545.00
Balance July 1, 1934		$4,017.26
	$6,562.26	6,562.26

EXPENDITURES

Office expense		$1,297.90
Personal services	$1,042.50	
Supplies, stamps, etc.	255.40	
Travel expense		$1,104.69
Meetings		253.06
Publication 1934 Proceedings		336.10
Examinations		22.24
Discipline		435.64
	$3,449.63	3,449.63
Balauce in appropriation July 1, 1935		$3,112.63

The decrease of halance is due largely to increased expense attendant upon disciplinary proceedings, including extra travel required

in hearing complaints last year, bills for which were not paid until after the last report.

The reduction of number of licensed attorneys continues, as shown by the attached table:

LICENSED ATTORNEYS

	1931	1932	1933	1934	1935
Northern Division	137	131	126	126	121
Eastern Division	138	125	131	127	131
Western Division	269	277	277	277	271
Out of State	26	28	21	21	23
	570	561	555	551	546

DECEASED SINCE LAST MEETING

A. P. Asher, Sandpoint
Ira E. Barber, Boise
J. F. Colvin, Boise
S. H. Hayes, Boise
Arthur Humphrey, American Falls
John J. McCue, Boise
John H. Myer, Boise
R. B. Norris, St. Maries
D. L. Rhodes, Nampa
H. C. Wyman, Boise

In line with an expression at last year's meeting that the annual meetings be held at Payette Lakes, or similar places, the meeting this year was fixed at Hailey as more convenient for the lawyers of the southeast. An expression as to the desirability of continuing this practice would be welcome.

The establishment, by rule of the Board, of local Bar units as an intregal part of the Idaho State Bar is being considered by the Board, an expression thereon might be helpful to the Board.

MR. GRAHAM: If there is no objection, the report will be received and placed on file. It is so ordered.

The canvassing committee will consist of Clayton Keane, W. J. Hannah and Paul Hyatt.

The next matter on the program is the "Practice by Foreign Attorneys—Report of Committee." At the last meeting of the Bar a committee was appointed, with A. L. Morgan of Moscow, now one of the Commissioners, chairman. We will now listen to a report by Mr. Morgan.

MR. MORGAN: Mr. Ware and myself met on two occasions and had some correspondence with Mr. Moore, the other member of the committee. I then made a trip to Boise and talked the matter over with Mr. Donart and with the Commission. We arrived at the conclusion that the members of the legislature would no doubt he hostile to any particular legislation that the Bar might want, that it wasn't necessary for the Bar to rely upon the legislature in the matter of regulating the practice of foreign attorneys in Idaho, and also that it was feasible to give some study to the question of regulating the

practice by rule, and for those reasons we decided not to present any matter to the legislature at all with reference to rules. That matter will no doubt come up in our program tomorrow and will be thoroughly discussed at that time along with other matters of government by court rule.

MR. GRAHAM: The next subject on the program is "The Fate of Bar Legislation" at the last session of the legislature. The Commission appointed a committee, of which John Carver of Boise was chairman, and we will now listen to the report of Mr. Carver.

MR. CARVER: Mr. President, and members of the Bar, I am not sure that the President's title of my report was exactly appropriate. He said "Fate." Perhaps it should be the "Ill Fate of Bar Legislation."

Tho work of the legislative committee failed to get under way as soon as it in my judgment should have, for the reason that the gentleman who was appointed chairman of the committee was unable to act, and I was only asked to take over and assume the responsibility as chairman of the legislative committee some ten days or so after the convening of the legislature, about the 17th. I called the committee together for its first meeting about the 24th of January, and from then on until the close of the regular session of the legislature we held meetings once or twice each week, and I feel that each and all of the members of the committee who took part did their level best to accomplish something really worth while. The committee had considerable apprehension relative to putting across the Bar program with the legislature. It had already developed and become apparent from the temper of the legislature that we would have considerable difficulty in putting our measures across or inducing the legislature to consider them favorably. So that, after some little intercourse with the committees of the legislature and with the legislators, your committee rather agreed that the most important work that we could perform, would be to save what we could of the situation as it then stood. It became apparent, as Mr. Morgan intimated a moment ago, that the legislature seemed to be hostile to anything which the lawyers might want.

We met with the Judiciary Committee of the House and of the Senate a number of times, particularly of the House, and some of our sessions grew rather warm and rather interesting from the standpoint that the members there took the position that we were trying to hoodwink them or put something over on them—they didn't know exactly what.

The Ada County Bar Association met in the latter part of January and appointed a committee on legislation, and that committee worked with your committee and rendered some very good work.

There was a bill introduced proposing to amend Section 3-205 I. C. A., relating to payment of attorney fees, attempting to regulate attorney fees that might be charged or allowed on the foreclosure of real estate and chattel mortgages. That particular bill (sponsored principally by a gentleman from the President's home town, down there at Twin Falls) provided for the attorney fees that might be

charged to the mortgagor. If the sum involved did not exceed $500, a charge of $20, where it did not exceed $1,000, $50, from $1,000 to $5,000, would be $75, and in excess of $5,000 it would be $100. We finally persuaded the Judiciary Committee of the House to accept in lieu of that proposed amendment, an amendment to Section 8-402 of the I. C. A. relating to redemptions from sales and this provision (perhaps you are all familiar with it) in substance provides that in mortgage foreclosure proceedings the amount necessary to redeem the property sold under execution shall not include any sum for attorneys' fees greater than the fee actually paid by the judgment creditor or which the judgment creditor has by written instrument become unconditionally obligated to pay his attorney for prosecuting his claim to judgment, and, provided, further, that the amount of such fee shall be proven by affidavits of the attorney who has received and the person who has paid the fee, or by other competent evidence, to bo presented to the sheriff for his guidance in carrying out the provisions of the law relating to redemption; and providing, further, that such redemptioner shall not be required to pay any attorneys' fees unless such fees shall have been paid within six months after the sheriff's certificate of sale shall have been issued, or within such time as the judgment creditor has become unconditionally obligated by written instrument to pay such fee. That was finally accepted and passed and is now the law of the state.

In addition to that the following measures were proposed with the following results:

An act providing that dying declarations in workmen's compensation cases shall be admissible in evidence; another measure that in such cases the employer or surety shall furnish a transcript of the record on appeal to the Supreme Court when a showing of indigence is made hy the workman desiring to appeal from a judgment, order or decree of the District Court, and authorizing and requiring the District Court wherein an action is pending to make an order requiring the furnishing of such transcript by the employer or surety in the event of such an appeal were not reported out of the Judiciary Committe of the House. Also a measure to amend Section 40-2107, providing for the deposit of cash or bonds of the United States, or securities guaranteed by the United States in lieu of undertakings by surety companies.

A measure to amend Section 3-417, I. C. A., providing that the time and the place of all meetings of the Idaho State Bar shall be designated by its Board of Commissioners instead of requiring rotation as was in the law. This measure was reported out favorably and passed.

A measure to amend Section 3-409, I. C. A., to provide that annual license fees paid by the attorneys should be paid to the Clerk of the Supreme Court, who in turn would remit the same to the State Treasurer, was offered in order that the Clerk of the Supreme Court have a more active check on the licenses paid and upon the names of the attorneys who are actually entitled to practice law. However, that failed to pass. In this connection, however, the State Treasurer, Mrs.

Enking, has assured your committee that she would be glad to furnish the Clerk of the Court with a list monthly of the names of those who have paid, so until such a measure can be passed it possibly will work out.

A measure providing for the transfer of cases from Probate and Justice Courts to the District Court when the defendant in such cases files a counter-claim or cross-complaint in excess of the jurisdiction of those courts, was presented and was passed

Your committee also submitted to the Judiciary Committee of the House a joint resolution which was part of the 1933 legislative program of the State Bar, providing for amendment of Section 2 of Article V of the State Constitution, to provide that nothwithstanding any other provisions of this constitution the legislature may abolish the Probate Courts and place their jurisdictional powers in the District Courts, and this measure was promptly rejected by the Committee.

A measure was also presented to amend Section 30-2703 to eliminate sheriff's commissions on sales under execution. This particular measure got as far as the third reading on the calendar of the House, but it was near the close of the legislature and in the shuffle died with the adjournment of the session.

With respect to the legislative program of the Bar that had been recommended at the previous Bar meeting, we decided in view of the temper of the legislature that it would be inadvisable and that was not done. I want to observe that there wasn't a lawyer who held a seat in the House of Representatives of the Idaho legislature at the last session. To my mind that is one of the reasons why that particular branch of the legislature had so much difficulty and seemed to be in turmoil so continually. It occurs to me that if some of the members of the Bar would seek and obtain seats in the Idaho legislature they could render a real service, and I am certain in my own mind that if they would do that, that they would be able to direct, or at least to assist in the direction of, the passage of laws in this state in a way that would really be appreciated, I believe, by the people at large.

I want to express my appreciation to all of the members of the committee who worked with me. We were required to work out these bills and formulate them and draft these measures and get them in suitable shape to present to the legislature in this limited time, and all of the members responded very, very fine. In the future it might be well to have this committee functioning and organized earlier, so that these measures might be worked out and drafted some weeks ahead of the convening of the legislature. You would have much better opportunity to get some good work done with the legislature. We were trying to draft bills, and, as you know, any of you who has tried to do that work, it is technical, and they need considerable examining and going over to determine their errors, and when you are trying to do all that, and the legislature is in session and you are trying to watch the various measures in which the Bar is interested that are on their way through the Houses of the legislature, it is a rather difficult and ardous task.

MR. GRAHAM: You have heard the report. If there is no objection, the same will be received and placed on file. On behalf of the Commission and members, I wish to thank Mr. Carver and his committee for the valiant work that they have done.

The next number on the program is a substitute for the President's address, and the gentleman who is going to deliver this needs no introduction to the members of the Bar of the State of Idaho. I now take great pleasure iu introducing to you Hon. T. Bailey Lee, who will deliver the address.

HON. T. BAILEY LEE: Mr. President and Gentlemen of the Idaho Bar:

A few days ago, we were celebrating a Declaration that announced to the world a newcomer into the family of nations. In quieter mood, we are now forgathered as citizens vested with great and peculiar responsibility to counsel together in the interest of that nation. For, without sound and equitable laws activating in response to the healthy aspirations of human nature, no success can indefinitely be assured Democracy among men.

To anyone conversant with the history of governments at all, and especially to those of us whose forbears' brains and energy contributed somewhat to the establishment of the system that has long excited a world's envy, it is axiomatic that Democracy is the best form of government thus far designed for regulating and protecting human beings. Under no other system, can the individual hope to attain so full a measure of personal achievement and happiness.

Where else can be found guaranteed the inviolability of the citizen's person, his right to labor undisturbed, the subsequent enjoyment of his toil-won substance and the priceless privilege of thinking and speaking his own convictions?

No matter how fiercely swirl conflicting currents of public opinion, how tumultuous the confusion of political parties vociferously clamoring for control, while economic distress and discouragement fast multiply, we know that under our own Democracy our salvation lies wholly within ourselves, to be attained or deferred only by the concerted efforts of a majority of our fellows.

So long as this principle remains our birth right, the stability and perpetuity of this nation are assured. For no sane voter will deliberately endanger his own interest; and none but the criminally disposed will jeopardize the legitimate enterprise of his neighbor. With larger experience and fuller understanding, contending minorities of one day become the successful majorities of the morrow; and, irrespective of reversed or substituted policies, the beneficient structure our fathers founded continues to elicit the trust and homage of an independent, self-governing citizenry.

To lose faith in our Government is to lose faith in ourselves. Upon divergent policies, we may differ widely, but upon the fundamentals won at Yorktown and the Covenant of a free people guaranteeing them, never.

With all its imperfections, all its opportunities for organized exploitation and inexcusable injustices, Democracy is still the only gov-

ernment fit for free men. Ballots instead of bullets; published returns in place of firing squads; powerful officials quietly retiring when superseded by the newly chosen; citizens all, banker and bootblack equal in franchise before the law.

And yet, right now, even from some masquerading as lawyers, the air is rife with strident arraignments of our Constitution and reckless denunciation of judges courageously upholding it! Blatantly, the cry is raised that judges and legislatures should ignore the plain mandates of a document embodying the reasoned will of a sober people, whenever it conflicts with the temporary objectives of an impassioned or excited majority. To control just such storms of popular emotion, there was marked in our charter of liberties a dead line beyond which legislative madness might not venture. And not until amended or rewritten in ordered calm by the American People will that document ever—Please God!—lose one jot or one tittle of its present authority. For ours, haply, is a government of laws and not of men, of laws unaffected by jungle fear and selfishness but inspired by innate sense of justice between man and man.

Not since the dark days of civil war, have we as a people been confronted with such momentously arresting problems. So complex have become the intricacies of our economic system that a distressed citizenry demanding relief and discounting the drastic effect of world conditions are vigorously championing measures, many of which are charged with the seeds of national bankruptcy and ruin. It is the hour of the demagogue and self-exploiter, a time that behooves all sane men to keep their feet on the ground and not be hurried, pell-mell, into fruitless, heart breaking quests of impossible Utopias.

Primarily are we here as exponents and protagonists of the law of the land. Few phases of daily life are unfamiliar to those of our cloth. As Justice Cardoza has said: "Everything that affects human relation is grist for our mill." Therefore, heavily lies upon us the obligation of sensing civic wrongs and striving for remedial legislation or the enforcement of that already adequate.

It is unnecessary to recall the moving part played by the Bar in the inception and subsequent guidance of this Repuhlic. Devotedly and fearlessly has it ever stood in the forefront of statesmanship and military activity. But it has lost much of the leadership it one time held in civil life, due mainly, I think, to commercial absorption of tho profession.

Time was when the lawyer, along with the eleric, was the outstanding man in his community, his suggestion and judgment dominant in public affairs. Attracted, however, by monetary return, too loose requirements of admission and lack of sufficient discipline, hordes of the unethical and unfit have lowered the profession in public esteem; and our continued apathy in this regard is largely responsible for the increasing disrespect of law and its tribunals.

Yet, even now, the upright practitioner enjoys a distinction accorded no other member of society. In implicit confidence and with no thought of bond, his clients entrust him as a matter of course with valuable property and jealously guarded, business secrets professional unfaith would irretrievahly dissipate.

Further still, he is daily being made the repository of poignant confidences that to his trusted family pbysician the client would never divulge.

But we have been content to linger while others progressed, consequently, we are woefully out of step with the times. While expedition and dispatch characterize all other fields, courts and court procedure, hemmed about with countless vestigial encumbrances, lag behind, to the dissatisfaction and irritation of a confused laiety. Why this continual dragging of prospective jurors through law schools upon the voir dire? Why insistently interrogate the luckless talesman as to his acquaintance with legal principles upon which the Court must later instruct him, if chosen? Why useless repetition of geographical, genalogical and vocational excursions already minutely logged by opposing counsel? Why this burlesque on cross-examination of marathoning a mole hill into a mountain, and why, Oh why, after each recess, poll the jury sitting in full panel rampant before respective counsel alertly couchant? These, however, are more properly matters for special committees; and I must, perforce, desist from further detail.

Suffice it to say: we are paeking too much dead wood for fair schedule. But 'tis uot procedure alone that demands alteration. Conceived in lugubrious sentimentality, there are statutes upon our books that, as Fallstaff might observe, are "the most villainous that ever offended nostril." Typical of such is the declared invalidity of a mortgage of community real estate signed hut not acknowledged by the wife, despite her proven engineering of the entire transaction and subsequent enjoyment of proceeds besought of and furnished by a creditor in good faith.

According to Shakespeare's oracle, "there be no equity in it."

Comedy too, sometimes deliciously unconscious, occasionally distinguishes the work of our lawmakers. Upon a particular page in the Criminal Code, a "Thou shalt not" is solemnly directed against the gambler and all his works. Scarcely two inches below, with equal solemnity, is enjoined in substance: "But, if you do gamhle, you've gotta gamble straight." And, with great triumph of reetitude, the punishment prescribed for lapse from such exacted virtue coincides with tbat to he meted out the honest malefactor, when caught. It requires no strain of imagination to envision what particular fraternity lobbied that choice, territorial relic through.

To rehabilitate the entire system is our pressing chore. Appreciablc progress has been made and is being made by the state organization. But indispensably essential is the lively interest and cooperation of every member of the Bar.

In many sections, there are no local associations, whatever; no agreed standards or united purpose, entirely too much free lancing. Not, until there is a recognized solidarity bent upon realizing the high ideals of the attorney's oath, will the laiety ever award the profession the dignity and influence it should enjoy. Heirs we are of a proud tradition, our potentalities for civic betterment and leadership

unlimited, so long as our benches and bars are motivated by that basic injunction:

"First, to thine own self be true.
And it will follow as the night the day,
Thou can'st not then be false to any man."

MR. GRAHAM: On behalf of the Commission and members of the Bar present at this meeting, I wish most heartily to thank and congratulate the speaker for the able and inspirational address which he has just made. I feel that no member who has attended this Bar meeting can return home without feeling keenly that he has received his money's worth, for expense of the member and time spent, in this one address alone. You now see why I did not make the President's address.

We have here a registration list, attendance register, and we want each and every member present to sign his name and address, so that we can have a permanent record of the attendance at each annual meeting. The next thing on the program is the report of the Recommendations Committee by Carey Nixon. A year ago recommendations were made that we appoint a resolutions committee, who would have the whole year for consideration and digesting of subjects that might be of interest to the Bar at the succeeding meeting. The members of that committee, one selected from each Bar district, were Carey Nixon, Western Division; A. H. Oversmith the Northern Division, and Finis Bentley, Eastern Division.

MR. NIXON: Mr. President, and members of the Bar, Judge Lee has taken some of the words out of my mouth. I was about to say as he said that the State Bar of Idaho is woefully behind the times. It is also significant from Mr. Carver's discussion of the legislative program attempted at the last legislature. We note the results that we were able to procure. At the annual Bar meeting which was held last year at Payette Lakes, the number present was smaller than the number that are here, and it is rather pleasing to note that the number has increased. There are about 550 members of the Bar, and I find that there are about 10% here, which to my mind is a rather small part. The President, and I thought if it was 20% it was something, and I find it is half of that; in other words, it would seem that there ought to be a more cohesive organization to accomplish the things that should be accomplished and make for a more active and lively interest in the Bar. It had always been the practice in the past to appoint what was termed a "resolutions committee" about the time that the Bar assembled at their annual meeting, and very hurriedly explanation would be given of what was desired without much thought of where they were to lead. Mr. Oversmith, Mr. Merrill and myself happened to be on that resolutions committee last year, and we thought it advisable to suggest that there be appointed a standing "recommendations committee."

I shall speak very plainly. I think it is about time when only 10% of the Bar of the State are present. Some said, "The program is not just what it ought to be. The program is considerably abstract." They thought that somebody else should be on the program

rather than the speakers that they have had. Mr. Oversmith and I had considerable correspondence, and we didn't have the benefit of Mr. Bentley's advice very much for probably good reasons, and we decided that it would not do much good to send out any communication to the members of the Bar very early before the meeting due to the fact that they would probably lay the letter aside, and in addition to that there had been published the proceedings of the last meeting which showed that the recommendations committee had been appointed and its purpose. In the early part of May, we drafted a letter which was sent out by the secretary and the purpose of that letter, as you all know because you received it, was to get suggestions as to what subjects or matters should be brought before the Bar meeting and particularly for discussion by speakers who were qualified to speak on those subjects, and out of some 550, as stated, we got exactly nine replies, so that brings the percentage down pretty small. Another thing, I have had two gentlemen from the Boise Bar call me, who seemed to think that this Bar meeting was a closed corporation. I said I didn't know how I happened to be put on the program if that was the case, and I suggested that due to the fact that 50 to 75 members made it a point to attend the Bar meetings, of course, somebody had to do the work; nevertheless the two or three that mentioned that subject to me I do not see here. So I guess it is a closed corporation so far as any of them are concerned.

Now, these are "subjects" which we have recommended which should be discussed by the meeting. These nine replies which we received were along three general lines, and one of those was omitted and the other two put in. The one that was omitted was the question of cutting fees, and that was so generally discussed that we didn't think it was necessary to discuss it at a Bar meeting. You all have a copy of this report of the recommendations committee. Some of the speakers were suggested, and some of those speakers cannot be here I am informed, so that someone else will have to carry on the discussion. These were merely suggestions for discussion. Since these recommendations were sent out the question of the Bar being a closed corporation and controlled maybe by a group of men has come up, and it seems advisable to discuss and perhaps read some comment from one member of the Bar so that he will be sure that there is no closed corporation here; he cannot be present apparently due to the expense, and so I think that we should have the benefit of his ideas. This is from a gentleman that lives in the interior of the state and in regard to the first recommendation of the committee's report he says this:

> "Your recommendation is indefinite as to what is intended to be read before the meeting this year. If it is intended to resurrect the old saw over the redistricting of Idaho, providing four judicial districts and so forth, I am most decidedly against the whole procedure. What we want and need in this state is more courts, not less courts. We need a district court or Superior court, or a court of general jurisdiction in each and every county of the state, and where the population and assessed valuation of a county is not sufficient to bear the expense, two counties can be joined for judicial purposes in one

district. This will facilitate business and cheapen litigation. It is the system of California and Washington. It is a noticeable fact that the committee which made the report before the Bar meeting at Pocatello, July 15, 1932, upon this question, took particular pains to keep away from any report on the efficiency and sufficiency of the Superior court systems in these two states to take care of the business of the people. The committee seemed to dodge any mention or comparison with those systems, information and full understanding of which could easily have been obtained and reported. If this question is going to be opened and discussed again, let provision be made to secure full and accurate information as to the economy, sufficiency and speed of court procedure in these two named states and an unbiased report made upon the same for the information and guidance of the Idaho Bar in passing upon this question."

Then this gentleman passes Recommendations 2 and 3, and refers to Section 4, Cost of Litigation, and says:

"The chances of a lawyer getting business is largely dependent upon the costs of litigation. As the prospect of costs in a case increases, the chances of a lawyer getting a case diminishes. The costs of a civil case on appeal to the Supreme court at present are excessive and unreasonable. This is particularly true of the costs of the reporter's transcript."

"Under the holdings of the Supreme court a folio is now 10 lines in the transcript, whether there are one or a dozen words to the line. At the present time the office and appointment of a court reporter in some of the Districts of Idaho calls for a bigger income than the district judge receives as salary. The rate of 15c per folio should be cut down to 7½c per hundred words, actual count, and that fee returned to the state Treasurer to help pay the salary of the reporter."

And as to No. 5, Formation of Local County and District Bar Associations, he says:

"This is a dangerous propostion. It would be an arbitrary assumption of authority over the lawyer, oppressive, illegal, and unconstitutional, giving no consideration to the individual necessities, financial ability or opportunities for travel.

"The idea of the organization of the Idaho Bar was to help, advance, favor and protect the lawyer, not to oppress him and annoy him by nagging restrictions and technical rules for fault-finding and criticism.

"A lawyer is very naturally jealous of his personal liberties and his privileges as a lawyer. He has spent his life fitting himself for the profession and wants the freedom of personal action to work out his own destiny in his own way. Open meetings all right. Forced meetings all wrong."

Dropping down to No. 7, regarding competitive methods in carrying on business or handling same, he says:

"This is a consummation devoutly to be wished, but, when the lawyer finds himself down at the heel, in other words, busted financially; in other words, robbed of the legitimate law practice by legislation, by state monopoly of branches of the law business, by banks, notaries public, abstractors, and county officers butting into the law business, the lawyer finds it pretty difficult to hold onto his dignity, especially when his belly is empty and the cupboard is bare."

And concerning Section 13, Instructions to Jury, he says:

"This is a very difficult problem. It ought to be thought out and worked out carefully before anything is done to formulate it into a recommendation to the legislature."

And No. 14, allowing attorney's fees against an insurance company or upon any policy of insurance upon which suit had to be brought for recovery, he says:

"Change it to read, 'That the law be passed providing that attorneys' fees shall be allowed to the successful party in all cases, pertaining to the collection of money, based upon the amount of recovery, and in all other cases, both law and equity, a reasonable attorneys' fee to be fixed and allowed by the court.'"

Lastly, he says:

"A very important matter, probably the most important of all, has been forgotten or omitted from this list of subjects for discussion. It is a matter that has to deal with the old lawyer. Out of the 550 lawyers practicing in this state there are probably 100 lawyers over the age of 65 years. Nothing has ever been done providing for the lawyer when age overtakes him and he finds his energy, his memory, his eyesight, his bodily strength, failing him. No thought has ever been given to him by our Bar. For him it is the same old dirge, 'Rattle his bones over the stones, he is only a pauper whom nobody owns.'

"We have in this state a number of lawyers over 80 years of age, trying to practice law, more of them over 75 years old, more of them over 70 years old, and more of them over 65 years old. What are you going to do for them? Are you going to continue the usual course followed in the past, of 'Everybody for himself, and the Devil take the hindmost,' or are you ready to mix a little humanity with your ethics and make provision for him in his old age? I offer this resolution: That the president of the Bar appoint five active practicing lawyers, members of this Bar, to enter upon the investigation of the age, financial standing and physical condition of all members of this Bar over the age of 65 years, and report fully at the next Annual Meeting of this Bar the results of their investigations, and make such recommendations concerning the same as they may conclude necessary to provide for the old lawyer.

"A great many things could be done for the old lawyer. A law could be passed requiring the qualifications of a judge of the probate court be that of an admitted lawyer. The Bar could provide a standing committee who would look after the matter of appointments for old lawyers in positions of reasonable compensation which would enable the lawyer to end his professional life in a comfortable and easy employment.

"Commissioners of U. S. Courts, Referees in Bankruptcy, positions on state boards, and last but not least, a system of pensions could be evolved by means of which the old lawyer could feel that he was not a candidate for the poorhouse.

"The profession ought to be enough in love with itself, to have pride enough in itself, to make suitable provision for the old man who has spent his life in the study and practice of the law, and finds himself at the end of the row.

"Will you do something for the old lawyer?"

That is about all I have to say, with the exception of one thing: It seems to me that out of 550 members of the Bar, when they meet,

for instance, at McCall, which affords opportunity for those in north Idaho to attend without going clear across the state, or when they meet in Hailey, which affords opportunity for those in the eastern part of the state to get here without driving clear to McCall, there ought to be a larger representation. Judge Lee brought out one or two things that would seem to me to make it imperative that something be done so that the members of the Bar or the Bar Association become a more cohesive force.

These recommendations, these subjects which have been recommended, it is hoped will bring out the discussion for that end. Thank you.

MR. GRAHAM: This report will now be received and placed on file—we are going to take up the discussion of each and every suggestion in the report. In drafting the program we had some little difficulty. Heretofore we have felt that possibly the Bar was more interested in getting some speakers of fame here, so as to interest the Bar. This year we have digressed from that to some extent and felt that if we could get some live issues in which we are all interested, and get the members of the Bar present at this meeting to discuss them, we would get more good out of it than to listen to a prepared address on some foreign subject, and for that reason we are going to spend more time in this meeting in the discussion of the subjects which are presented here than we have heretofore at any other meeting.

The senator from Hailey wishes to make an additional report.

MR. HEDRICK: Members of the Association, I was requested by some of the members who have their wives here to announce publicly, so that they will have a good excuse or explanation for their wives, that this is a stag banquet, and it is to be understood that it is a stag banquet and they will leave their wives at home, or wherever they happen to have them.

MR. GRAHAM: That requires some nerve on behalf of some of the members, and they now have the support of the body behind them. We will now have the report of the canvassing committee.

MR. HANNAH: Mr. President, there were 22 votes cast, 21 cast for A. L. Morgan and one vote for Perry Mitchell.

MR. GRAHAM: The result of the ballot elects A. L. Morgan as Commissioner for the Northern Division for three years. If the Commissioner of the Northern District works as hard in the next three years as he has for the last six months, I want to assure you gentlemen some results in the north. He has canvassed almost every county in northern Idaho and conferred with the members of the Bar with the idea of getting them stimulated to come here, and the attendance from north Idaho shows the result of his work. The next thing on the program is the report of the Judicial Section. Judge Koelsch, are you ready to report?

JUDGE KOELSCH: Let me report simply this, that the Judicial Section met yesterday, and we had an attendance of 50% of the district judges and 60% of the Supreme justices. We have listened to a very interesting and able discussion of "The Inherent Power of Courts to Make Rules of Procedure," by Justice Ailshie. We then heard Judge Sutphen, of the Fourth District, discuss in general, the rules that are adopted in the several districts of the state, with his comment thereon. Thereupon, a committee was appointed to select from the rules that were by Judge Sutphen discussed, a set or code of rules to submit to the meeting tomorrow morning. This committee worked very hard from ten o'clock this morning until one o'clock this afternoon, and while we have a set of rules formulated, they are not written, and we are not ready to report them. They will be reported tomorrow and will contain ground for discussion of practical, every-day questions that enter into your every-day practice.

MR. GRAHAM: We have the recommendations of the resolutions committee and the Judicial Section report. We will be somewhat busy tomorrow, and I am going to order that we proceed with the discussion of No. 1. Mr. Secretary, will you read that part referred to?

MR. GRIFFIN: This is the report of 1932. The section dealing with non-partisan election, nomination and selection of judges reads as follows:

> "NON-PARTISAN ELECTION: In considering the proposed judicial reforms it should be borne in mind that one of objectives is the securing of a judiciary who shall be both *nominated* and *elected* without partisan affiliations or obligations. 'Exhibit C' is the tentative draft of an act to provide for the non-partisan *nomination* as well as the non-partisan election of judges. The act provides that district judges may be nominated upon the petition of not less than twenty electors of the district *at least one-half of whom shall be members of the bar in good standing*, and the justices of the supreme court shall be nominated upon petition of not less than forty electors of the state *at least half of whom shall be members of the bar in good standing*.
>
> These provisions give the bar power at least to exclude the obviously unfit from offering themselves as candidates for judicial positions. They still leave laymen with a voice in the nomination of judges and leave the right of election by the people unimpaired."

MR. GRAHAM: Now, the Act which they proposed, and which was adopted at Pocatello by the Bar, follows the suggestions there. Nomination is not by primary election. The nomination is completed by getting sufficient signers, half of whom shall be lawyers in good standing. That completes the nomination and entitles them to go on the ballot at the general election. That is the substance of the Act.

GENERAL MARTIN: This Bar has advocated for years, the non-partisan election of judges, so that a man who proves himself fit and who renders a good account of his services in the office of judge in the district or on the Supreme bench for years, may not have every so often to enter into a contest for the position which he holds, because the work of the judiciary is special, important, and when the fitness of a man is once established and he is rendering good services, they will be accepted in my opinion so long as he is willing to continue to render those services and as long as he renders good services. So I have for a good many years, desired a sys-

tem by which the Bar of the state itself could have a voice in selecting the candidate for judicial position. In the general election this purpose cannot be accomplished, but it must be accomplished mainly in the nomination of the judges themselves. Now, how can it be done? I venture the suggestion that the people of the state realize the fact that lawyers know better than they, in discussing high qualities or character, the man who has a judicial mind and can apply it to abstract legal questions and to facts to which these abstract questions are applied, better than the layman, and the vast majority of the laymen of the state, I venture the suggestion, would be perfectly willing to accept the opinion of the lawyers as to whom would make the most acceptable judge. As long as we had judges on the party tickets, party men voted their tickets a good deal of the time, whether the candidate was fit or not fit, and that will always be true if they are on party tickets. Therefore, we voted to have them removed from party consideration, and that has been accomplished and a large step has been attained, but we should press forward in this matter until we realize what our Associations have realized in some other states, the value of the position where they have a dominating influence in the selection of judges, for it can be done no other way, and with a closely integrated Bar, in fact, we could accomplish it by the State Bar endorsing and sponsoring the candidacy for judicial position. We can, I think, go a step farther, however, as advocated by the Judicial Council, and secure a law in which the lawyers of the state will have an equal voice to a petition in nominating the candidates who are to be voted for. It has always been my position, and it was the position of the Judicial Council, that there is no necessity of putting candidates for the judicial positions through two campaigns. There is but very little change—there is some, but it is not what it should be, in the present system that we have, over the old system where political parties nominated the candidates. It has been my suggestion that a district judge might be nominated by petition of 40 electors, of which 20 should be attorneys, and that number 20 was selected because there are some judicial districts in the state where the number of lawyers is not so great as in others. I think a better provision in the law, and I think it could be got through the legislature if it were properly entered, would be that a district judge could be nominated in his district by so many petitioners, providing he had the endorsement, as the signers, of 2-3 of the lawyers in his district; as to the nomination of the Supreme court judges, they could be nominated upon a petition which would contain a certain percentage, which should be large, of the attorneys of the state. In that way the lawyers of the state can absolutely veto the candidacy of a judge, the candidacy of a man for a judgeship, who is known by the profession to be unfit, and we no longer will hear the boast that a man who was candidate for justice of the Supreme Court did not know enough law to hurt him, in other words, he did not know enough law, in the minds of some people, to make him eligible to the office. I think we can never attain the best results until we get a law by which the State Bar can have a controlling voice in the nomination of candidates for judgeships. I believe that this would have a tendency, which to me seems desirable and, I believe, to the majority of the lawyers, of continuing in judicial position the judge who is making good. It is an office in which frequent changes are not desirable, in my opinion. Judgeships are not attractive to all lawyers; some of them cannot divest themselves of a desire to be in the arena, where they fight each other, and take a position on the bench where they must maintain a judicial air and poise. So, only a man who has that judicial temperament, who has the learning, who has the character, known, and well known, in my opinion could secure an endorsement of 2-3 of the Bar of the state, say, for a position; and a man who could secure that endorsement would probably not be a disappointment on the bench, either to the members of the Bar or to the people generally of the district or the state.

If we could then supplement this legislation with that which would make the holding of a judicial position more attractive, where a man, who once enters upon that career and shows aptitude, would be sure of some retirement provisions according to the physical condition of the man, there would be some reason why a man who is willing and desirous of doing this really important work, like one or two speakers spoke of it as the bulwark of our safety, our personal privileges, could engage in that kind of work knowing that he would not be a target of political shooting every four or six years, that he would not have to go through, as is the condition under the present law we have, the expense and effort of a primary campaign and then the general election. Let's get these men nominated in a proper way, and then when we vote upon them let them be elected at that first election. I like the California system where the man once in office—and it has been brought about by the California Bar—continues, and where some desirable number of petitioners feel that he should be called to account he is required to submit himself against his record as a judge. In an election if a majority of the people vote to continue him, he is continued; if a majority of the people vote against continuing him, then he is out of the picture, and they proceed in the way provided by the law to select another judge. That meets my approval, Mr. President. I think it is a good system.

MR. BENOIT: In so far as the non-partisan judiciary is concerned, I am heartily in favor of it, but I disagree to some extent with Mr. Martin in this. We have in the state of Idaho comparatively few lawyers in each judicial district as compared to a state such as California and larger states, and assuming that a man who is now on the bench would come to the various lawyers in smaller communities, asking them to sign his nomination blank, it would be a most difficult thing and almost an impossibility for that lawyer to say to the present judge that he refused to sign his nomination blank even though he may be opposed to him. Furthermore, I believe in our county of Twin Falls if a man were nominated by 2-3 of the members of the Bar of the judicial district, you would find possibly 4-5 of the electors who would refuse to vote for him and would vote for a man that was not endorsed by your Bar. Unfortunate and sad

as it may be, I believe that condition exists. I don't believe that the plan is practical in a small state such as the state of Idaho. I believe in the theory of it, I believe it is fine, but I don't believe that it would be helpful or assist in any way whatever to elect the efficient man to the bench, either district courts or the supreme court. Our present system, although not as valuable as it might be, is superior to the plan offered in this proposal, only because we have a small state here, and the members of the Bar are few, and we would meet with propositions as lawyers that would be embarrassing to us always.

GENERAL MARTIN: I think the gentleman is mistaken as to the sentiment of his county. I believe a man endorsed by ¾ of the lawyers of his district would be unquestionably elected. These judges who occupied the positions in our district at the last election, had lawyers take their petitions and I think they were signed by every lawyer in the district. There were no other candidates. They had no opposition, and if the lawyers in your district desire to take this into their hands, that would happen in your district, the men who receive the endorsement of your lawyers would be the only men running.

JUDGE BOTHWELL: My views may be very different from his and they may show you how near the lawyers agree in Twin Falls. It appears to me that the theory advanced by Mr. Martin, for instance, that you would have to require endorsement of the attorneys of a particular district or a particular town before a judge could be nominated, would conflict with a contested election, for instance, in our district we bave four candiates, or two judges to be elected. If it were unanimous, there would be no contest at all. If it were under an appointive system by the lawyers themselves, by which they could go in and select them, that would be another thing, but if 2-3 of the lawyers want two judges in our district, where are you going to get the four candidates nominated?

GENERAL MARTIN: There would have to be two.

JUDGE BOTHWELL: You have to get signatures, as I understand it from your proposition, of 2-3, and those should support all four candidates.

GENERAL MARTIN: No. Two candidates.

JUDGE BOTHWELL: Well, if 2-3 support two, where are the others coming from?

GENERAL MARTIN: The other two would not come.

MR. BENOIT: It is not practical. I think we are all in accord, but it seems to me that it works out now in favor of the lines you have been speaking about; for instance, at the last election in our county we had in our district down there practically all of the attorneys supporting the present judges and those men were nominated then. As far as our district judges were concerned, there was no exception taken to them by any attorney. So I think we are on a very equal basis now.

GENERAL MARTIN: The only difference is in the present system the man may have his name presented without the endorsement of any lawyer.

MR. BENOIT: Yes. As I recall, this question of 20 names, was advanced as a safeguard, I think, that we have something the attorneys could veto. It is fairly desirable, but it would be impossible, it seems to me to have any very large number of attorneys to endorse any particular man. The attorneys all do get behind the men who are proper timber for the judiciary. There is no question about that. We all gladly give them our support, but I doubt if your proposition would get any farther than what the judicial council recommend.

GENERAL MARTIN: I want the attorneys to control the nomination.

MR. BENOIT: Yes, but I think it is impossible to go that far, and it looks like we have made ground very, very materially.

MR. GRAHAM: You favor an amendment to the present law requiring a certain number?

MR. BENOIT: A certain number which would not make it impossible to hold an election, so that they could veto such people as you have in mind.

MR. MARTIN: In other words, we agree except as to the one point of the number?

MR. BENOIT: Yes. I think it would be impossible to carry that out.

JUDGE REED: Mr. President, if my recollection of the Constitution is correct, a man to become a member of the Supreme court would not have to be learned in the law, and, as suggested by General Martin, that the attorneys should select the nominee, I think any law to that effect would be unconstitutional, because you are depriving the people of the right to vote and select their own candidates, who do not have to be members of the Bar or learned in the law.

GENERAL MARTIN: I suggest that the people have no right to nominate. The legislature can provide any means of nominating candidates.

JUDGE REED: If the legislature should say that to become a candidate you would have to be learned in the law, that is in direct conflict with the constitution.

MR. GRIFFIN: This Act does not provide any qualification in that respect.

JUDGE REED: I think you would meet with considerable opposition from the laymen if they had to follow, particularly in selecting men to the Supreme bench, the recommendation of the Bar.

GENERAL MARTIN: The fact is, Judge Reed, in states where the state Bar Association has been put in a position to endorse them almost invariably the candidates of the Bar Association have been nominated and elected.

JUDGE REED: That is true. I won't dispute that at all, but I doubt if there are any of those states that have the same provision that we have. I know that is true in Ohio, and then in California they work very successfully, but we must remember that the members of the Bar are great in number there. In this state we have few in comparison with the states that have those provisions. In my

district, for instance, I don't believe there are over 31 members of the Bar in the whole district.

MR. OVERSMITH: Is it necessary in order to be a candidate for judge that a man must live in the district?

GENERAL MARTIN: It is necessary under the law.

MR. OVERSMITH: If a judge happens to die or be removed or resign, it is pretty difficult sometimes in these smaller districts to get a man to accept who is qualified. This is true in a number of the districts in this state. Now, it seems the lawyers at least ought to be able to endorse a man for a judgeship who didn't live in the district, if he was properly qualified for the position, but, the Governor must appoint somebody that resides in the district.

MR. THOMPSON: More than superficial thought should be given to the question before determining or recommending at any time that judges may be either directly or conditionally recalled because of decisions which are unpopular. The suggestion which General Martin made, if I understand him correctly, is a close approach to judicial recall. I have known of cases in California, upon which I am not sufficiently advised to want to give the details at this time, in which very able judges have been recalled for rendering very able opinions which were unpopular with the masses. I can very readily conceive such conditions arising in Idaho in the immediate times. Thus, if we assume that a legislature were to adopt a social security measure such as the Townsend plan, or such as some of the legislation that has been adopted by our Congress, the judge would be intimidated, or, if he were able and fearless and held the legislation unconstitutional, he would be subject to recall by the people. That one illustration ought, for the present, to be sufficient, although I have numerous of them in my mind, as probably others of you also do.

MR. OVERSMITH: If the man cannot be recalled until the next election, can't we recall a man now by nominating another man under the present system?

MR. THOMPSON: I guess that is possible. I think General Martin's theory would be quite different from our present system.

GENERAL MARTIN: Under the system I have suggested, and which has been tried out in California—you might call it a recall—it can only be submitted at a general election, at the end of his term. Now, in Idaho at the end of a judge's term if somebody sees fit to contest with him, he has to go out and contest it. Under that system, at the end of his term if nobody desires, or not a sufficient number desire, he would go on for another term without having to undergo an election, but if there are a sufficient number of people in the state who sign the petition, it would require him to submit to an election, not as facing some Tom, Dick or Harry, but on his own record, and let the people of the state or his district say whether or not they endorse continuing him in office on the record he has made. If not, then someone is elected for his job; candidates are nominated and somebody is elected.

MR. THOMPSON: I concur with the thoughts expressed by Judge Bothwell and Mr. Benoit, because I understand it to be a

part of our program that petitions for renomination bearing the endorsement of lawyers shall be a prerequisite of candidacy. There may be instances where very able men have come to the time of life or circumstances that they are willing to serve. There may be members of the Bar who are particularly agile at circulating petitions, and present them with the effect that Mr. Benoit has suggested. There are many men who will hesitate to sign these petitions. So that it seems to me under the procedure you suggest that all that is necessary for you to do is for someone to get out early and fast at the expiration of the term with a petition, and thereupon we are concluded on the subject.

MR. HAWLEY: May I ask you whether you think we could get a better Bench and the people would be served better if the lawyers had a dominating voice in the appointment?

MR. THOMPSON: Yes, of course. With the result we obtain, I thoroughly concur; the methods to obtain that result, I suggest that we should not adopt lightly or without deep consideration.

JUDGE AILSHIE: I approach this subject with a sense of personal delicacy. I want to say this with reference to the securing of nominations by petitions of the practicing attorneys. There is something about it that does not appeal to me, calling on the attorneys to sign your petition, and it is something that I do not believe the average judge likes to do. It must be embarrassing to the judge. What chance has the practicing attorney before the judge if he refuses to sign the petition? None at all. Now, you place the candidate for the judgeship in a delicate position that he ought not to be placed in, and you place the practicing attorney in a position that he ought not to be placed in. Now, suppose as most of the trial judges do, they place their petitions in the hands of some friend and ask him to go out and get the signatures, and he starts down the line of the attorneys and he comes to you and you want to sign it, and are his friend and you advocate him and you think he is the best judge and you sign his petition. He comes to some other fellow and maybe he doesn't like the judge, and he won't sign it, and it is reported that he didn't sign it. If I should be a candidate tomorrow for a nomination under the present system and were sending out a petition for signature, I would instruct the person whom I was asking to circulate my petition not to present that to any attorney, and I would tell him if any attorney sees you securing signatures and asks to sign it, let him, but do not go to an attorney's office and ask him to sign this petition. I have no objection to the system that is proposed by some, that a new man coming out to seek a judicial office shall be certified to by a certain number of reputable attorneys.

Let me say this to you, gentlemen, and I say this out of some experience, it is a trial and a hardship for a man to go through two of these elections. The legislature has met that proposition by an act that if any man who is a candidate for the office secures in the primary election a real majority of all the votes cast for the candidates for that office he is declared elected without going through the supplemental election. These laws adopted through the co-operation

of the Bar associations in states like California and New York are not applicable to us. They have over 15,000 lawyers in California. We have about 550 in the state of Idaho. If you are going to require 75% of the lawyers to endorse each candidate, where is the other fellow going to get any signers? I believe that kind of proposition is entirely out of the question.

MR. MORGAN: I don't know whether Judge Ailshie's statement was intended to perpetuate in office the present members of the Supreme Court; nevertheless, it would have that effect to pass an act requiring the new man to have the endorsement of the attorneys of the state and forbidding the same when a present member of the bench seeks to retain his office. I am not in favor of anything of that kind. I want something that will apply to both. I am not in sympathy with the proposition that an attorney does not dare to refuse to sign a petition of anybody that wants to be judge. Whenever that condition arises it is due to one of two facts,—either that the attorney does not possess the necessary intestinal fortitude to protect himself and his people, or it is due to the fact that he hadn't ought to sign the petition of the man who is asking him to sign it. Do you mean to tell me that we are electing judges to this bench who would decide a case against an attorney simply because he refused to sign his petition? If that is the case, I say it is high time that the lawyers of the state of Idaho took it into their hands to nominate and see pnt upon the bench men who are bigger than that, and I want to say when the proper time comes I shall deem it a pleasure and an honor to refuse to sign the petition of any man, whether he be off the bench or upon it. That is a part of my liberties as a citizen of Idaho, and I am heartily in favor of the lawyers of the state being permitted to denominate the men who go upon the bench and Bar. The judges of the state are members of the Idaho Bar, nothing else, and I believe that it is the privilege and duty of the Bar to select from its members the men who are fit to handle the judicial affairs of the state.

MR. OVERSMITH: Judge Ailshie is somewhat mistaken in his view. A lot of people have told me that they voted for Judge Ailshie because he was head of the Idaho State Bar and because the lawyers wanted him.

MR. WARE: I concur with Mr. Morgan in his position as a citizen, but let's assume that when the petition is submitted to an attorney by the district judge there is pending before that judge an undecided case where the attorney is involved. I believe firmly that the Bar should participate in the nomination of judges by endorsement by secret ballot. Under the system you are trying to pursue now you are adopting the evils which the open ballot had prior to the Australian secret ballot system, and I think any endorsement by any Bar association, county, district or state, should be by secret ballot rather than hy signed petition.

MR. SOULE: I have personally encountered the situation which Judge Ailshie has spoken of. I experienced twice in the last election where undue infiuence was brought to bear in the nomination of

judges. I think that is an illustration of what we are advocating, and so I enter a protest against the suggestion set up by Mr. Martin. When you have to apply these methods in rural communities where the vote is light, I don't see how the practice of endorsing these judges by lawyers is practical. It will not work out. The high plane upon which you seek to put it is beautiful, but you have got to be practical.

MR. GRAHAM: The legislature does not convene until the winter of '37, and I am going to appoint a committee of members to make a study of this thing and report back at our next annual meeting as to whether or not the nomination of the judges and selection of judges shall be controlled by the Bar, and if they are in favor of that, then to work out some plan or scheme so we can intelligently discuss it at our next meeting. This is the committee: Raymond L. Givens, one member of the Supreme Court; Taylor and Koelsch, members of the District Court, and the following members of the Bar: Anderson, Ware, Eberle and Bothwell. Now, you can meet before we adjourn and talk over some concrete plans without any expense, and try and work out some plan. If there is no objcction, we will now adjourn.

MORNING SESSION, JULY 12, 1935, 10:00 A. M.

MR. GRAHAM: The next subject for discussion on the report of the rccommendations committee is, "That the Supreme Court and District Courts adopt and promulgate rules of practice for trial courts, to be uniform throught the state of Idaho." Is that involved in the Judicial Section?

JUDGE KOELSCH: Yes, I think it is.

MR. GRAHAM: Then we will pass No. 2 and No. 3. No. 4, "The cost of litigation should be minimized wherever possible." Mr. A. F. James.

MR. JAMES: It is not my purpose to make any address. I have been in the state practicing since 1912, and during that time I have seen the tendency upon the part of the legislature to increase the cost of litigation. I recall the time when the plaintiff's costs in the District Court were much less than they are now; I remember when it was $10.00, and I think even before that it was less, and the defendant's filing fee was $3.00; then these were boosted to $12.00 and $5.00, respectively, and then a little later, not being satisfied with that, a further regulation was made that if the defendant filed a cross-complaint he had to pay $3.00, and then just a few years ago another act was passed giving the probate courts and justices of the peace power to require the party demanding a jury to pay the jury fees. It seems to me this tendency is in the wrong direction. The courts should be open to everyone. We should not let it be said that the courts are merely places for a man of wealth to litigate his troubles, to which poor people cannot get. Many people who would be unable to get into court will attempt to settle their controversies, sometimes even by physical violence, sometimes by appointing arbitrators, and many times when they do that they get into deeper

water than they are before. Another thing, the cost of reporter's transcript is excessive. Don't misunderstand me. I am not taking the position that the reporters are overpaid; they are underpaid. I would be in favor of increasing their salary to such an extent that the compensation will be adequate, but I am in favor of reducing the cost of the transcript.

The printing of briefs in the Supreme court is quite an item, but I will say that the court has, in the cases that I have had where my clients cannot afford to pay for the cost of printing the brief, given orders permitting the filing of typewritten briefs. There are many cases tried where there is merit in the cases and where the defeated party cannot afford to go to the Supreme court. Many important questions are raised, and I believe it is the duty of the state to furnish more economical and, I might say, cheaper justice. It has this effect directly upon the attorney—someone will come in a little short of cash, and you and he talk it over, and sometimes the attorney will say, "You raise enough to pay the court costs, and I will take a chance," and it has been to the detriment of the attorney in that respect. I don't like the idea at all of requiring a litigant to put up the costs of a jury in the lower court. I think that the county owes to the people a free jury in the lower court to the same extent as it does in the district court. I would just like to have the reaction of the other members. I think that that tendency should be stopped, and that we should back-track on the proposition.

MR. MORGAN: Some time ago I received a letter from a man expressing the idea that service of summons by publication might well be abolished, and the more I think of it the more I believe it is a good idea. That is another expense added to litigation, and the publishing of a summons in a newspaper nine times out of ten does not tend to give notice at all. It is mere theory. If yon cannot find the man to serve, it is almost ridiculous to say that he will get it from a little local newspaper. I think it might be mailed to the party's last known address and do away with publishing summons.

MR. OVERSMITH: I think that is an excellent idea, hut you ought to take into consideration the legislature. I remember in '29 the newspaper men over the state got word that we were going to cut out publication. Your newspapers have got too much influence in the legislature, and lawyers too little, to cut it out. I want to make this suggestion. I will ask Mr. James if he will present this matter a year from now for the State Bar, showing where we could revise the schedule in a concrete form. Then we could take action and appear before the legislature, hoping we might have a more favorable legislature.

MR. JAMES: The sheriff's charge for commission, I don't see any justification for it, 2% of the amount of the sale—

MR. GRAHAM: We tried to get it changed in the House, but it died in the session.

MR. MARTIN: It seems to me that the fee put on for the purpose of paying for the Code should be taken off. The Codes were paid for and that fee is simply going into the general fund of the state

at the present time. I think litigants should pay for the reporter's transcript. I don't believe it should be done by general taxation. I don't think that the taxpayers generally should be forced to pay for the benefit of those who go to litigation, and while to have litigation very cheap might encourage litigation, I don't think we are interested as a body in encouraging litigation, so I think whatever is necessary to pay a reasonable fee for transcripts of the reporters should be paid by the litigant. The question of jury fees, I am rather impressed with that, Mr. James. It seems to me the work of this Bar should be to do away with the system of juries in these smaller cases. There is certainly no need of a jury in the smaller cases in the inferior courts, and they might be abolished, or at least cut down in number.

In the matter of publication, our friend from Latah county has admitted a strong barrier in getting that done, and that is the influence of the legislature. I think that would be a legitimate field for a committee, investigating as to what could be done in the way of reducing the cost of litigation, and we ought all to try to that end to reduce cost of litigation, but not hy taking it away from the litigant and putting it upon the general taxpayer or by cutting out useful and necessary matters in carrying on.

MR. GRAHAM: Mr. James, you have not made any specific recommendations?

MR. JAMES: No, I haven't.

MR. GRAHAM: Let me suggest that you continue this for next year and hring a specific report as to what we could adopt in the way of fees so that we could get a concrete suhject to act on. If there are no more remarks, we will proceed to the next. No. 5, "That the Board of Commissioners of the Idaho State Bar can strengthen and create proper interest in the State Bar by dividing the state into County or District Associations, membership in which, and attendance at meetings of such County and District Associations, shall he necessary qualifications for membership in the State Bar."

MR. WARE: I am to discuss briefly the formation of local county and district Bar associations. If I understood your remarks yesterday, Mr. President, there is a Bar Association in Twin Falls. I gather that there is one at Boise, and I assume that there is one at Pocatello. I should like to call your attention briefly to the situation as we have it in our end of the state. I helieve that probably one of the greatest things which could be done, and one of the greatest factors for strengthenening the State Bar, would be by having strong local Bar associations throughout the state. We have this situation in Nez Perce County. When I went there in '27 I never heard of a Bar association until one of the members of the Bar died. Shortly thereafter the Bar duly assembled at the rooms of the district court and the president of the Bar, who, by the way, was always the oldest living member of the local Bar, would appoint a committee to prepare the necessary resolution. Before coming down here I happened to glance at the files of the old Bar Association. There is a very beautifully worded constitution and a fine set of by-laws, and the only

thing subsequent to it, are resolutions from time to time in behalf of departed brethern.

Now, the younger members of the Bar in Lewiston, being somewhat interested in establishing Bar associations, discussed it from time to time for several years, and in February, 1934, called a voluntary meeting. I don't know whether we can admit that that is the Bar Association or not, but we did elect a president and clerk, and it has functioned very satisfactorily since then, except the oldest living member of the old Bar association still considers that association the association de jure, but has never called a meeting under any circumstances, except to appear once or twice to protest the method of procedure of our meetings, Mr. President. I think I can also say in behalf of the neighboring counties of Latah and Clearwater in the Second Judicial District, that the younger members of the Bar there in collaboration with Mr. Oversmith and Mr. Morgan—and, by the way, we have several older members of the Bar in Lewiston who work with us—have worked out a Bar Association there which is reasonably effective, and I think that the fact that you have a reasonable representation from the Second Judicial and the Tenth Judicial Districts here today at this meeting is due to the fact that we do have Bar associations that function to a certain extent. Both districts have a grievance committee at times to handle some of the matters which might otherwise be referred to the State Bar.

I think we took one important step this spring when about the middle of April we held at Lewiston, a meeting and banquet, to which all members of the Bar in Idaho, Lewis, Nez Perce, Latah and Clearwater counties were invited, together with the members of the Law Faculty at the University of Idaho, and the law students. We had a very fine meeting. There were 45 or 50 members of the Bar present, and every county was well represented. There was a majority of the Bar present in each instance. One of the things that we were confronted with, and probably it will come up for discussion here, was the practice of non-resident attorneys in the state of Idaho. We are so far removed from the State Bar and so cut off, as you might say, from the rest of the state, that it is very important that the Bar in our section and also the Bar, I take it, in Coeur d'Alene and Wallace and Kellogg and that part of the state, should be organized to protect our respective interests.

I have nothing partieular to say as to the method of formation, except I do believe, Mr. President, that the younger members of the Bar do not want the formation of a junior Bar. They want to work with this Bar. They want to consider themselves as memhers of the State Bar. We are members of it, and we want to support it, and we want the encouragement of the State Bar in the formation and fostering and forwarding of our local Bar associations, and we want you gentlemen to rely more often in the future than you have in the past on our local associations to assist in carrying out your work. I disagree personally with the suggestion that attendance at meetings of the county or district associations be compulsory as a qualification for membership in this Bar. I really believe that we can

foster the best interests of this association by developing a voluntary local Bar association and by encouraging attendance in it. We must first make our local associations respectable and worthwhile before we can compel attendance at the meetings. There are certain gentlemen in our respective counties up there who probably wouldn't attend our meetings except under compulsion, but I am compelled to add that if they were compelled to attend they would add very little to the meeting. The only thing I can suggest is that the State Bar and the Secretary, if possible, really give us a little more attention than they have in the past and give us a little more to do.

MR. MORGAN: May I be permitted to add one idea to that suggestion of our young friend from Lewiston? I think we should have the right to organize these local Bar associations where there are small counties, even small Bar districts might be permitted to join in some sort of local organization, if it is found desirable to the members themselves—not in any manner of compulsion. I believe that the attendance at the meeting should not be compulsory. I also feel that the Idaho State Bar should adopt rules and regulations making it possible for the Bar as a whole to inflict punishment upon any member who wilfully disregards and violates the reasonable rules and regulations laid down by the local Bar association. I have gone over the entire north end of the state and more or less over the south end of the state, and everywhere you go you talk to people about the local Bar association trying to do something and always you hear this statement: "We cannot do anything here. We organize a Bar association, and we adopt a fee schedule, and immediately so and so violates the schedule, and then everybody throws up their hands in despair, and we don't function." I can see no reason why membership in the local Bar association should not be compulsory. A man by virtue of being regularly admitted to the State Bar automatically becomes a member of this local association and amenable to its rules and regulations, and whenever that local Bar association adopts reasonable rules and regulations for the government of that institution, then I believe that respect for those regulations should be made mandatory, and some sort of method provided whereby an individual who does not live up to his pledged obligations to his own organization can be reprimanded, suspended or otherwise punished. I can give you an illustration of that. In our county, getting back to this eternal back-fire of a Bar schedule, we adopted a Bar schedule and every member of the Bar in Latah county signed that schedule and immediately began to violate it. I say that a man who would sign up to do a proper thing with his brother lawyers and violates that promise ought to be punished, and I am satisfied that we have the inherent power to do that. I believe first, however, we should organize local Bar associations with compulsory membership and the right to make people respect the reasonable rules of the local association.

MR. GRAHAM: To me, and to the Commission, this is the most important subject that we have up for discussion. I am going to defer further action on this particular recommendation until tomorrow,

when we can have it again open for discussion. In the meantime see if you cannot make some suggestion as to how we can co-ordinate the state organization with the local organizations so as to make something effective

The next recommendation is No. 6, "That a tort committed through an intervening cause should give a right of action to the injured party in addition to any compensation under the Workmen's Compensation Act." Mr. Walter H. Anderson is not able to be here. Is there anybody that wishes to discuss that subject?

MR. OVERSMITH: I think the matter will require legislation, and as long as Mr. Anderson has made a study of it, I would ask your unanimous consent that it be deferred until next year. There is no reason for it to come up now.

MR. GRAHAM: If there is no objection, it will automatically be deferred until the next annual session. Coming now to No. 7, "Your committee believes that the practice of law is an honorable profession, and in its practice, lawyers should refrain from a competitive attitude or competitive methods in acquiring business or in the handling of such matters as may be entrusted into their hands. The same thing is expressed in the ethics of the American Bar Association, and we recommend that every County or District Bar Association, and the State Bar and its members, be urged to recognize the practice of law as a profession and not as a business, and if necessary that this recommendation be enforced through disciplinary proceedings." If there is no objection, the matter will be deferred for discussion until tomorrow morning together with No. 5. No. 8, "Subdivision 3 of Section 16-202, I. C. A., is designed for the protection of estates of decedents, and prohibits parties and assignors of parties from giving oral conversations had with decedents during their life-time. This section has been held not applicable to officers, agents and representatives of corporations, and corporate entities, and said section should be amended."

MR. OVERSMITH: Recently I had a case involving reformation of a mortgage. I was relying upon Subdivision 3 of Section 16-202 of the Code until I began to look up the matter. Our Supreme Court in the case of Webster-Soule Farm Co. vs. Woodmansee, 36 Idaho, 520, held that the wording of the section did not apply to agents, and officers of corporations. I see no reason why the mouth of a manager or agent or any representative of a corporation should not be closed the same as anybody else. The position of our Supreme Court is in line with the majority of decisions throughout the United States, of courts where the law is similar to the Idaho law. It is not a question of attack on corporations, or anything of that kind. It is putting the agents, officers, and so forth, of a corporation in the same category as individuals. I know the judge before whom I tried the case was very much surprised that it did not take in agents and representatives and managers of corporations. I move that it is the sense of this meeting that Section 16-202, I. C. A. be amended so as to cover representatives, agents and managers of corporations, and be referred to the legislative committee.

MR. GRAHAM: Those in favor of the motion say "Aye." Opposed the same sign. The "Ayes" prevail, and the matter will be referred to the legislative committee.

MR. GRAHAM: No. 9, "The industrial welfare of our State requires liability insurance, and has resulted in centralizing legal business in large centers of population, in many instances in a foreign state. Liability insurance companies employ outside agents and outside attorneys, the services of which could well be performed by local agents and local attorneys. Under such circumstances your Committee feels that liability companies should disclose in any suit or proceedings their interests in the cause then under consideration by written pleadings." Mr. J. F. Martin. I don't find him here. Is there anybody else who is prepared to discuss the matter? That brings forth the idea that the Commissioners want it definitely understood that when we call upon members of the Bar to do something, we want co-operation. We are not going to be arbitrary, but without the co-operation of the Bar we cannot do anything, and when we put you on a committee to do something, we want to see you do it. Now, Mr. Martin ought to be here or have a paper here.

GEN. MARTIN: I think you are right. I think you ought to issue some kind of writ and bring them in when they are not here to perform their duty. I think every member of this Bar when he is appointed to do something by this Bar Commission, or to present a paper at a Bar meeting, ought to do it, and if he is absolutely unable to do so he ought to let us at least know why he can't.

This subject, however, brings up the old matter that has been considered more or less by attorneys for a good many years, especially since automobile accidents have increased largely and damage suits have resulted thereby. I don't see that there would be any value in going into the question as to insurance companies conducting their business to a certain extent through outside agents. As a matter of fact, the greater portion of the ordinary insurance business is done through local agents, and the outside agents are general agents who represent the companies and are not encroaching to any great extent upon the rights of local agents to earn their commissions and fees. The same thing is true in regard to attorneys. Of course, all of these liability insurance companies have their general attorneys and their office legal staff in their general offices, but with rare exceptions do these general attorneys or the attorneys for the general office ever come into the state, at least in Idaho, to try cases. Some of the Spokane attorneys who represent these companies go over into north Idaho, but in this part of the state that is not an abuse that calls for any great consideration as a corrective matter. The question as to whether or not a liability insurance company's interests should be disclosed by written pleadings in the action is another matter, and to my mind not one of great importance, although attorneys differ very radically about that. I have the feeling, and I think a great many of the attorneys who try these cases have the feeling, that every jury nowadays knows that the chances are that that automobile is carrying

liability insurance, and the man that does not carry insurance is just out of luck in that regard if he comes before a jury.

I remember trying a few years ago a case at Payette, in which the van or truck of a furniture company had been used by one of its employees for his private pleasure after business hours, and he was killed, the wife was injured, and a young child, and one of the jurors after the trial was over made the remark to me that it would not have made any great difference to this furniture company because they no doubt had their car insured. It happened to be a case where they carried no insurance on this motor vehicle, but this is so firmly imbedded in the minds of the people that these cars are insured that the average juror takes it for granted and feels when he is considering a case that there is some insurance company behind that is going to pay whatever verdict they render for the injured party. It wouldn't make any difference to the liability company whether their interest was disclosed or not; in fact, I would just as soon defend a suit for personal injury disclosing the fact that the insurance company is the real party in interest and that it will have to pay whatever verdict is rendered, and present it on that fair open ground to the jury, as a matter for their fair and honest consideration as jurors, and I think they will treat the insurance company fairly, and I believe the verdicts would not be any larger. We would get just as fair and honest results, for now the lawyer on the other side asks the juror—some fellow perhaps on relief—if he owns any interest in any insurance company that carries insurance on an automobile, and the lawyer for the company sits there without any objection because the courts have held that it is all right to inquire. You might just as well be permitted to get up and say that this car was insured. It has been advocated by attorneys who bring these suits because they think they could get bigger verdicts. In my opinion they would not get any bigger verdicts, maybe not so big, because there would be no subterfuge.

MR. OVERSMITH: Those questions may not be very important in this section of the state but I dare say in the last thirty years there has not been a single case in the ten northern Idaho counties, with the exception of one or two in Lewiston, where a liability company has been involved, that a Spokane attorney has not tried the case. Now, I think we are entitled to a little protection. They are drawing the money out of Idaho, they are liability companies, and there should be more co-operation between the local Bar and the liability companies. There are two or three liability companies now who are turning over the trial work of their cases to local attorneys. We believe that it would not hurt for this Bar to bear down somewhat upon this question.

I do think, as the chairman has remarked, that if a person is on the program to discuss a subject he ought at least to show the courtesy of writing to the committee or to the secretary or to the Bar Commission that he can't be here so that somebody could be substituted on the program and look after it. Probably the Commission itself should discipline the members of the Bar who have absolutely ignored the request of the Bar Commission and have not come here. The Commission is trying to do its best to make a success. We are trying to make a Bar out of it. For heaven's sake, don't ignore them. Show the courtesy of advising the Bar Commission so they can make other arrangements.

MR. MORGAN: One very good reason for making an insurance company disclose its interest is that if inadvertently it creeps in any way that an insurance company is defending and you get a verdict, you lose it in the Supreme Court. Just why should a litigant be put to the expense of getting a just verdict, and merely because this secret institution that is in there protecting its rights but concealing its identity, happens to be dragged into the lawsuit, lose out. If you will make them come into the open, that will be done away with. They are the real party in interest, and there is no reason why they should not disclose their interest.

The majority of the Commission is in favor of inflicting some sort of reprimand upon anybody that is placed upon this program and is called upon to do anything in the future who doesn't function or give a good reason why. The reason is this, that the business of this Idaho State Bar must be carried on, and the duty has been placed upon your Commissioners to carry it on with your assistance. Now, very frankly, the power is vested in the Commission to see to it that a committee or anyone else who is appointed and fails to act, be disciplined in some way. Whenever one is called upon by the Commission we expect him to act, and if the Bar doesn't like that they will have to get another Commission, because that is the attitude we are going to take.

MR. FEENEY: Along the line of discourtesy shown to the members of the Bench and Bar, I find myself directed by the Federal Court to appear in indigent cases and leave all the rest of my business go for the privilege of practicing law in the Federal Court. I think any member of the Bar ought to be compelled, when he is honored by being on the program, to come here and do his duty by the members who are here. Even judges of the Supreme Court and Judges of the District Court have come and are carrying on this work.

MR. SMITH: General Martin, what would you think about making the insurance company one of the necessary parties in interest in an action like this?

GENERAL MARTIN: I don't see why that should be necessary. Just to disclose their interest would be all that was necessary, unless it was desired to dispose of the matter in one suit. You now, of course, have to bring a suit against the insurer for the recovery, and judgment is paid in most every case, but in case it is not paid you have to bring another suit. That would avoid that.

MR. SMITH: I had occasion to brief the law as it exists in some of the states in that connection; the law in Nebraska provides that the insurance company must be made a party. It is my opinion that in order to avoid a multiplicity of lawsuits it would be a good plan to make the insurance company a necessary party to the action.

Regarding foreign attorneys practicing law in Idaho in these cases, it seems to me that our courts have the inherent power to make

rules in that connection. I have known of instances in Boise where that question has come up and foreign counsel was trying to cut down the local counsel as to fees, and there was immediate resignation in the case. I understand that the situation in the north is different. I maintain that this Bar has the right to control that situation and should do so.

MR. OVERSMITH: In order to dispose of the matter, I think that matter might go over for further discussion. Nobody has made a study of it. Let's have it a year from now. We cannot do much this year.

MR. GRAHAM: Are there any objections? If not, the matter will be continued automatically and placed upon the discussion roll for next year.

MR. REED: Before you leave the question just presented, particularly as to the foreign counsel, I am going to make the suggestion that I think the fault lies with our local Bars. From my own observation my experience has been that a great many attorneys outside of our district are associated with foreign counsel and very seldom, if at any time, do the members of the Idaho Bar appear in the trial of that case, and I have been told a number of times that they permit the use of their names on the claims at a very nominal fee and don't expect to appear in the court during the trial of this particular case.

MR. GRAHAM: Possibly in making rules the court could make some rule covering foreign attorneys.

MR. WARE: The matter is a very vital matter as far as the Second and Tenth Judicial Districts are concerned, and I believe it is the wish of the majority of the members of the Bar from those districts that the matter be considered. It was touched upon at the last Bar meeting, but we are going to he forced irretrievably to try to handle it through our local Bar associations if we cannot get a uniform rule over the state or the assistance of the State Bar.

MR. GRAHAM: Is that matter considered in your recommendations?

JUDGE KOELSCH: No, it is not. We have no rule on that.

MR. GRAHAM: The Commission has had that under consideration and we are trying to work out some rule whereby we can protect the attorneys in those particular districts. They are harassed by outside counsel, and as a result the local counsel are only hirelings and let them use their names at a nominal fee. I think the state of Washington has a very stringent rule as to foreign attorneys appearing in their state, and the Commission has under consideration adopting reciprocal rules and making the attorneys in Washington and Oregon comply with our own rules. If we can work out some plan along that line it will be of great benefit to the attorneys in those particular districts. Are there any other remarks?

If not, we will proceed to the next thing, No. 10, "Section 70-166, I. C. A., provides as follows: 'The common law of England, so far as not repugnant to, or inconsistent with, the Constitution or laws of the United States, in all cases not provided for in these compiled laws, is the rule of decisions in all Courts of this State.' This statute is silent as to whether or not it is the present common law of England which shall be the rule of decision, or the common law of England at the time Idaho became one of the United States, or at any other period or date. The majority of the Courts of last resort throughout the country hold that this rule of decision applies to the common law as it existed in England at the time of the Declaration of Indcpendence. We therefore suggest that the Supreme Court of this State announce a rule of decision in conformity with the majority decisions."

JUDGE BUDGE: That matter is before the Court now.

MR. GRAHAM: Then we will not take time for discussion.

MR. OVERSMITH: And No. 11 stands in the same category.

MR. GRAHAM: And that will be automatically disposed of without consideration. The matter is before the Court. No. 12, "The State of Idaho through the Attorney General's office should protect its citizens against the unlawful expenditure of public funds, and the illegal levy of taxes, and we recommend that one of the duties of the Attorney General shall be to investigate, with the assistance of the various County Attorneys, wherever possible, reports of illegal expenditure of public funds by any of the political subdivisions or officers of the State of Idaho, and appropriate action be taken in the name of the State of Idaho, as plaintiff, to remedy any just complaints."

MR. GRIFFIN: A very similar matter was taken up last year.

MR. OVERSMITH: It was taken up. I drew the bill and presented it to the revenue and taxation committee of the House. I don't think they understood it. I don't see any harm in it, and I can see a tremendous amount of good. In my county, for instance, I don't see any reason for over half a million dollars of illegal diversion of money and expenditure of money. Several years ago I had a case where it was proposed to invest public money of a highway district in a bond or policy of some eastern concern. There is no way that you can bring action of that kind, unless you bring it in the name of an individual taxpayer. You must depend upon donations or donate your services in a matter of that kind. The case was for flagrant violation of law. It seems there should be some duty somewhere upon some public officer to prosecute to conclusion, for instance, to the Supreme Court, any illegal diversion of money. If I steal any of your money or property, by an action you can send me to the penitentiary, but if I am on a public board and illegally divert money, there is not a public officer that will take charge of the matter. There are very few of the county attorneys who will ever take up a matter of that kind if you bring it before them, and some of the county attorneys themselves are remiss in their duties and allow by their permission the payment of bills that are purely illegal. That is not true as a whole. There should be a further amendment to take care of emergencies. A lot of illegal expenditure of money is due to the fact that great emergencies arise sometimes where there is no money to take care of the emergency, for instance, one highway district in my county found itself without money to repair the culverts, hridges and so forth. They violated the law. There ought to be some way for their petition to the county commissioners and getting permission to raise an extra

levy. In case of an emergency in a county, such as insurrection or floods, or unprecedented circumstances, they could apply to the State Board of Equalization for permission to raise such levies as were absolutely necessary at the time. That should be done by notice so that the taxpayers would have a chance. The law enforcement officer should protect the taxpayer just the same as the law enforcement officer protects us against the criminal acts of an individual. I don't see any distinction between the duty. I don't mean to say that the act of appropriating money, or the way that a municipal corporation is spending money, is with criminal intent, but the results are the same where the taxpayer is concerned. I move that it be referred to the legislative committee.

A VOICE: I second it.

JUDGE KOELSCH: In Owyhee County with no criminal intent at all, they spent money and they issued warrants when they had no money to spend. They took the position, here are certain expenses that the county must incur and, of course, it has to issue its warrants therefor, regardless of what the prohable income of the county is. Let me give you one instance—in '32 they levied the maximum levy allowed by law for current expenses. Their assessed value was three million dollars for county purposes. If every dollar of the taxes levied for current expenses had been paid in full, and we know that is very seldom done—there are always some delinquent taxes—they would have received that year $27,000.00 in taxes. In their budget they appropriated $87,000.00. There was elected in that county a young fellow as county attorney. He seemed to take in the situation very soon. The result was an action. This action came before me, and went to the Supreme Court, and since that time Owyhee County has balanced the budget on paper, and by next year will have it actually balanced. I mean by that their income will pay up their bills, everything that they appropriated. And you will find if you look into it we have sufficient law on the subject. All you need to do is to get a young attorney like Mr. Smith to enforce that law, and your counties will soon be on a cash basis.

MR. MARTIN: Practically every state and every county indulges in using money for purposes not authorized by law, and there is no way to stop that unless some taxpayer will dig down in his own pocket and pay the expenses of bringing the action. The public officials either have no duty enjoined upon them to protect the public in that regard, or in many cases they are not authorized to do it—and the gist of this recommendation is of value in drafting some official whose duty it is to bring these actions instead of forcing it on the taxpayer.

MR. SOULE: For a number of years we have had the budget law. There is no county under the budget law that can get on a cash basis; in other words, we budget ahead for a year and borrow under the budget law to operate one year ahead. I think our trouble, or a substantial part of it, is our budget law. I am not saying that the budget law is all evil. The first budget law passed in Idaho set up some six or eight different funds for the sheriff's office and for various other offices and made it unlawful to take from one fund and put in another. Therefore, one fund would sometimes lie idle. I remember when in the fund of the sheriff $1,500 lay idle and he had not a dollar to employ snfficient help when he needed it. The county officials cannot budget ahead intelligently. We cannot foresee just what will happen. It is true the last clause of the budget law attempts to take care of emergencies. I certainly doubt that it does but we have taken and assumed that it does.

MR. OVERSMITH: 1 don't find so much misappropriation of funds in the counties as I do in the school district, highway district, good roads district, and small municipal corporations. There doesn't seem to be any duty devolving upon anybody to look after those, at least there is nothing specific. It is very difficult to get any remedy wbatsoever, unless you dig down in your own pocket and pay the expense, and we are not going around begging people to put up money in order to carry out what ought to he a public function. It is a public function when the money is raised.

MR. GRAHAM: There is a motion before the house, and that is that this be referred to the legislative committee. Those in favor of the motion signify by saying "Aye." Those opposed same sign. The "Ayes" prevail. The next one is No. 13, "We recommend that all statutes relating to instructions to juries be repealed, and that the Justices of the Supreme Court, on the recommendations of the Judicial Council of the State of Idaho and the Board of Commissioners of the Idaho State Bar, provide by rules the manner of giving instructions to juries, exceptions thereto, and any other matters in connection with the subject and which will be uniform throughout the State of Idaho." That will naturally come under the rules and regulations of the courts, and it will he continued until the discussion of the Judicial Section report when it comes up.

The next is No. 14, "That a law be passed allowing attorney fees against an insurance company or upon any policy of insurance upon which suit had to be brought for recovery." This rule is in force in a number of states, providing for the recovery of attorney fees on insurance policies and I see no reason why it should not be enforced on insurance companies the same as it is on notes and mortgages. In the absence of Mr. North, to whom this subject was assigned, and in the absence of any objection, I am going to automatically refer that to the legislative committee for consideration.

The next subject, No. 15, "Requiring all teachers to take the oath agreeing to support the Constitution of the United States and the Constitution of the State of Idaho." Mr. Benoit has handed to me a specific resolution, and we will consider this resolution in lieu of the subject as printed on the program: "BE IT RESOLVED That the Idaho State Bar favors the enactment of a law by the state legislature requiring all teachers and instructors in all public and private schools, colleges and universities within the state to subscribe to an oath of allegiance to the constitution of both state and nation." Mr. Benoit, what have you got to say on this subject?

MR. BENOIT: Mr. President: This subject is possibly a little foreign to anything pertaining to the practice of law, or anything that

may benefit any memher of the Bar. It was not brought up at my suggestion. I was asked by the President to present it. This question can be seriously considered by any Bar association. The subversive propaganda attempting to scrap the Constitution and destroy our present fórm of government is much more serious than many people would think, regardless of the attempt of many able men to minimize its seriousness. Investigations have shown that in schools, our public institutions, teachers and instructors have taught the boys and girls doctrines of Communism. No objection to teaching doctrines as they are, but the objectionable part and one which would be at least odious to any American, is the influence that these teachers have in impressing upon youngsters the fact that our form of government is outmoded and that Communism and Collectivism of Soviet Russia is what we need in this country.

Not long ago a group of teachers in New York state refused to take an oath to uphold and defend the Constitution, and in the last session of the legislature in Massachusetts I am advised that the teachers' association had a tremendous lobby to defeat such a proposed law in that legislature, saying that it reflected upon the teachers and that it questioned their patriotism. Well, certainly, if they had much patriotism they would have had no objection to taking such an oath. I am wondering how many of you men who were required to take that oath before being admitted to the Bar feel that your patriotism was being questioned.

Our statutes provide that every man appointed to an office created by statute take that oath. If there is any reason why teachers who teach your children and my children, who are supported by money raised by taxation, should have any objection whatsoever to taking an oath of this kind, I don't know what it is. I don't think this question should prompt much discussion. I believe the members of the Bar would be happy to pass a resolution of this kind, and personally I believe that any teacher who would refuse to take the oath of allegiance to the Constitution, both state and nation, has no business to teach your child or my child. I move that the resolution be adopted.

GENERAL MARTIN: Do I understand that this includes private schools?

MR. BENOIT: Yes, it does.

JUDGE BUDGE: With all due respect to what my friend Mr. Benoit has said, I am just wondering whether we, as members of the Idaho State Bar, should inject this question into our deliberations. I may not be fully informed, but I am not satisfied that we have in this state a class of teaehers or instructors that will come under the suggestion that might he carried by an adoption of this resolution. We are not living in a thickly populated state, or in a state where the population is so dense that possibly something of this sort might, or might not, be justified. Personally, I hold the highest possible regard for and have the greatest unlimited confidence in the teachers and instructors engaged in the teaching of our young folks in this state, and I do not believe it would be wise to point to them as a class that would he required to subscribe to the Constitution of the state. Now,

I think in a little town like this possibly you could go out and find out who the teacher is that is teaching the young children, and in this town you will find that they are of the highest reputation and they are people of high ideals, that they are loyal and patriotic and love the Constitution and institutions of this state as much as any of us, and possibly more, and I think we ought to be just a little careful about adopting a resolution of that kind, for the reason that I do not think it is a matter that we are interested in to the extent that we ought to go on record.

MR. FEENEY: I find myself in disagreement with both of the last speakers. I agree with Judge Budge that it is a matter not germane to our work, but I agree with Mr. Benoit that it is a matter that the proper societies and proper organizations should take up, and that those who are teaching our children should be required to take the oath.

MR. SMITH: Any teacher who obtains a salary or emolument from any state or government source should take this oath to support the Constitution. I disagree with Mr. Benoit that all teachers should be required to take it. For instance, teachers who are connected with strictly religious or sectarian institutions. I have always understood that education is one of the sovereign powers, and comes under one of the main branches of our government, and I don't see any distinction in requiring all government and municipal officers to take the oath of allegiance to our Constitution and in requiring a teacher obtaining a salary from the same source, to take the oath of allegiance.

MR. MORGAN: I am in hearty sympathy with Mr. Benoit, and, as usual, I find myself not in accord with the Supreme Court. The situation is this: The purpose of this oath is not to protect public funds; it is for the purpose of protecting the Constitution of the United States, and I can see no difference between a child who is educated in a secular or private institution and one that is educated at public expense, so far as that matter is concerned, because both of them and each and all of them are future citizens of the state. There can be no reason why you and I should subscribe to an oath that a public school teacher or a private school teacher is not required to subscribe to and respect. For that reason, while it is not a matter that primarily concerns the Bar, I am heartily in sympathy with the speech of the speaker here yesterday who substituted and "pinch-hit" for the President, to the effect that the judicial department is the bulwark of our country, and I believe that it is highly proper and meet that this organization should go on record as recommending to the legislature, not as a matter which our legislative committee shall put through, hut as a matter of recommendation, that we believe that the government at large and the children of this country are entitled to the protection of that oath, and I am in favor of the recommendation.

MR. BENOIT: I did not intend to reflect upon any teacher of our state. I grant you that in a state of this size we do not have the condition that exists in the larger states, hut why should any school teacher in the state take any offense whatsoever; as a matter of fact, if they are that kind of teacher that we want they should he glad to

take that oath and say they would gladly do it as a prerequisite to being chosen and elected by the school board, as should the members of the school board. I can see no reason for alarm about this or that anybody is going to take any offense whatsoever.

MR. JAMES: It seems to me that this motion is directed at the teachers. I think it could be considered as an affront. If it be deemed necessary that the teacher should sign the usual oath, why not have a motion to the effect that all officers of the state, including teachers, be required to take the oath?

MR. BENOIT: All officers do already.

MR. JAMES: A motion of this kind will be deemed a direct attack on the teachers. I would like to offer an amendment to that resolution to read, "as is required of officers of the state."

MR. BENOIT: I accept the amendment.

MR. OVERSMITH: There are certain municipal officers that are required to take the oath. Now, teachers are hired by municipal corporations, or quasi-municipal corporations. I have no objection to a teacher teaching Communism or Socialism or anything else as long as they don't become revivalists or propagandists and neglect their duty. I can cite an instance where teachers go entirely outside of their own work teaching Socialism and Communism. They are right here in Idaho. There is no question about it. They are here. Now, they should teach the subjects they are assigned to teach and not be teaching Communism when they are not hired to teach Communism, but I am going to suggest that you revise that resolution that all salaried employees of state and state institutions and municipalities or quasi-municipal corporations should take the oath of office.

GENERAL MARTIN: May I ask a question? Is it a violation of the Constitution of the United States to teach Socialism?

MR. OVERSMITH: No, it isn't. I will move that the resolution be changed to require that all regular salaried employees of the state, state institutions, and of municipal corporations or quasi-municipal corporations, take the oath.

A VOICE: I second the motion.

JUDGE BUDGE: I think we are just going too far. We are considering a matter which is entirely without the business that should be before this Bar. We know that the rebel soldier took the oath of allegiance, he would take it noon and night as often as they administered it to him, but that didn't make him a Union man. Who is going to administer this oath? Are we going to admit that it is necessary in this state that we stand up every instructor in our institutions and teacher in our district, before they can go in and teach our children, and say that they have to take an oath that they will support the Constitution of the United States?

MR. GRAHAM: You make the lawyer do that.

JUDGE BUDGE: We ask the lawyer to do that because he is admitted to practice and that is a statutory matter, but the school teacher is a local matter. Each school district employs their own teachers, and it is a matter for the trustees of that district who they will employ, and they are not going to employ the class of people that

some of you have in mind that this oath might make American citizens or loyal American citizens. I don't think the taking of an oath in the way suggested will make a teacher a loyal citizen, if she isn't now, and what I object to is designating them as a class, pointing to them as a class. I am afraid that you are going to reflect upon them, and it will not be a help.

MR. MORGAN: Doesn't Mr. Oversmith's motion eliminate your entire objection?

JUDGE BUDGE: I don't know that it does because I think, Mr. Morgan, that it is a matter we are not concerned about; it is a matter we really couldn't say was a part of the business that we are here to transact.

JUDGE KOELSCH: Most of you know I am not much of a debater. But when this question is bandied about I cannot sit still; when they say it is an affront to any citizen to ask him to take the oath of allegiance to the Constitution of the United States, it seems to me that even these vacant chairs would rise up and protest against it. It is not a theory that is confronting us; it is an actual situation that we have got to face. Those of us who look about cannot help but notice that the Constitution of the United States at the present time is under attack, even from very high sources; so much so that a senator of the United States felt called upon to reply to that attack. In the state of New York, as Mr. Benoit mentioned, probably 700 teachers refused, not because they were singled out as a class, but they refused to take the oath of allegiance to the United States because they wanted to go on with pernicious teachings. There is no question about it. In the year 500, or such a matter, before the Christian era, every school boy in Rome, before he could graduate from the common school of that Empire, was compelled to commit to memory the Twelve Tables. Those Twelve Tables took a similar place in Roman law that the Constitution of the United States does in our law, and while that law was in force the glory of the Roman Empire was undimmed; when the law was dropped, that fact contributed to the Empire's downfall. We know that there is pernicious instruction being dealt out in some of the schools. Why not set a worthy example here and say that the teachers of this state are not afraid to take the oath of allegiance to the Constitution? I am in favor of that resolution.

MR. SOULE: We do not ask teachers to take the oath because we feel that they are beneath any of the other officers, but it is to instill into them the sort of patriotism that was indicated throughout the address of T. Bailey Lee that we heard yesterday, and it should not be an offense to anybody, even if they could teach Socialism in the schools. It is for that reason that I think it is very proper that this Bar should pass on the matter.

MR. KESSLER: I have never been given very much to the compulsory taking of an oath. No one holds in higher esteem the Constitution of the United States, and enforcing and abiding by the laws of the state of Idaho, than I do, but I always wonder if when we go through the formality of requiring oaths we are not really weakening that patriotism. As has been said by Mr. Martin, requiring the tak-

ing of an oath would not prevent the teaching of Socialism. I doubt whether it would prevent the teaching of many of the things that many of us consider absolutely pernicious. It isn't tbe right way, in my judgment, of going about it. We probably should teach in our schools and require our teachers to teach the fundamental principles of democracy and the high ideals of Americanism and the superiority of the democratic form over other forms of government and the power of the rule of the people. I believe that is right and it should be required to be taught, but requiring the mere formality of an oath to support the Constitution and laws of the state, it seems to me, is a reflection. It is true that members of the Bar take it, and probably it is a matter of form through the ages. I don't know as there is any particular objection to it, and I don't know that there is any great virtue. Those who are going to support the laws and Constitution will support them, and those who won't, who have these pernicious ideas in their minds, are going to violate their oaths. We have to go deeper than that. I will go as far as anyone in requiring the teaching of patriotism and the real principles of government, but to single out teachers or any other class and say they shall go through the formality of taking the oath—those who don't have high regard for principles will disregard the oath when they do do that. I think that is not the best way, and it is going at the thing in the wrong way and won't work.

MR. GRAHAM: May I remark that I was instrumental in putting this on for discussion and feel that I perhaps was to blame for the discussion that has taken place. This matter was brought to me most forcibly a few years ago. I had a boy that attended Pittshurgh "Tech." He was there a year, and when he came out of that institution he was a rank, raving Red by reason of the teaching, and it took me ever since then up to the present day to get him with both feet on the ground. Now, I tell you this, that the institutions of higher education are under suspicion at the present time. Look what took place in Chicago. It is possible that here our teaching force in the state of Idaho do not need any admonition from us; if they don't, they ought to be pleased to walk up to the counter and hold up their right hands and take the oath of allegiance. It is not a reflection upon their citizenship. I am a Canadian by birth, and when I came to this country, and was naturalized I took the oath; I took it again when I started to practice law. I am not ashamed of the fact that I took the oath of allegiance. The children of that tender age are being impressed with those ideas; I tell you it is ruinous to the child, and any person who has had a child in the position that I had one will realize the importance of it. Now, what is the next step? You say we have nothing to do with it. I think it is the duty of every lawyer in the state of Idaho and every judge in the state of Idaho to stand upon his hind feet and say "Yes, we are behind the Constitution of the state of Idaho." All public officers—teachers in my judgment are quasi-public officers—should be pleased to have the opportunity to walk up and take that oath and place themselves heyond suspicion. We will now listen to the motion. What is your substitute motion?

MR. OVERSMITH: That all salaried employees of state and state institutions and municipal corporations or quasi-municipal corporations should take the oath of office.

MR. MARTIN: We have just reached the point where we are making it ridiculous. Here is the city of Hailey that wants to hire a man to go out and dig a ditch to lay a water pipe. Must he take his oath to do that?

MR. OVERSMITH: If he is a salaried employee.

MR. GRAHAM: All in favor say "Aye." Those opposed "No." The "Ayes" prevail. We will now vote upon the motion as amended. Those in favor of the motion say "Aye." Those opposed "No." The "Ayes" prevail. We are adjourned until two o'clock.

AFTERNOON SESSION, JULY 12, 1935, 2:00 P. M.

MR. GRAHAM: We will take up a matter by Mr. Eberle and have the report on "Conditions Facing the Idaho Lawyer."

MR. EBERLE: Some time ago the Bar Commission asked me to act on a committee to send out a questionnaire to the members of the Bar with respect to certain phases of the practice of law in Idaho. This is in line with the policy of Bar surveys all over the country. We examined the reports of a number of those surveys and were surprised to find that many of them had been made as "CWA" and "FERA" projects. They were rather elaborate and heavily staffed in the forces that they used in making these analyses and surveys. They used about the same method of approach in practically all of them. They would first develop the growth and origin of the Bar in the particular jurisdiction that they were examining. They would go into the question of over-crowded conditions. They would analyze the legal aid for the Bar, and in general give an analysis of the profession in that particular jurisdiction with reference to the earning capacity and income of the lawyers and compare it with other businesses and industries. They used a number of indices in determining the relation of the profession and that of other industry and business. Many of them had used questionnnaires. It was quite manifest, however, that that was a futile gesture and unpractical for no substantial part of the questionnaires ever returned and those that were returned were only partly filled in. In view of the apathy on the part of the lawyers of Idaho, it was thought more than futile then to send out a questionnaire to the members of the Bar. We did come to this conclusion, however, from an examination of these reports on these surveys, that there can be no question but what there are great possibilities in an analysis of the profession, so far as Idaho is concerned; in other words, in addition to the program of the Bar Commission with respect to the betterment of the administration of justice, that the Bar undertake in a proper manner and with a sufficient staff the gathering of data and the analysis of the profession particularly with respect to the income and the earnings of the members of the Bar in Idaho. As has been mentioned here yesterday, and for the first time in the many years that I have attended these meetings, there has been a general theme of this meeting to create interest and to build a real and

powerful and helpful Bar. It is, of course, a reciprocating situation. It may be that if the proper interest existed in the minds of lawyers, we would have the proper activities on the part of the Bar, and perhaps a different kind of activity might create interest in the members. I have come to these meetings for a number of years. Each time I go away feeling that what we say here and what we do here is rather futile, that there is no typical, no genuine representation of the Bar at these meetings. I am speaking frankly because I feel that the major premise of any constructive suggestion is not to "kid" ourselves, but I have come because it is the one opportunity I have each year of meeting old acquaintances and old friends that I don't run across in the ordinary course of my practice, and in these years there has grown up between us a genuine affection. I get a real joy out of coming and I never lose hope that some time, somewhere, we will be able to build a real Association with the members of our profession.

Now, with respect to this activity I mention, an analysis of the Bar, I have particular reference to the earnings and income of the members of the Bar. Each time that matter is brought up it is generally followed by some member of the Bar arising and haranguing upon the ideals and the lofty sentiments and perception of the profession. I believe in the twenty years I have been here I have tried to impress upon myself and others the ideals of my profession. I believe that in that time I have been impressed with the fact that it is a jealous mistress. I think I know it is a career of constant toil—at least the loss of my golden locks should bear proof of that. So when I say this I am saying it not with that sentiment or conception that pecuniary remuneration should not be subordinated to the proper duty and function of the members of this profession, but I have an abiding belief that in any business, any profession, where the members are not receiving a living wage, there is an inclination toward a corruption of mind and character that is not wholesome. Now, I didn't go into this with the thought of making the analysis myself, because I think that that is the function of the Bar Commission, but I did ask Mr. Diefendorf, the Commissioner of Finance, to check into the incomes of the members of my profession from 1931 to 1934, inclusive, and give me a classification according to certain definite limits which I gave him. I was not going to give you all of these gruesome details, but after listening to Carey Nixon read the letter of one of our fellow members I concluded to give you this in just one or two sentences. I found that apparently last year, 1934, 70% of the members of my profession earned less than $2,000.00, and, excluding the judges and district attorneys and others that were appointed and were receiving salaries as such, 10% of my profession had a gross income of over $4,000.00. I am not going to analyze for you what a gross of $4,000.00 means to a lawyer. You can read between the lines from your own experience. You may say that that was a bad year. The fact is that using the index of business it was not a bad year in Idaho in other business. Our retail sales were about twenty million dollars, not far off from the maximum in the pre-depression days. In 1933 the income tax was $260,000. The collections to date for 1934, I think

I noticed in the press, were running $360,000. Business made money in Idaho last year. Seventy per cent of our profession were under $2,000. To me that is not a wholesome condition. It is true that this in part may be due to what one of my clients insists on calling "these depressionable days," but I checked up the '31 returns and found that in '31 there were in the classification under $2,000 only 10% less than there were in '34, and that the number of lawyers receiving over $4,000. gross in '31 was only 20% more than receiving that amount in '34, and, as you know, '31 was a good year in Idaho; the backwash of the depression had not reached us. Whose fault is it?

Of course, it is true that whenever this question is brought up before the Bar someone raises the point that we owe a duty under our oath to protect the poor and oppressed and to protect the abused. I am not worried about that phase of it. There is always a certain amount of charity work, but I cannot believe that when the major portion of a profession is not receiving a living wage, that that is due entirely to charity. I suspect that the Bar is giving away its capital and giving away its services. We laughed yesterday when Mr. Nixon read the letter from one of the members of our profession. We ridiculed the idea of giving them some protection. I am not as young as I was when I talked about this some years ago, but for twenty years I have watched the older members of this Bar going one by one. I know the widows of many of them. What do they leave? I need not tell you—a worthless law library—with one or two exceptions that you know of, no other things. Now, is that the fault of our profession? It is true that we should subordinate pecuniary remuneration to the proper function and duty as a member of the profession, but surely with these statistics, can anyone ever accuse a lawyer in Idaho of practicing law here for any reason excepting for love of his profession?

You chuckled when Mr. Nixon read the letter where the lawyer said that he could not afford to attend these meetings. I am not sure that I can afford to attend these Bar meetings. We dress; we live; we give our time and our energy to the public; we try to live up to a certain standard that we believe is fitting to the dignity of our profession; and yet if the Clerk or any of these officials who have been receiving more than we receive were to be put to the type of living that we do, would we lose respect for them? Is that partly the reason why people have lost respect for us? We may not believe in the Machiavellian philosophy, but that is one truism we have got to meet, as apparently the legal profession of this state has given its services for nothing and lost self-respect, because to me, and I don't care whether it is a person on relief or any place else, it is only when he obtains a living wage for his services that there is a stiffening of his self-respect, in any business or any profession.

Now, if the Bar Association through an analysis would be able to help the individual member, it might facilitate their ability to attend these meetings; it might create an interest in what we are doing for the individual members; it might be so valuable that we could impress upon those who are entirely apathetic to our association that there

might be something more to the profession than merely love of our practice. Yesterday it was mentioned that in the medical profession and the other professions their attendance runs 70, 80 and 90% at these meetings, and they do have a cohesive organization. Anyone that ever had occasion to use an expert medical witness in the past will know that you cannot obtain his testimony for the same price today that you could a number of years ago; just try it. Every medical man takes what he calls the "Hippocratic oath," and in a certain portion of that oath is the portion that says that each member will be just and generous to every other member.

Now, in listening to the statements made here with respect to the local Bar schedules and agreements, I had in mind here a particular case in Boise. We get up at the luncheon table and we discuss this situation. We say that there is a certain amount of legal work; that there is no reason why the people should not pay a living wage to those that provide those services; and we agree on what we think is a reasonable fee; we sign that agreement; and yet within a day or so here is a member again working for nothing. Now, of course, it is possibly true of our profession that we should never lower the standards to those of ordinary merchandising pursuits, and yet in the last several years have you heard of any merchandising pursuits that have lowered their standards to a point where their members would do that? It is not a question of lowering of standards as a profession to the standards of merchandising pursuits and business, but our raising them to the same point where business has raised their standards because, call it what we may, in business it is "chiseling." The moment that that standard is broken by any member of the Bar it is demoralization. When we talk economics we call it "cut throat competition." I am not certain whether anything can be done about it. I am not certain but what we will go away and say we heard the same old conversation, and we will have the same condition continue, but I am always hopeful that by persistence some day, some time, we will be able to organize the men of our profession in this state into a cohesive and powerful and helpful organization, where every member will be just and generous to every other member, and no one will be able to say of a locality that the major portion of our people are not receiving the compensation of ordinary clerical help. I don't care what philosophy of life you may use, but I think you will agree with me that that condition is conducive to a mental corruption that is more insidious than the palpable and obvious corruption that we may be familiar with in our practice. I have spoken plainly because I think, having tried a number of other ways to induce the membership to come into this organization and make it worth while, we might try this once with the idea of helping the individual member; perhaps it will be futile; still I think we should persist.

Now, the suggestion made this morning, which will be discussed tomorrow, is that we organize in districts or local Bars, and that they become part of our state organization, and inasmuch as conditions cannot be the same in the different sections of the state, that agreements may be made by these local Bars which will be recognized by

the State Bar. It has been said that a violation by a lawyer of those local agreements will never be sustained by the Supreme Court or by our judges as grounds for disbarment. I can't think that our judges in this state will ever feel towards us to the extent that when a member of our profession signs an agreement with other members and violates that agreement, that that conduct is not conduct unbecoming a member of our profession. Of course, measures such as that are the court of last resort, perhaps the only way we can bring back to the members of our profession that only through a united front can we raise the standard, because, as I say, I have an abiding belief that unless the members of any profession or business are receiving a living wage for their work (and I think every member of the Bar does work and works hard) only with such living wage we will have a stiffening of self-respect and the dignity of our profession. I thank you.

MR. GRAHAM: In arranging the program for the Bar meeting we wanted a speaker here that could enthuse the members and bring home to each and all of the members of our profession an inspirational message. We took it up with Judge Ailshie by reason of his connection with the members of the American Bar Association, and he by reason of his acquaintance has secured the services of a distinguished lawyer from the City of St. Louis, who is on his way to the American Bar Association meeting and is kind enough to come this way for the purpose of helping us out. I will now ask Judge Ailshie to introduce the speaker, as he knows his faults and failings much better than I do.

JUDGE AILSHIE: Mr. Chairman, ladies and gentlemen, as yon all know it has been the custom and practice of the Bar Commission for a number of years to secure the services of at least one outside speaker and some one of outstanding reputation and ability, to address us on whatever he might see fit. In casting about in my mind I recalled the incident which brought me into acquaintance with our speaker for today. I was fighting a losing battle down at Chicago at the meeting of the American Bar Association some years ago when the campaign was revived on repealing the 18th Amendment. A number of us agreed on the evening before that we would make a fight against the recommendation of the executive committee of the American Bar Association. It had been agreed that I should make the first talk and the others should back me up. When we got into that great hall the next morning I made the most heroic battle that I knew how, and all my assistants fell by the wayside. To my great surprise and delight my friend here came to my rescue and, while we didn't save the day, it enabled me to retire very gracefully, and I have a very kindly feeling for him. We have met since that time, and I know that he will give you a splendid message. He has been engaged in a great many political and civil fights in his state and he is such an outstanding character that in these perilous times he has been called by the city authorities to the position of corporation counsel of the City of St. Louis and that, of course, means that he has some standing in that city and that he is known as a lawyer of ability and a fighter

that doesn't quit, and I take great pleasure in introducing to you, Honorable Charles M. Hay, corporation counsel of the City of St. Louis, who will address you on the subject, "Is the Coustitution Adequate to meet the Demands of Modern Society?" Mr. Hay.

MR. HAY: Mr. President, Judge Ailshie, members of the Idaho Bar Association, and ladies and gentlemen: It was really worth while coming all the way out here to be introduced in such a lovable manner by so distinguished a jurist of your state as Judge Ailshie. You are not known to me very well, and I am not known to you very well; in fact, Judge Ailshie took great chances, not knowing me any better than he does, in inviting me to come out here and particularly in giving me the freedom of selecting some subject; in fact, we are in the situation of the young fellow that went west to get a job on the ranch. He went to a rancher and told him he was looking for a job, and the rancher said, "We haven't anything for you to do except ride a horse," and he said, "I don't know anything about that; I was never on a horse in my life," and the rancher said, "I can fix you up fine; I have a horse here that never had a man on his back in his life." I can only hope that we will get a little bit more acquainted as we go along. I do appreciate very much indeed this introduction. Judge Ailshie has been kind enough to refer to my connection with the City of St. Louis and some of my propensities, and I didn't realize he was in such desperate straits in Chicago. It was, I presume, somewhat of a surprise for a man of my physical appearance, from St. Louis, to appear to assist a man making a dry fight. I am about the only remaining dry in the City of St. Louis, and when I was asked to be City Connsel of St. Louis by a mayor whom I only casually knew, I was as surprised as if I had been offered the prime ministry of England. I couldn't understand it, but when I attended some of the celebrations celebrating the Democratic victory, and when I saw some things which in my unsophisticated world I had never seen before, I decided that the only reason the mayor had appointed me was that they wanted one man sober enough to make a speech at all times. He wants a sober Counsel, so I was elected to that position.

When Judge Ailshie asked me to come and speak to you he told me I could select any subject that I wanted to select. It was about the time that something happened that raised an issue in the minds of the people as acute and important and as far-reaching in its implications as any issue that has been presented to the people for many days. I realized in making the selection of the subject I did that I was selecting what has been and even now is a controversial question. I realized I was selecting a controversial subject and one on which, if I should say anything at all, I would say something with which some of you would not agree. I did not think that it was worth while to come 1,500 or 2,000 miles over here and simply say some little things in which I did not believe myself, and contributing nothing to the stimulation of thought, if not to the sum total of your wisdom, and I was moved to select a controversial question because of the generosity of Judge Ailshie in giving me carte blanche to select any subject tbat I wanted to, because that indicated this,—that he

was not going to censor me too closely, and especially because I was going to the state that sent to the United States Senate one of the most independent men that ever graced that body, and while I say to you I think I do not belong to that party that Senator Borah belongs to, or, rather, to that party the appellation of which he bears—I don't know whether he belongs to any party or not—some parties may bclong to him, but he does not belong to any—I could not conceive of a state and the Bar of a state that was big enough and broad enough to continue to send that man to the Senate, which would be particularly critical of a gentleman who came out and said some things with which you did not agree, so I took the liberty, gentlemen, of getting up a speech that expresses some views that I have. If you disagree with me, I trust you will at least enable me to get safely out of the city, and, if you agree with me, I shall be comforted. If there is any disagreement, it will be an evidence that I have perhaps contributed something to the arousing and stimulating of thought. If there is any body of men in America who ought to think, who ought to do constructive thinking, critical thinking, bordering at times on destructive criticism, in order that they will through thinking and discussion, inquiring and seeking for the truth, find the way the people of America ought to go, it is the Bar of America. We have a glorious history, we lawyers, in the record of contribution to constructive thinking and constructive leadership throughout the history of the Republic, particularly in the great crises of the Republic. We cannot forget that the voice which gave the colonists their battle cry of "Liberty or Death" was the voice of a lawyer; that he who will be known as tbe "Father of the Constitution," not a practicing lawyer, was a learned lawyer, and associated with him were twenty-eight other lawyers in the Constitutional Convention, who fought out the great controversies and made the great portion of contributions that ultimately led to the framing of the Constitution; that later those who led the Colonists to the adoption of the Constitution were the lawyers here and there in the Colonies. Later in our history in other crises lawyers have been leaders. I think, referring to it briefly, we do not claim too much when we say that lawyers not only led in the fight for independence, for the right to establish the sort of government that the people of this country might elect to establish, but that they always have been and were the buttress of the government in the days that have followed, and have been the great leaders in tbinking, in constructive thinking, in every age of our history. Therefore, I make no apologies, gentlemen, for selecting a subject on which we must do some thinking today and tomorrow and in the tomorrows that lie ahead of us for perhaps many years.

Is the Constitution adequate to meet the needs of modern society?

The question I put here has been pressing itself to the force for some time—particularly since the Supreme Court's decision in the N.R.A. case. In the comments and discussions followiug that decision, varying and contradictory views have been expressed, ranging all the way from proposals thoroughly to revise the Constitution—to a demand for condign punishment of him who dares suggest any change.

One group demands that the Constitution follow the New Deal; another that the New Deal follow the Constitution. One insists that the constitutional limitations upon the power of government to deal with social and industrial problems and processes remain inviolate at all costs; another insists that governmental powers and functions be so changed or extended as may be necessary to enable government effectively to deal with modern social and industrial problems and processes. One group would, it seems, save the Constitution, whatever happens to the country. The other would save the country, whatever happens to the Constitution.

RIGHT OF EACH GENERATION TO MAKE ITS OWN LAWS

I hold that it is the right of our generation, as of each and every other, to study its own conditions and needs and shape its laws, government and institutions as it may determine will best serve the demands of the time.

Democracy's great philosopher-statesman, Thomas Jefferson, in a letter written in 1816, stated this proposition as follows:

> "Each generation is as independent of the one preceding, as that was of all which had gone before. It has then, like them, a right to choose for itself the form of government it believes most promotive of its own happiness; consequently to accommodate to the circumstances in which it finds itself, that received from its predecessors. . . . This corporeal globe, and everything upon it, belong to its present corporeal inhabitants, during their generation. They alone have a right to direct what is the concern of themselves alone, and to declare the law of that direction."

Upon the relative capacity of succeeding generations to act wisely, he said:

> "Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment. I knew that age well; I belonged to it, and labored with it. It deserved well of its country. It was very like the present, but without the experience of the present; and forty years of experience in government is worth a century of book-reading; and this they would say themselves, were they to rise from the dead. . . .
>
> "We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regime of their barbarous ancestors."

COLONISTS FRAMED CONSTITUTION TO MEET NEEDS OF THEIR DAY

It was upon these principles and convictions that the colonists acted in framing and adopting the Constitution. It was not written by a group of generous but ambitious patriots trying to immortalize themselves by writing a declaration of purposes and a plan of government for future generations. It was written by far-visioned but practical men trying to set up a government to meet the needs of their day and hour. They were not trying to save America from the depression of the 20th Century; but from threatened anarchy in the

closing days of the 18th Century. Their primary concern was not whether historians in later centuries would agree with Gladstone that the instrument they were framing was the "greatest work ever struck off at a given time by the brain and purpose of man;" but whether the men of their day would think well enough of it to adopt it and set up a government under it.

RECOGNIZED RIGHT OF AMENDMENT

The framers of the Constitution explicitly recognized the right of succeeding generations to effect changes in the Constitution and the government set up under it, by making provisions for amendments. They extended this right not only; but they themselves made liberal use of it. Within four years after the original Constitution was adopted, the first ten amendments were proposed and ratified. Succeeding generations have likewise exercised this power by the adoption of eleven additional amendments.

Thus, through the power of amendment, the Constitution has changed. Indeed, it has grown. It is a far greater instrument today than when originally framed. Then it contained no Bill of Rights. This is now embodied in the first ten amendments. Then it continued the slave trade for 20 years and recognized the institution of slavery. Today the 13th, 14th and 15th Amendments prohibit all that and provide further guaranties of personal liberty. Under the original Constitution, no federal income tax could be levied; the people could not directly elect their senators, and women had no voice in the government. All these are provided for in the Constitution as it now stands.

CONSTITUTION GROWN TOWARD DEMOCRACY

The Constitution, I repeat, has grown. It has grown in the direction of true democracy. Of the 21 amendments, 13 of them, the first ten and the 13th, 14th and 15th, throw guaranties and safeguards about the rights and liberties of the individual—the 17th provides for the direct election of senators, and the 19th extends suffrage to women.

It has grown in the direction of democracy in two other respects—in the nullification, or amendment by practice, of the Electoral College system of selecting a president, and in the adoption of the 20th, or Lame Duck, amendment.

The framers of the Constitution considered the Electoral College set-up their crowning achievement. This was to save the country from the ignorance and excesses of the mob. Wise and good men were to be elected and they were calmly and most dispassionately to select a president. Not once has the system worked as planned. Throughout our history, the electors have been mere figureheads perfunctorily recording the will of the people.

Through the 20th Amendment the people are enabled to have their will put into effect without the delay formerly prevailing. The old arrangement was essential in our early history, on account of the state of transportation and communication, but with improvements in these, it became only a senseless obstruction to the people's will. Nothing more strikingly demonstrates that the original Constitution was written primarily to meet the conditions of that day and time than

this. The people of that generation traveled in ox-carts, on horseback and in buggies, and they arranged their schedule accordingly. We are traveling in automobiles and airplanes, of which the framers of the Constitution never dreamed, and we may exercise the right to revise the schedule.

CONSTITUTION A LIVING ORGANISM

From all this it appears that never in our history have we considered the Constitution as a frame in which to fix and freeze the social order, but rather as a basis and plan for the organization of the social process—subject to growth and change to accommodate the progressive changes of society. We have never considered it a sepulchre in which to preserve the dead band of the past, but an orgauism through which to give expression to the life of the present. As such, the Constitution has been adequate to meet the needs of every age and generation of our history.

To put it another way, the people of every generation of our history have been able to work under and through the Constitution in their organized efforts to establish justice, promote the general welfare and secure for themselves the blessings of liberty. They have, as I have pointed out, changed it from time to time, but in making the changes, they were just as much within their rights, just as *constitutional,* as in preserving the provisions left unchanged.

Indeed, a struggle to change or amend the Constitution may evidence a higher order of intelligence and patriotism than a placid acceptance of the status quo. While, in a given instance, it might mean an unwise attempt to overturn a sound principle of policy, it might also mean an effort to uproot iniquities and injnstices protected by the Constitution. It might well mean an attempt to enlarge and extend the power of the Government to accomplish the purpose declared in the Constitution.

PURPOSE OF CONSTITUTION UNCHANGEABLE

We must not lose sight of this: *that the unchanged, unchangeable and imperishable part of the Constitution is its purpose.* Do we not rightly interpret the mind and soul of the American people of every generation when we say that the part of the Constitution which has been their "Ark of the Covenant" is the *preamble. Here is the declaration of its purpose—the revelation of its soul.*

What boots it that we change the set-up or procedure of our courts, the mode of appointing judges—or even the rules of human conduct—so long as we the better establish justice? What boots it that we lengthen the arm of government and extend its powers—so long as we promote the general welfare?

I hold to the conviction that the most unconstitutional thing in America is injustice—whether it result from the operations of goverument, social customs or business practices. Nothing is so violative of the purpose—the spirit—the soul of the Constitution as that which destroys the right or opportunity of an American citizen to a fair chance to acquire the things that make for comfort and happiness. The people will rise against your constitution, your laws, your government, your social customs, your business practices, if under them men, women and children starve in a land of plenty. They will curse American civilization if we, for long, are unable to find the way to give to every American a fair chance to earn an honest living.

ARE FURTHER CHANGES NECESSARY?

The purpose of the Constitution must, therefore, be kept inviolate. *It must be realized and fulfilled more and more.* The question which we now face squarely is whether, in order to do this, we need to make further changes in the plan and framework of the Constitution. Before we can answer that question, we must know how the Constitution is to be construed.

If we construe it strictly, read it to find what *cannot* be done, rather than what *can* be doue, then we will find it necessary to make changes—some of them far-reaching; but if we construe it liberally, read it to find what can be done to accomplish its high purposes, then we shall need to make few changes.

Our profession is disposed to be afflicted with what may be called "unconstitutionality-itis." We have a specie called "great constitutional lawyers," whose specialty is to find things *"unconstitutional."* They have usually been found in the employ of big business. They are adept in determining what *business can* do under the Constitution, but what *government cannot* do. For instance, it was constitutional for business to form trusts and monopolies; but unconstitutional for government to restrain them. They found it constitutional for utilities to organize holding companies and super-holding companies, and to adopt business practices which boosted rates and sucked up the resources of the investing public; but unconstitutional for government to regulate rates, supervise the issuance of securities or control or abolish unnecessary holding companies.

LIBERAL CONSTRUCTION NEEDED

What we need in our profession, whether on or off the bench, is an increasing number of "great constitutional lawyers" whose learning is exemplified in their knowledge of what government can do under the Constitution to establish justice and promote the general welfare. We need lawyers and judges with the conception of the dignity and power of our government under the Constitution as expressed by Judge Parker:

> "The people of the United States constitute a great nation. There is no reason why their national government should not foster the healthy growth and development of that nation by encouragement to agriculture, industry, education, road building and other activities essential to the national welfare. And in time of national distress, when the industry of the country is prostrate as a result in large measure of the collapse of interstate and foreign commerce, there is nothing in our constitutional theory which prevents the national government using its powers for the relief of suffering and to place industry again on its feet. It is the only agency which the people have of sufficient size and power to approach the problem presented with any hope of success; and I see no reason why it should be preclnded from exercising the power."

All the world knows the contribution to the growth of the Constitution which came through the interpretation and construction of it by Chief Justice John Marshall. He made it a living, vital thing. It is not too much to say that by his interpretation and construction of the Constitution he sealed the union of the states.

Certain it is that so long as the Supreme Court exercises the power to declare acts of Congress unconstitutional, the interpretation and construction of the Constitution by the Court is of supreme importance. There are many who question the wisdom of permitting the Supreme Court to exercise this power. They point to the fact that ours is the only country which vests in any judicial tribunal power to declare legislative acts null and void.

SHOULD BARE MAJORITY OF COURT DECLARE ACT UNCONSTITUTIONAL?

I am not prepared at this time to say that I favor denying that power to our Supreme Court. It may be well for us to provide this check against hasty or radical change from the principles and policies of government declared and adhered to by those who have gone before, but I submit that to lodge in any body of nine men power, by a bare majority vote, to declare a policy of government, which has been enacted by the congress, with the concurrence of the President, to be of no effort because it is not in accord with the plan and functions of government as laid down in a former generation, is too much of a surrender of the will of the present to the dictates of the past.

I am in thorough accord with Senator Norris in his proposal to require a vote of at least seven of the justices as a prerequisite to the declaring of an act of Congress unconstitutional. There is, in my judgment, much to be said in favor of a *unanimous decision*. We demand the unanimous vote of twelve men, sitting as a jury, as a condition to depriving a citizen of life, liberty or property, but we give to nine men the right, by a bare majority, to declare null and void an act which the Congress, the President and a majority of the people may deem essential to the preservation of life, liberty and property. It seems to me about time that we put this policy to the test of reason. We may well question whether it be not the sort of folly in government which in times past has incited peoples, balked and cheated of their rights, to seek them through violence and revolution.

CONSTITUTION LIMITS FEDERAL POWER

But even with the most liberal construction of the Constitution and with the requirement of a unanimous decision as a condition to a declaration of unconstitutionality, there will be found limitations upon the powers and functions of the Federal Government, which an increasing number of people believe an obstruction to a realization of the purpose of the Constitution. Certain it is that it prevents the government from doing some things which the President and an overwhelming majority of Congress recently deemed necessary to promote the general welfare.

The Supreme Court held, in a unanimous decision, that as the Constitution now stands, the Government cannot exercise the functions undertaken through the NIRA in so far as they pertain to local or intrastate activities. If the decision had been other than unanimous, we might have concluded that it was the result of a particular theory of construction of the Constitution; but the liberals of the Court were as emphatic as the conservatives in declaring the act to be an attempt to exercise rights and prerogatives reserved to the states. We must, therefore, conclude that this act and any other purporting to extend like authority to the Federal Government attempt to empower that government to exercise functions which the framers of the Constitution said might be exercised only by the states.

The NIRA was proposed and sponsored by the President; was supported by the overwhelming majority of both houses of Congress; was voted for by Republicans as well as Democrats; was acclaimed by the public, by leaders of business as well as labor. It undouhtedly embodied the wish and will of the people of the United States of the day and generation in which it was promulgated. But it is found to be in conflict with what the people of a former generation declared to be the proper function of the Federal Government. Therefore, in deference to the limitation which they imposed upon the functions of the Federal Government, we cease to do what we declared essential to the general welfare.

Let's put the same proposition in another way. The generation which framed the Constitution declared that all matters of local or state concern should be dealt with only by the states. We of our generation said that business has become so far nationalized that those phases of national business which are carried on within the states so far affect that national welfare as to warrant the Federal Government in exercising supervision over them. The enactment of the NIRA, the AAA and other measures in the National Recovery program were the result of a conviction on the part of the American people that, as Judge Parker expressed it, the national government "is the only agency the people have of sufficient size and power to approach the problem presented with any hope of success." Who will gainsay that?

NATIONAL PROBLEMS DEMAND NATIONAL APPROACH

The approach to the problems presented by the depression, by way of the national government through the NIRA, the AAA and other measures, may have been and may be unconstitutional, but tell me by what other way they could have been approached. Who will say that the state governments could have dealt with them? The depression and disaster were national in scope and effect. The business involved was national. The choice presented was *national* approach or *no* approach to the problems presented. That's the choice presented now. Let us not be deceived or misled. State control and supervision of business today means no adequate control and supervision. The captains of industry—the apostles of big business know and understand that perfectly. That's why many of them have become such ardent champions of states' rights.

At the time the original Constitution and the first ten amendments were adopted, business, as I have heretofore pointed out, was local.

On account of the transportation handicaps then existing, local governments alone could deal with it. Our fathers had the wisdom to fit the government to conditions. They recognized stern realities. Today business is national, whether it be the business of merchants, manufacturers, miners or farmers.

The manufacturer, miner, or farmer, in the act of manufacturing, mining or raising his product, is engaged in a purely local activity; but who will say that his business is purely local in its scope and effect? His product may be produced in Missouri, but marketed in Idaho. The price at which he may be able to sell his product in Idaho may be determined by labor and other conditions prevailing in Missouri. Since I have been City Counselor of St. Louis, I have participated in the settlement of a number of strikes—among them a nut-pickers' and textile-workers' strike. I found that the major cause of the trouble in each of those two instances was wages and labor—conditions prevailing, in one case, in the nut-picking business of Southern Texas, and, in the other, in the textile industry of the Carolinas. In other words, what a manufaeturer is able to pay in St. Louis may be determined by what his competitor in Texas or the Carolinas or New York pays. The sweatshop of South Carolina, in respect to laws regulating it, is a state institution; but, in respect to its effect on wages and priees, it is *national.* Do you propose to establish a national standard of wages and business conditions by the cooperative action of the states? One heretic state can damn the whole undertaking, just as one chiseler can jeopardize fair practices in business. The part played by some of our states in spawning all kinds of corporations and setting them afoot in the land is historic.

SIZE OF MODERN BUSINESS

The demand for federal supervision and control arises, not alone from the interstate or national scope and effect of business activities, but from the size of business units. Messrs. Berle & Means, in their work on "The Modern Corporation and Private Property," point out that 200 large non-banking corporations now control 49.2% of all corporate wealth (other than banking), 38% of all business wealth (other than banking), and 22% of the entire national wealth. They predict that if the 1924 to 1929 rate of growth of these corporations, and of all others, were maintained for the next twenty years, 85% of corporate wealth would be held by 200 huge units; and if maintained for thirty years, all eorporate activity and practically all industrial activity will be absorbed by 200 giant companies. These companies range in size from such eompanies as Consolidated Coal, United Shoe Machinery, Deere Plow Company, with 94 million dollars, to Consolidated Gas, with 1171.5 million and General Motors with 1400 million, Standard Oil of Indiana, with 1700 million, U. S. Steel Corporation, with 2286 million, Pennsylvania Railroad, with 2600 million, on up to the king of them all, American Telephone and Telegraph, with 4228 million. Who has the hardihood to say that these companies can be adequately supervised and controlled by state governments?

SETTLED COUNTRY DEMANDS MORE GOVERNMENT

Is it not clear that the settling up and development of our country have wrought such tremendous changes in all phases of life, and created conditions so radically different from those prevailing at the beginning, as to require a different governmental approach to them? In the days of discovery, settlement, frontiering, pioneering, development, conquest, when there was room for all and work for all hands to do, the laissez faire doctrine was ideal. All men needed was to he let alone, turned loose, given rein and room to assert their powers. They could take care of themselves and adapt themselves to each other. There was little or nothing for government to do. There were none so strong as to need restraint, and few so weak as to need aid.

But, today, the country is settled and developed. Its economic development has been attended by such a concentration of wealth and economic power, as we have seen, as to vest undue power and economic control in the hands of small groups of men. The 200 corporations to which I referred have in themselves so much power over the production and transportation of the necessities of life, and, what's more, so much control over the opportunities of men to work and earn a living, as to enable them to impose insufferable burdens upon the people, if they elect to do so. They have too much power to be turned loose unrestrained and unanswerable to the people as a whole.

I know the stock objection to the vesting of adequate power in the government to deal with the problems modern industrial development presents—"It's dangerous!"—"The power will be abused!" I grant that; but I also know that the power of great aggregations of wealth may be abused. The country should know that, unless it has forgotten what happened between 1924 and 1933. Any power, governmental or industrial, may be abused. The difference is this: The people may, at any time they choose, correct the abuses of governmental power; but unless government has some authority over business activities, they are powerless to correct industrial abuses.

I do not mean by what I have said to contend that the Federal Government should be vested with all of the powers asserted through the various recovery acts. Some of them may have gone farther than is necessary to aceomplish all that government should attempt to accomplish.

FACE FACTS AND CONDITIONS

What I am contending for is that we face facts and conditions—just as our constitutional fathers did—and fit our governmental powers and functions to them. They had primarily local and state problems to deal with, and they empowered local and state governments to deal with them. We bave national problems of which they never dreamed, and we ought to empower the National Government to deal with them.

I do not mean by this to abolish state and local governments. Far from it. There will always be an abundance of local and state activities and problems with which only local and state governments should be concerned. But he is blind who does not see that activities—local

in performance but national in their effect—can be adequately dealt with only by the National Government.

AMERICA'S SUPREME QUESTION

The supreme question which the American people face today is this: Shall the limitations upon the power of the Federal Government to attack existing social and industrial problems remain inviolate; or shall its power and authority be so extended as to enable it to deal with them effectively? To the answer of that question the lawyers of America should dedicate themselves with their highest intelligence and most exalted patriotism.

At a previous annual meeting, the American Bar Association appointed a committee to study recent acts of Congress to determine their constitutionality. I propose that the Association in its approaching meeting appoint a committee to study the problems presented by modern social and industrial conditions, and determine whether the Government, under the Constitution, has adequate power to deal with them; and if it be found that it has not, then to propose such amendments as will vest such power in the Government.

As lawyers we revere the Constitution; as citizens we cherish the rights and liberties of the people; as patriots we love our country. If we find that the Constitution in any respect, in what it grants or what it denies, jeopardizes the rights and liberties of the people or the welfare of the country, then it is our duty to sacrifice something of our reverence as lawyers to our obligations as citizens and patriots, and preserve the rights and liberties of the people and the welfare of the country.

First and above all, we must save the country—for

"He who lets his country die
Lets all thing die
And all things dying curse him.
He who saves his country
Saves all things
And all things saved bless him."

MR. GRAHAM: Let the audience stand and give a rising vote of appreciation and thanks to this honorable gentleman. Mr. Hay, I need not extend to you any further appreciation and thanks for your able address. The audience has expressed that more forcibly than I could.

MR. GRAHAM: Mr. Howard, Dean of the University College of Law, would you care to tell these gentlemen of the merits and demerits of your institution? Possibly there are some that do not know about it. I was unfortunate enough to offer a criticism of your institution, and in view of that I learned a lot about it.

DEAN HOWARD: I have no speech to make. I have no message or appeal. It has been suggested to me that perhaps some of you might be interested in a few facts about the law school and a little information as to how the law school is progressing and what we are doing, and I shall be very happy to answer any questions which might

occur to you with respect to the operation of the law school. One thing is the increased attendance in the law school during the last few years. There has been a successive increase in registration in the law school for a period of six years. We now have, or did have during the last academic session, 53 students registered in the law school. I do not anticipate a great increase next year, but I do anticipate some increase in the law school. I do not think that we need a large law school in the state, but we do need a law school with an adequately trained personnel, capable of giving instructions in the fundamental principles of the law; a small law school, in other words, maintaining high standards of instruction, and that is what we are aiming at. We have four regular members of the faculty and several special lecturers. Judge Ailshie comes to the University there every year and delivers lectures on the subject of mining law, and Mr. Ben Oppenheim of Boise covers the field of irrigation law. Besides that we have one or two other occasional lecturers who come there and discuss various subjects of interest to lawyers and to law students.

You may be interested in the changes made in the curriculum during the past year. We revamped to some extent the program of study along the lines of current tendencies of legal education, outlined and developed by the principal law schools of the country. Briefly, a few of the new courses, or courses which are being taught in a somewhat different manner and materials worked out along different lines from the past are: we are putting in the program for the first year students a course in court organization. This course deals with the English court system and its adaptation in this country, and the study of the state and federal judicial systems in an attempt to give the student an understanding and appreciation of the study of law administration in general. Then we hope this year for the first time to have a course in legal bibliography, a course in the use of legal digests, encyclopedias, source books and other materials. I personally think it is a subject of very great importance and a subject which perhaps has not been dealt with adequately in the past. Every man who graduates from a law school ought to be able to get into a law office, not to practice law, because I think all we can do is teach the fundamentals and give him an appreciation of what the law is in action so that he may function, after he gets started to practice, with some facility, but work out legal problems; he ought to be able to handle a law library without instruction on the part of anyone, and I think this course in legal bibliography will enable him to do that in the future.

There is a realignment of the materials in the commercial law field. In the place of partnership and agency and the traditional courses in that field we are putting in for next year and giving for the first time a course on business association which will have for its purpose the presentation of all the material in that field in a very realistic manner. That will cover unincorporated business ventures, partnership property and accounting, and include administration of insolvent estates, and will be a preliminary course to business associations II, which will cover the field of incorporated business ventures, the field of management and control, corporate powers and lia-

bilities, organization and reorganization of financial structures. In addition there is a realignment in the materials in the field of credit. We are putting in two courses entitled "security" and "creditors' rights." The first of these courses, "security," will cover the field of pledges and trust receipts, letters of credit, suretyships, mortgages, and the second course, "creditors' rights," will cover rights of creditors, administration of estates of insolvent debtors, fraudulent conveyances, general assignments, receiverships and bankruptcy. These last two subjects have not received the attention in the past that is their due, and I believe that the realignment of materials in this commercial law field will be of some value. Then we are putting in this year for the first time, a course in taxation and a course in administrative law, the latter course covering the development and function of administrative tribunals and such matters as delegation of power and administrative legislation and administrative adjudication and other topics embraced in the general subject of administrative law. While there will be no radical or sweeping changes made in the curriculum, I think the changes made will present the subjects to the students in a more realistic, coherent and uniform manner.

You might be interested in the matter of the cost of the operation of the law school. You have seen various figures in the paper, most of which are inaccurate, grossly inaccurate, to say the least. I have seen a statement in the paper that the law school cost $50,000 a year to be operated. Well, in the biennium of 1933-1934, $28,950 was expended by the law school, making a total of $14,475 each year. Now, that includes everything,—the salaries of the teachers; it includes cost of maintenance and operation of the library, all incidental expenses. I dare say there is not a law school in this country that is being operated at such a cost as that.

Someone was asking me about the requirements. I suppose that most of you know that we require, as a minimum, two years of college work. That is in accordance with the provisions of the American Bar Association committee on legal education and with the provisions of the Association of American Law Schools, of which the college of law is a member. Two years college work, and three years of law study. A great many of our students have spent three years in the college and some four years. Many of them enter the law school at the beginning of their fourth year and receive their academic degree at the end of our fourth year.

I am interested more than anything else in maintaining the standards of scholarship in the law school. I am not interested in building up a big law school. I think we should be prepared to train all those citizens of the State of Idaho who want to engage in the profession, in the practice of the profession of law. I think we ought to be able to do it in an efficient manner. We ought to be able to do it in accordance with the traditions of legal scholarship and along the most progressive lines as developed by law educators at the present time, and I feel if we can do that we can teach a man there what he needs to know about the fundamentals of the common law, what he needs to know about the peculiarities of local law—for instance, we have

a course in which we cover the field of community property. I need not tell you that that is of outstanding importance in this section. If we do that we can serve the people of the state in the way they should be served. I shall be glad to answer any question that you have to ask in reference to the law school.

MR. GRAHAM: We have with us two older members of the Bar, three that I see here, and I am going to give each one of them three minutes. I see Bill Healy, and I think he may have something to say about the Bar Commission and about his work.

MR. HEALY: Mr. President, I feel, of course, highly gratified to have this recognition from the President. Carey Nixon a little while ago told me of the project that you had of arousing greater interest in the Bar meetings. As part of my duties at Spokane, I made a practice of attending as many as I could of the meetings of state Bar associations in the four northwest states. I was at Eugene last September. The three coast states, Oregon, Washington and California, have made an arrangement whereby they hold, in turn, each annual meeting with the meeting of the Pacific Coast Institute, which is an organization of the Pacific Coast law schools. The Pacific Coast Institute has an endowment of some sort which enables them to get first-rate talent at their meetings, and by holding meetings of the Pacific Coast Institute along with their Bar meetings they have succeeded in making these meetings very interesting to the Bar. The one at Eugene last September was the most interesting two days that I have spent in a long time. My own personal opinion in watching state Bar association meetings in the last several years is that the standing lack of interest and the standing lack of attendance may lie in the fact that we seldom have something of great interest to offer on questions of the hour, such as was the masterly address we have listened to today on the part of Mr. Hay. If we had several of these at each meeting and if it became known that addresses of that sort would be heard at the Bar meetings, I think interest would tend gradually to increase. I have thought many times that it might be possible for states like Oregon, Washington and Idaho to hold joint meetings, or that the Idaho Bar might participate in the state Bar convention of either Oregon or Washington on the occasion of the holding of the meeting of the Pacific Coast Institute. I thank you very much for the opportunity of speaking to you.

MR. GRAHAM: We have another past Commissioner here and I will ask Mr. Hawley to make a few remarks.

MR. HAWLEY: It is very courteous of you to call on me I am sure. You haven't always called on me at the proper time, I will say that. I think that there has not been a meeting of the Bar in many years which has been so interesting so far and which probably has been so provocative of discussion, if not dissension. I presume that later in the session we will be given an opportunity to discuss some of the points in some of the papers that have been given. I am not altogether in sympathy with the several speakers who have suggested a decadence of our organization; in fact, I think that we do quite well in attendance when one considers the various elements that

should be considered. In the first place, we have only about 550 members of the Bar and probably 450 of them active practitioners. They live very widely apart, and it is quite a burden, both in time and money, for a man in Kootenai County to attend a meeting in the southeast, and that accounts for the fact that we have so few members present, but I think it does not indicate a lack of interest in the organization. I think that we probably have a fair representation at our meetings. It varies from 50 to 150. I feel that is very good. Suppose you take your lodges that you belong to—how many members attend each lodge meeting? How many men attend the various organization meetings, organizations to which you belong? It is not the Bar. It is rather a different question, plus lack of interest in things they should be interested in. So far as the other Bar associations are concerned, I had the opportunity of being guest speaker at the Oregon Bar Association and at the Washington Bar Association meetings at many times, and while the attendance may have been very meager on account of that fact, still I noted that there wasn't a very much larger attendance, at least not proportionately a different attendance than we have here, and I just feel that we should not be pessimistic about the condition of this Bar. I thiuk it is in better shape than ever.

The program yesterday, the judicial section's work, all point to the renewed interest in the profession by members of the profession, and I think that you gentlemen who are leaders now should be congratulated. I, for one, feel that the Bar is not decaying and that the organization is increasing more and more and particularly the younger men are coming to regard their avocation as a real call to public service and professional duty.

MR. GRAHAM: Thank you, Mr. Hawley. Commissioner Owen I now find has evaporated. We possibly will hear from him some time tomorrow. We will now adjourn until tomorrow morning at ten o'clock.

MORNING SESSION, JULY 13, 1935, 10:00 A. M.

MR. GRAHAM: Mr. Oversmith has a resolution in regard to our deceased brothers. Will you present it, Mr. Oversmith?

MR. OVERSMITH: Since the last annual meeting of the Idaho State Bar Association, death has removed from our profession the following members:

A. P. Asher,	Sandpoint
Ira E. Barber,	Boise
J. F. Colvin,	Boise
S. H. Hayes,	Boise
Arthur Humphrey,	American Falls
John J. McCue,	Boise
John H. Myer,	Boise
R. B. Norris,	St. Maries
D. L. Rhodes,	Nampa
H. C. Wyman,	Boise

These men labored diligently for the welfare of the state of Idaho and the betterment of their chosen profession, and it is therefore proper that we pause in our labors to pay tribute to these men who have forever been taken from among us, and it is with profound regret that we here record their passing. Mr. President, I move the adoption of the resolution.

A VOICE: I second the motion.

MR. GRAHAM: It has been moved and seconded that this resolution be adopted. Those in favor signify by saying "Aye." Those opposed "No." The "Ayes" prevail.

MR. CONDIE: Mr. Chairman, Mr. McFadden handed me this communication this morning and asked me to present it.

"To the Idaho State Bar:

"On account of my affliction—deafness for many years, I cannot personally appear. I ask your indulgence in this however.

"Many years ago, Harry Ensign, of loved memory, one of our District Judges, while he was Prosecuting Attorney here, made the list I am submitting, of the lawyers of the Hailey Bar many years ago; many of the lawyers will recollect the names. This list was made on an old fashioned typewriter, an Oliver, and meant a lot of work, mechanically, besides digging out the names.

"It will be noted that there is only one living, our loved Judge Sullivan. I would like to leave the list for the older members of the bar to prize.

J. L. McFadden.

"On top of this, I am submitting an article from the Statesman, of old times—40 years ago, which I would like to have read. As Judge Hodge and I used to be old tillicoms, I think the Bar should make the Judge ride a bike yet on Main Street."

(Newspaper Clipping)

"The Statesman was able to scoop all other news services in the report of the jury's findings, the verdict of murder in the first degree in the case of Paul Lawson, through the bicycle run of Mr. Hoge, stenographer of Judge Stockslager's court. He left Challis at 7 a. m. and arrived at Ketchum at 5:45, having made the 80 miles in 10 hours and 45 minutes. The message was in The Statesman office by 7:30. In addition to rough winds and roads Mr. Hoge broke off a pedal and snapped the chain with the result that he walked quite a distance before he could get it fixed. He cobbled the chain with a piece of wire and used a block of wood with a hole bored through it for a pedal."

SECOND JUDICIAL DISTRICT, IDAHO TERRITORY
1881-1890

		JUDGES.	
1.	H. E. Prickett.		
2.	John R. McBride.		
3.	Jas. H. Beatty.		
4.	I. N. Sullivan.		
5.	Lyttleton Price.	H. E. Prickett.	
6.	Chas. O. Stockslager.	Case Broderick.	
7.	S. B. Kingsbury.	Chas. H. Berry	
8.	E. G. Brearley.	H. W. Weir.	
9.	J. B. Rosborough.	Jas. H. Beatty	
10.	Frank E. Ensign.		
11.	V. S. Anderson.		
12.	Jas. H. Hawley.		
13.	N. M. Ruick.		
14.	Frank Ganahl.		
15.	V. Bierbower.		
16.	Geo. M. Parsons.		
17.	A. J. Bruner.		
18.	Geo. H. Roberts		
19.	A. J. McGowan.		
20.	Homer Stull.		
21.	HAILEY BAR J. H. Crichton.		
22.	Texas Angel.		
23.	P. M. Bruner.		
24.	W. N. Hyndman.		
25.	J. H. Harris.		
26.	D. E. Waldron.		
27.	A. F. Montandon.		
28.	J. S. Waters.		
29.	A. M. Funkhouser.		
30.	D. M. Sells.		
31.	L. Vineyard.		
32.	E. B. Lemmon.		
33.	John H. Burns.	DISTRICT ATTORNEYS.	
34.	S. A. Ballot.		
35.	Robert McCullogh.		
36.	W. F. Anderson	P. M. Bruner.	
37.	C. E. Jones.	Geo. H. Roberts.	
38.	H. H. Rockwell.	N. M. Ruick.	
39.	R. A. Sidebotham.	J. S. Waters.	
40.	H. C. Street.		
41.	Wm. C. Lovell.		

MR. CONDIE: I move that this be spread upon the minutes of our Association meeting here today.

A VOICE: Second the motion.

MR. GRAHAM: Those is favor of the motion signify by saying "Aye." Those opposed "No." It is so ordered. We will be glad to hear you now, Judge Koelsch, if you will come forward here.

JUDGE KOELSCH: The rules we are about to submit to you that the committee agreed upon, are rules that pertain merely to the ordinary conduct of the business of the courts. I believe we have entirely avoided submitting any controversial rules. For instance, a rule that might come up for profitable discussion is the question as to whether or not district judges should be permitted to comment on the evidence, also a rule that we did not submit, that judges should examine the jurors on voire dire and permit only such special interrogatories on the part of counsel as they deem proper.

MR. GRAHAM: May I ask, is this a proposed set of rules you feel should be finally adopted, or is it a tentative plan?

JUDGE KOELSCH: All of these rules are merely tentative. But we are sometimes timid in exercising the power that we really have. There are a great many matters that could be better regulated by rules than they can by statute, and in this connection I should like to read an excerpt from an address by Dean Charles E. Clark before the American Judicature Society:

> "This Society has long supported the principle that control of court procedure—that is, the details of getting court business done—should rest not with the legislature but with the courts themselves, that is, that 'rule-making power'—power to make and change rules of procedure—should be vested in the courts. For the occasional spasmodic action of a legislative body, difficult to secure at best and conditioned by the political and personal idiosyncrasies of the law makers, there should be substituted the continuing supervision and control of the body having the knowledge and skill to provide effective action —namely, the courts. This is wholly sound as far as it goes. It is in accord with the modern trend of good government to substitute the expert for the politician. But unfortunately courts get accustomed to old ways even though outworn ones; and, being busy with their daily business, do not exercise the authority given them."

In further preface before I go on, I should like again to refer to the very fine paper that Judge Ailshie submitted to us the other day and call your attention to a few points particularly on the backwardness and timidity of the courts in adopting rules to regulate their own procedure. This was a rule of the Supreme Court of Colorado: "The rules governing comments by district judges shall be those now in force in the United States District Courts." A case went to the Supreme Court of Colorado, and three separate majority opinions and two dissenting opinions were written, and Judge Ailshie quotes from the major opinion here. I would like to re-read that in order to give you a better idea of the power that the courts really havo in this connection. He says:

> "The judicial power of the state is vested in the courts; the lcgislative and executive departments are expressly forbidden the right to exercise it, and the courts, charged with the duty of exercising the judicial power, must necessarily possess the means with which to effectually and expeditiously discharge that duty; this duty can be performed and discharged in no other manner than through rules of procedure, and consequently this court is charged with the power and duty of formulating, promulgating, and cnforcing such rules of procedure for the trial of actions as it deems necessary and proper for performing its constitutional functions. In our scheme of goverument, the responsibilities thereof are presumably equally divided, and each department must perform its own tasks, and accept the responsibilities therefor. If we assume that for many years the courts have surrendered, to a certain extent, the rule making power to the legislative department, and if we assume that such a practice, over a long period of time, gave validity to the exercise of that function by the legisla-

tive department, or that the legislative statutes upon the questions of procedure, and the enforcement of those statutes by the courts, amounted to an adoption thereof by the courts of such statutes as rules of court, all has now been set at rest by the solemn act of the legislature in passing a statute recognizing the constitutional power of the courts to make its own rules for its own procedure."

Judge Ailshie then goes on to eompare the statute with ours, and he quotes that statute, and he says:

"In connection with the discussion of the Colorado case, it may be well to note an expression contained in Sec. 7-207 of our statute.

"It is there said:

'In charging the jury the court may state to them all matters of law which he thinks necessary for their information in giving their verdict; and if it state the testimony of the case it must inform the jury that they are the exclusive judges of all questions of fact.'"

Judge Ailshie's comment on that is,—

"So far as I know the Supreme Court of Idaho has never discussed or passed upon the meaning or scope of the expression 'and if it state the testimony of the case,' as employed in this statute. It will be a matter of interest and undoubtedly elicit a lot of able discussion from members of the Bar, and perhaps from the court itself, if some trial judge should enter upon a review of the evidence in a case, either in connection with or independently of his instructions to the jury. It would be of value to the profession to know just what the legislature intended by this expression."

I merely refer to this because we have not submitted to you any controversial rules. I have referred to this opinion to show the power that the courts really have that we don't appreciate and perhaps, as the Colorado court said, may have in a measure lost by permitting the legislature to prescribe these rules for us. Now, without further comment, because I presume the comment will come up during the discussion, Mr. Chairman, I would like to control this thing all the way through, if you will permit me to exercise your functions to that extent, because I have some comment to make on these various rules as I give them and, of course, I expect you to do so.

The first rule is, "Calendar—Duty of Clerk":

"Immediately prior to the commencement of every term, the clerk shall make up a calendar of all criminal cases, including appeals from inferior courts, and of all civil cases at any issue pending in the court, or in which the time for appearing is shown to have expired. The clerk shall note opposite each case briefly the nature of the action, the names of attorneys and upon what issne the case is pending, and in criminal cases whether the defendant is in custody or has been admitted to bail.

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

You will notice that this is merely a general direction as to the calendar, and unless someone desires to discuss that I think we will pass that and consider it adopted, because that is merely a preliminary rule.

"Rule II. Call of Calendar. The Calendar will be called at the opening of eaeh term, and at such other times as the Court or Judge may designate."

I presume that also may be considered as adopted without discussion.

"Rule III. All motions, demurrers or other proceedings involving only issues at law may be called for hearing immediately following the call of the calendar and parties must be ready to try them without prior setting thereof."

I will go baek to the first rule that I read. This merely provides that the clerk shall prepare the calendar.

GENERAL MARTIN: That leaves that to each judge, I presume.

JUDGE KOELSCH: I would like to call your attention to the fact that in Ada County in the Third District, having provided for the general calendar, it then divides the calendar into four divisions. We have a Miscellaneous Calendar; a Motion Calendar; a Criminal Calendar, and a Trial Calendar. Of course, that perhaps would not be praetical to many of the outlying counties in some of the districts, cases naturally fall into those four divisions. Some of the districts simply have the Trial and Law calendars—but then you have always a number of cases in court that have been pending so long that they do not belong on either of those two calendars. We throw them all on the Miscellaneous Calendar. Judge Sutphen throws his on what they call the "Off Calendar." This, being a general rule, provides that the clerk shall arrange the calendar into such divisions as the Judge or Court may direct.

MR. KESSLER: I am quite agreeable with the rule, but in that connection it seems to me that there ought to be required in connection with that, as often I believe it would save a great deal of delay and a great deal of time of both attorneys and judge, a rule that counsel having any motion or demurrer that presented a law point, file at the time of filing or within a reasonable time, say, five days, or such a time as the Court may allow thereafter, a memorandum of points and authorities.

JUDGE KOELSCH: We will come to that. We have such a rule. This rule says they must be ready to argue all their motions and any question of law on the opening day of court.

MR. OVERSMITH: It seems to me it would facilitate the matter if the calendar were prepared five days before and distribute it among the attorneys that want the calendar.

JUDGE KOELSCH: I think that is a good suggestion. The way we have done it in the Third Judicial District is to get the calendar from the clerk four or five, sometimes ten days ahead, and then we drop a card to each attorney who has a ease pending on the calendar advising that he must be prepared, if there is a law question, to present his case on the opening day.

MR. OVERSMITH: You can ohviate the nccessity of that by getting your calendar out for distribution five days before. I think it would be a good thing to amend that rule to that effect and consider it amended.

JUDGE KOELSCH: That is up to the judges to determine.

MR. OVERSMITH: I don't think there is any objection, and I am going to ask that with unanimous consent it be considered that the rule shall provide that the calendar be prepared five days before the opening of court and that it be ready for distribution among the attorneys, if they want to have it.

MR. FEENEY: I don't know whether it would be practical in small counties—would it make a difference?

JUDGE KOELSCH: As a matter of fact, it would be easier than in large counties. In the large counties it would mean the distribution of a good many copies.

MR. OVERSMITH: I am not asking that it be mailed, just make it available.

JUDGE KOELSCH: If there is no objection, Rule I will be amended to that effect. The reporter has got that. Rule IV:

> "All attorneys having matters pending before the Court must be present or be represented by some one at the calling of the calendar, otherwise the cause may be stricken from the calendar."

MR. OVERSMITH: Sometimes we are out of town.

MR. KESSLER: What do you mean by "stricken from the calendar"?

JUDGE SUTPHEN: It is just put off the calendar. The statute recognizes that procedure. To place the case back on the calendar, counsel must make a motion and serve notice on the opposite party. It is just a matter of form, but it is sort of a default in counsel not appearing, and I might add, in most of these cases where counsel don't appear it is probably a case where a settlement is pending and the ease should be off the ealendar list, and can always be placed baek on the calendar on motion and notice. It is not a dismissal of the case.

MR. MORGAN: Would not the word "may" be interpreted as "must," or would it be in the diseretion of the Court? Mr. Oversmith suggests that he might be out of town. In other words, if the word means "must", it must be stricken from the calendar; and further it works considerable hardship if it "must" at all time be striken, whereas, if it were within the discretion of the Court—

JUDGE SUTPHEN: The word is "may."

JUDGE KOELSCH: He "must" be present.

JUDGE REED: I think if you will read the last rule that we have, that might elarify the situation.

JUDGE KOELSCH: In that connection, Mr. Morgan, if you will just listen one moment, the last Rule is:

> "Any of the foregoing rules may, in special cases, be suspended to meet the exigencies of the case. The party applying for such suspension shall make proper showing of such exigency."

However, gentlemen, I would like to call your attention to this, the rulo says:

> "All attorneys having matters pending before the Court must be present or be represented,"

and if they are not, the case is stricken from the calendar. That would play into the hands of the attorney for the defendant, of course. That must be modified, it seems to me, because if the attorney for the defendant should not be there, the plaintiff's case would be stricken from the calendar.

MR. JAMES: I am wondering if it would not be sufficient if the word "must" would be changed to "should."

JUDGE KOELSCH: Which is merely advice and would not mean anything.

MR. OVERSMITH: May I suggest a little addition there, "unless excused by the Court."

GENERAL MARTIN: It seems to me it would be better if it provided that the Court should proceed to pass upon the question of law, or to set the case for trial, if that is what is pending, but that refers to the absent attorney.

JUDGE KOELSCH: What do you think of the suggestion by Mr. Oversmith, "all attorneys, unless excused by the Court"?

MR. OVERSMITH: I think the attorneys should be taught the courtesy when the calendar is called to be there, or that they arrange in advance for an excuse.

GENERAL MARTIN: That would cure the matter.

MR. CHAPMAN: It seems to me that the attorneys are the people who are interested in the progress that the case makes, and if they have negotiations pending for settlement, and if they have arrangements as to how the matter is to be handled, it seems to me that the case should not be stricken from the calendar unless one of the attorneys by motion has that done. It might be an injustice to the attorneys on both sides; the presumption is that they are employed to eonduet that particular litigation, and sometimes they are in a hurry and sometimes they are not in a hurry, and it seems to me that if the attorney on the adverse side wants it strieken, he can stand up and tell the Court that he wants it stricken, and until something of that kind transpires, I think it should stay there.

JUDGE SUTPHEN: I might say it has been the rule of the Fourth Judieial District for several years, and I have never heard any complaint upon the application of the rule. Just beeause a case is on the calendar and no counsel appears, I do not always strike it from the ealendar, but this provision is "may be stricken" and in tho Court's diseretion, as we have it here.

Now, in practiee that is simple. These cases are called, no counsel is present and the Court has not been informed, and eounsel has not called up the Court or advised him that he eannot appear, or written a letter or anything. Then the Court simply has the case stricken from the calendar. I think it is a eourtesy to the Court to make a motion and serve a copy on opposing counsel that the case be reinstated. In general we find counsel asking to have the case taken off the calendar, and it is eonvenient to opposing counsel to know that no activity can be had in the case, that is, no action can be had on the case until motion is made that it be reinstated on the calendar. It is a protection to all parties.

GENERAL MARTIN: Do you require a showing on the motion to reinstate?

JUDGE SUTPHEN: No. Of course, counsel explain to me why they were not there, but don't make any showing of merit or anything of that kind. Under this particular rule, we just transfer it off the calendar. I will explain, in this district we have had this situation where there were a great many of these Off Calendar cases, and it keeps alive foreclosure cases and the like.

MR. WARE: I would think that if it is stated, "otherwise the case may in the discretion of the Court be stricken from the calendar," that might accomplish it, but there is one thing I would like to suggest here. As I understand it, the calendar will be made up five days in advance of the term and counsel will have the right to secure the calendar as so made up. So, counsel, will be perfectly free to notify the judge or clerk of the circumstances which would suggest to the Court the reason for not striking the same from the calendar. I don't know whether it is taken care of later on in these rules, but I should think that it would be well to add here that, "The Court may in its discretion forthwith determine the issue of law and set the case for trial or strike the same from the calendar."

MR. EBERLE: I think it should be arranged so that the lawyers will know that we have an active and inactive calendar, and then when it goes on the inactive calendar for a certain length of time, it is dismissed.

MR. JAMES: I move that Rule IV be amended to read as follows: "All attorneys having matters pending before the Court must, unless excused by the Court, be present or be represented by some one at the calling of the calendar; otherwise, the cause may, in the discretion of the Court, be stricken from the active calendar."

MR. EBERLE: I move that at the discretion of the Court it may be placed on the inactive calendar. Certainly the Court's calendar is all of the cases.

MR. REED: Mr. President, I might suggest in line with the suggestion made as to the amendment that each district perhaps has a different number of calendars. In your district I understand you have Trial, Law, Criminal and Motion calendars.

MR. GRAHAM: I am afraid your rule as proposed is too drastic by reason of the rules that now prevail in some of the courts. Stricken from the calendar, as Mr. Eberle says, practically amounts to a dismissal. Now, in the light of Judge Sutphen's rule, he carries an Active Calendar, plus an Off Calendar record. Our court hasn't that. Our courts adopt that, however, to a certain extent by putting it on the Passive Calendar, as you might call it, by request when the term is called. By agreement of counsel for everyhody that passes onto the inactive calendar, and at the next term of court it can be placed on the active calendar and considered. All you do is pass it to the Off Calendar, and then it requires some more work to get it on the active calendar by filing a motion. It takes more time and trouble. I think our plan down there is the right one, and that is when the cases are called, the cases on the calendar are supposed to be ready for trial,

but by agreement of counsel and court it is passed from the active to the inactive or passive calendar. I am afraid that is too drastic.

JUDGE KOELSCH: Let me submit before further argument—as a matter of fact I rather understood we would have to do as we do in the legislature, each one can only appear once and have only one minute—but let me submit, as I contended before the committee, these cases naturally fall into these four calendars. You have a Motion calendar, which includes all questions of law, demurrer, or whatever they may be. When that question of law is determined and the case is at issue, you put it on the Trial calendar; if it is at issue for a certain length of time and nothing is done, you certainly don't want to call the case every month as we would have to do in Ada County where we call the calendar every month. We have a calendar that would take three or four hours to call. And naturally it falls into the Miscellaneous calendar, that is, the inactive calendar; and then at the end of the year, if nothing is done, if the case has been on the Miscellaneous calendar and nothing is done with it, it is up for dismissal. But if you come in and simply say that the case is in process of settlement—

GENERAL MARTIN: The desirability of uniform rules is so that the attorneys will know what the practice is in all of the districts. Now, we have certain rules in one district and a certain kind of calendar, certain rules in another district, which are different, and another kind of calendar, which is different, and the desirability of the thing from the attorney's standpoint—and we think it certainly works inconvenience to the judges—is to get rules and calendar and everything else that will be uniform throughout the districts, so that when I come to this district or any other district the rules will be uniform. In lieu of this rule that the calendar be divided into such divisions as the Court may direct, I move to substitute that,

"The calendar shall consist of four divisions:

1. Miscellaneous calendar:
2. Motion calendar;
3. Trial calendar;
4. Criminal calendar.

A VOICE: Second the motion.

JUDGE KOELSCH: The question is on the substitution of the division of the calendar into these four divisions instead of allowing the judge of each district to arrange the calendar into divisions. Those in favor of the suhstitution signify hy saying "Aye." Those opposed "No." The chair is in doubt. Those in favor will rise. Those opposed will rise. The motion is lost.

JUDGE KOELSCH: The motion now is to adopt Rule IV: "All attorneys having matters pending before the Court must, unless excused by the Court, be present or be represented by some one at the calling of the calendar; otherwise the cause may, in the discretion of the Court, be stricken from the active calendar." Those in favor of adopting the rule as thus amended signify by saying "Aye." Those opposed "No." The rule is adopted. Rule V:

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

MR. POOLE: I move this rule be adopted.

MR. OVERSMITH: I would suggest at the end of Rule IV that the following be added: "Such case may be reinstated by the Court on showing of good cause."

MR. EBERLE: I move that the Bar Commission send to each member of the Bar a copy of these proposed or suggested rules, that they have a limited time within which to make suggestions to the Judicial Section, and that then the Judicial Section can go over them again in line with these suggestions, and then they be submitted again in final form as approved by the Judicial Seetion.

A VOICE: I second the motion.

MR. GRAHAM: Let me state that has not passed out of the Judicial Section yet, and I don't know anything about them. My suggestion would be this, that the Judicial Section send these out to the local Bar associations and to some of the local attorneys for discussion and then send their suggestions back to the Judicial Section. We have no objection to having the Bar Commission send these out if the Judicial Section will place their tentative rules in our hands so that we can get them printed and sent out. I am heartily in accord with the General's statement. We are not going to cover a half dozen of these rules this forenoon, and then there are only 25 or 35 lawyers here, and that is only a smattering of the Bar to pass upon them. We will have to send them back to the "grass roots" so that the members of the Bar may discuss them, so that they will take some interest in their own welfare, and I think it would be best to get them back where they belong, and give them thirty days to discuss them and pass on their amendments.

MR. EBERLE: I will amend my motion to include after the question is sent to the members of the Bar that the local Bar associations discuss the rules and send in their recommendations to the Judicial Section.

JUDGE KOELSCH: If that rule goes into effect that dispenses with further discussion here this morning.

MR. EBERLE: I presume so.

MR. BENOIT: I believe that the Judge should at least read all of the rules at this time.

MR. GRAHAM: I was going to make that suggestion that Judge Koelsch read the rules, with his suggestions, and then we could take the rules back home and discuss them.

JUDGE KOELSCH: Those in favor of the motion signify by saying "Aye"; those opposed "No." Motion carried. Rule VI is:

"All defendants on bail in criminal cases must be personally present in court at the opening thereof on the first day of each term, or in lieu thereof may appear by counsel, but must thereafter be ready for arraignment or other proceedings at such time or times as the Court shall appoint, defaulting in which the bail bonds will be forfeited."

Rule VII:

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

I would say this, that during the pendency of a divorce case in my court the plaintiff got a job in the consular service in South Africa. I took her testimony and waited 20 days and took the corroborating evidence then, and granted the divorce. Rule VIII is:

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

I do not think that rule adds anything to the existing law on the subject. Rule IX:

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

The latter part of the rule is covered by statute, but the first part is not; in other words, if a demurrer is sustained to a complaint the statute does not provide time within which an amended complaint must be filed, and this fixes five days. Rule X is:

"In cases where the right to amend any pleading is not of course, the party desiring to amend, except when the application is made during the trial of a cause, shall serve adverse party with notice of application to amend, an engrossed copy of the pleading with the amendment incorporated therein, or a copy of the proposed amendment, referring to the page and line of the pleading where it is desired that the amendment be inserted, and if the pleadings were verified, shall verify such amended pleading or such proposed amendment before such proposed application shall be heard."

I omitted Rule IX-a. I will read Rule IX-a.:

"Whenever counsel for either party files a demurrer either general or special, or a motion direeted to the adverse party's pleadings, he shall within five days thereafter serve upon the adverse party, or his counsel, and file with the Clerk a short brief of the points and authorities relied upon in support of such demurrer or motion, and a failure to file such brief within said time shall be deemed a waiver of such motion or demurrer."

I think this motion should be suspended to discuss this matter.

MR. MARTIN: I suggest that that should only apply to general demurrers. The special demurrer points out the objection to the pleading and reason for it so that counsel on the other side is thoroughly advised what the point to be raised by the special deumrrer is. Of

course, the general demurrer gives no indication, and I favor the rule that it applies only to general demurrers, but it seems to me it should not apply to special demurrers.

JUDGE KEOLSCH: Rule XI:

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

Rule XII. Here is a rule that I personally would like to hear some discussion by the Bar on:

"Arguments in civil jury cases shall precede the giving of instructions to the jury by the Court."

MR. HAWLEY: I move we go on record against that.

JUDGE KOELSCH: I would like an expression on that. All in favor of the rule, please stand. (One person stood.) The motion is lost. Rule XIII:

"INSTRUCTIONS. 1. All requested instructions must be presented at or before the close of the evidence, and accompanied with citations, and a copy thereof served on opposing counsel.

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

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

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

.....

Attorney for Plaintiff (or defendant).'

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

'INSTRUCTION NO.——.'

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

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

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

Rule XIV:

"FINDINGS; Service or objections to,

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

Rule XV:

"APPEALS FROM INFERIOR COURTS. Transcripts on appeal from Justice and Probate Courts must be filed in this Court and costs of filing paid by appellant within fifteen days after the perfection of said appeal, when said appeal is taken on questions of both law and fact, and within thirty days after the perfection of said appeal when said appeal is taken upon questions of law only; and upon failure so to do, the respondent in the appeal, at any time before said transcript is filed by said appellant, may cause such transcript to be filed, paying the prescribed fee, and placed upon the calendar for dismissal; Provided, that in case the delay is caused by any default or neglect of the Justice or Clerk of the Probate Court, the fact may be shown by affidavit and dismissal denied."

Rule XVI:

"CASES TRANSFERRED FROM OTHER COUNTIES. 1. In all civil causes transferred from another county, the party at whose instance such order of transfer was made, must deposit with the Clerk of this Court statutory filing fees. If said party fails to pay said fee within five days after said papers have been received, the opposite party may pay the same, have the cause placed upon the calendar and move for its dismissal.

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

Rule XVII:

"CAUSES TRANSFERRED FROM JUSTICE COURT. 1. In all causes transferred from the Justices' Courts by virtue of the provisions of Sec. 10-207, I. C. A., the moving party must, within five days after said papers have been received by the Clerk of the District Court, deposit with said Clerk the statutory filing fee. Upon failure to make such deposit within said five days, the opposing party may pay said fee and have said cause placed upon the calendar for dismissal.

2. When said cause is transferred upon stipulation of the parties, said fee must be borne equally by the parties and deposited with the Clerk of the District Court at the time said papers are received from the Justice Court."

Rule XVIII:

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

Rule XIX:

"SUSPENSION OF RULES. Any of the foregoing rules may, in special cases, be suspended to meet the exigencies of the case. The party applying for such suspension shall make proper showing of such exigency."

JUDGE KOELSCH: Under the motion heretofore passed, these rules will be handed to the persons who compose the next Judicial Section to carry out the motion made by Mr. Eberle.

MR. GRAHAM: We have another matter regarding the rule making power of the courts. Mr. A. L. Morgan.

MR. MORGAN: To a large extent, the Board of Commissioners, with the approval of the Supreme Court, are now exercising the powers mentioned in Subdivision 3 of the Report of the Committee now up for discussion. However, in order that the greatest benefits may be derived by the bar as a whole it is well that the subject be given consideration to the end that this body become self-governing. Our present system can, in my judgment, be greatly improved. I believe this improvement can be made without any constitutional amendment and certainly without any legislation on the subject.

Section 13, of Article 5 of the Constitution, reads as follows:

> "POWER OF LEGISLATURE RESPECTING COURTS. The legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a coordinate department of the government; but the legislature shall provide a proper system of appeals, and regulate by law, when necessary, the methods of proceeding in the exercise of their powers of all the courts below the Supreme Court, so far as the same may be done without conflict with this constitution."

A search of our constitution fails to disclose any authority authorizing or justifying the legislature in attempting to prescribe the qualifications of a lawyer or in any way granting to the legislature power to authorize anyone to practice before the courts of this state. Under said Section 13, of Article 5 the determination of that question is one of the powers which rightly pertains to the Judicial department as a coordinate department of government. Also the constitution does not specifically or by inference extend to the legislature the power to say whom of the bar may be removed, reprimanded or otherwise punished.

Of course, lawyers are amenable to the statutes of the state regulating the conduct of individuals in the ordinary course of life, the same as other citizens or individuals. For an infraction of the law which is applicable to any other citizen, a lawyer is likewise liable. But for the legislature to say that in addition to suffering punishment for the infraction of a general statute the lawyer shall also lose the right to practice his profession is going entirely beyond the limits justified by the constitution. There is no Section of the constitution bearing upon the subject except the one quoted above. I am of the opinion, therefore, it might be successfully urged that Section 3-301, Idaho Code Annotated, which provides grounds for disbarment, is not binding upon the Supreme Court and especially do I believe that that portion of the statute granting to District Courts the right to suspend, remove, or reprimand an attorney is entirely beyond the power of the legislature. The integrated bar act, if that act itself is not beyond the scope of the power of the legislature, places with the bar commission, subject to approval by the Supreme Court, the right to determine who shall and who shall not be admitted to practice law. The act also makes it the duty of the Commission to formulate rules regulating the conduct of persons admitted

and upon a violation of the rules so promulgated by the Commission it becomes the duty of the Board of Commissioners to investigate, by a procedure outlined, and to report the evidence and its findings to the Supreme Court together with the Board's recommendations thereon, in which case the Supreme Court can enter such judgment as it deems proper. It will be observed that Section 3-408, Idaho Code Annotated, being a part of the Bar Act, purports to clothe the Board of Commissioners with power to make rules subject to the approval of the Supreme Court governing the admission of individuals to practice law. The section also purports to clothe the Board of Commissioners with power to formulate rules regulating the conduct of members of this bar without any reference to approval of such rules by the Supreme Court. It merely provides that in disciplinary proceedings upon the rules laid down by the Board of Commissioners and the facts as represented to the court by the Board of Bar Commissioners, the Supreme Court shall enter such judgment as it sees fit. In my judgment that Section of the statute as well as every other Section which purports to regulate the conduct of attorneys in their relation to the courts and court proceedings should be totally disregarded. In lieu of such statutory enactments this bar should adopt a system of rules and regulations governing the conduct of attorneys, specifying such acts as shall subject an individual to disciplinary measures and providing the procedure which shall be used in the disposition of the case.

Such a system and such rules would of course require the approval of the Supreme Court. It is not at all likely however that the court will long withhold its approval of a system and a set of rules that has the support of the State Bar. It is of course not practical for such a set of rules to be formulated at the present meeting, but in order to keep the matter thoroughly alive and to avoid the delay of waiting for a future meeting, no better prepared than this, to pass upon the rules and regulations it seems to me that proper machinery should be provided at this meeting for preparing such rules and regulations and presenting the same to the Supreme Court for consideration, and that prior to the next Bar meeting the rules as drafted and presented to the Supreme Court, together with its expression as to its approval or disapproval of each particular section may be printed and furnished to every attorney in the state in ample time to permit careful consideration of the entire system so that each attorney will be prepared to thoroughly discuss, and intelligently vote upon, each Section of such system at our meeting a year from now.

I believe also, the system should provide that amendments to the rules may be suggested from time to time and should further provide that such amendments be investigated by the bar commission and a recommendation made to the court thereon, and in cases where an emergency may exist that the amendment or a new rule may be adopted for immediate use subject however to being revoked or approved at the State Bar's next annual meeting.

It is not my purpose to suggest that the bar has the power to adopt rules regulating conduct of members which must, of necessity,

be binding upon the Court but I do believe, since we are an organization whose members are amenable to the organization itself, that the members ought to have the right to regulate themselves.

I also believe the Supreme Court will adopt the policy of approving such rules and regulations as the bar desires, because it does not appear reasonable that such approval would be withheld when the bar had adopted such rules and regulations after mature study and debate. The Supreme Court ought to fall in line with the idea for another reason. Under Section 3-405, Idaho Code Annotated, the members of that court, as well as District Judges and Federal Judges within the state, are members of the bar, and under Section 3-408 above mentioned, are subject to being hailed before the Commission the same as any other member of the bar.

I believe that it is beyond the power of the legislature to say what shall and what shall not constitute contempt of court. Whether or not the doing or the failing to do a particular thing constitutes contempt of court is a matter peculiarly within the realm of the Judicial Branch of government, and for the legislature to attempt to limit in any way the right of the Judicial Department to prescribe what shall and what shall not be contempt of its Courts is, in my opinion, in direct contravention of Section 13, of Article 5 of the Constitution above quoted.

While the legislature has undoubtedly endeavored by certain Sections of the statute to protect practicing attorneys within the State, its action in that respect is some times abortive and ridiculous. Section 3-104 provides that if any person shall practice law or hold himself out as qualified to practice without being admitted to practice by the Supreme Court, and without having paid the license fee, he is guilty of contempt both of the Supreme Court and of the District Court of the District in which he shall so practice or hold himself out as qualified to practice. In other words, if this individual seeks to practice in the Probate Court or seeks to practice in the Justice Court and charges a fee for it his act would constitute contempt of the District Court. It is possible, in reason, that he might be guilty of contempt of the Supreme Court due to the fact that he is offering to practice law in total disregard of the rights of the court that has the power finally to say whether he shall practice or not, but just how he may by such act be guilty of contempt of a District Court is a matter that I am unable to fathom.

The subject assigned me regularly belongs with a discussion of the right and the duty of the Supreme Court of the State to adopt uniform rules of practice throughout the state, but since, by its terms the subject is limited to the question of rules regulating the conduct of attorneys, we must pass by a thousand and one vagaries in our legislatively prescribed procedure.

There can be little question but that this bar is better able to prescribe workable rules for regulating the conduct of its members than is any legislature that heretofore has or hereafter shall convene within the State. As an individual member of the Bar Commission, I am ready to concede that the bar as a whole should make the rules

for the reason that first the rules are for the regulation of the bar as a whole, second, because the bar as a whole is better qualified to make these rules than is any of its individual members. As an observer of our Supreme Court as in the past and at present constituted, I believe that the bar as a whole is better qualified to determine rules and regulations that shall govern its conduct than is any court, the members of which are selected from the bar. Necessarily, however, a draft of such rules must be submitted by someone and I therefore, Mr. President, move that the Commissioners of Idaho State Bar prepare rules governing conduct of attorneys and a method of procedure in handling infractions thereof; that the Commissioners shall, with the aid of such Committees as may be appointed by them, prepare and present such rules and regulations to the Supreme Court within ninety days from the date of adjournment of this meeting.

That it is the sense of this body that the Supreme Court of the State should give speedy consideration to such report to the end that it may express its approval or disapproval of the report of the Bar Commission or any part thereof at an early date.

That as soon as practical, after action by the Supreme Court on said report, the Secretary shall cause to be printed such rules and regulations together with the action of the Supreme Court in reference thereto and shall mail a copy thereof to each member of the Bar as soon as may be after the same is printed, and that said report shall carry on its face or by separate notice as the Commissioners shall determine notice to each member of the Bar that the said report will be up for discussion and action at the next annual meeting of said Idaho State Bar.

These rules before they become operative must be approved by the Supreme Court. Now, my theory is that the rules shall be submitted to the Supreme Court and their comment appended upon them, then the rules together with the comment of the Supreme Court be broadcast throughout the state before our next annual meeting to discuss these matters, and those rules which the Bar desires to adopt will be passed up to the Supreme Court with the request that they be adopted.

MR. HAWLEY: You spoke in your address about rules of procedure, which I rather take it means the procedure in court. You also spoke about the rules of conduct which apply to the Bar. Now, do your rules cover both of these divisions, or are you merely now speaking of rules of conduct for attorneys?

MR. MORGAN: Rules of conduct are the only ones we are working on at the present time, but I do believe this, that the matter, in so far as it does not conflict with Judge Koelsch's rules,—that any rules it is possible for this Bar to make, we should make.

MR. HAWLEY: The Judicial Section, I think, eventually expects to pass on that. It was discussed in the topic, "The Inherent Power of the Court," at the first meeting, but nothing particular was done about it.

MR. MORGAN: Here is one point I want to call your attention to and leave it with you for thought. The legislature merely defines what shall constitute contempt of court as applied to the practice of

law. They say any individual who practices law unlawfully is guilty of contempt of the Supreme Court and he is guilty also of contempt of the District Court of the district in which the contempt is conducted. Let's assume that that practice will consist of practicing in the probate or justice court. Just how, will somebody tell me, could that be contempt of the District Court? The theory, as I understand it, upon which he is guilty of contempt of the Supreme Court, is that the Supreme Court is the body which has the final say as to whether or not that individual shall be permitted to practice law; therefore, if he presumes to practice he is in contempt of the Supreme Court. But the District Court has no authority to admit him; it has nothing to say about it, and just how would he be guilty of contempt of the District Court, and just why should the District Court be given any right to punish him for contempt? Matters of that kind we should take away from the legislature and make rules of our own.

GENERAL MARTIN: Suppose he would try to practice in the District Court, then he would be guilty.

MR. MORGAN: That might be possible, but they don't make that distinction. They merely say that if he attempts to practice law illegally he is in contempt of court.

MR. GRAHAM: Our rules pertain to the government of the members of the Bar and have nothing to do with procedure at all and that belongs entirely with the Judicial Section. We will have to hasten along. Mr. Ware, did you wish to add anything to what he has said?

MR. WARE: The only thing I want to bring out was something with reference to the practice of non-resident attorneys in the State of Idaho, which I think can't be handled by a mere report.

MR. GRAHAM: My idea was that that was in our proposed rules that are going to the Supreme Court. In that we will embody some suggestions or some rule covering the practice of non-resident attorneys, possibly adopt the rule that has been adopted by the Bar Association of the State of Washington, providing for reciprocal rules. We have given it much consideration, providing for reciprocal rules.

MR. MORGAN: Mr. Ware, I think had prepared a rule or resolution, and I would like to have him either submit it here or leave it with the Commission.

MR. WARE: I am prepared to present it very briefly. This is the situation we are confronted with in the northern part of the state. Now, in October, 1933, the Supreme Court of the state of Washington adopted the following rule, which I shall read:

> "No person shall appear as attorney or counsel in any of the courts of this state, unless he is an active member of the State Bar, Provided, that a member in good standing of the Bar of any other state may, with permission of the court, appear as counsel in the trial of an action or proceeding in association only with an active member of the State Bar, who shall be the attorney of record therein and responsible for the conduct thereof.
>
> "Application to appear as such counsel shall be made to the court before whom the action or proceeding in which it is desired to appear as counsel is pending. The application shall be heard by the court after such notice to the adverse parties, as the court shall direct; and an order granting or rejecting the application made, and if rejected, the court shall state the reasons therefor.
>
> "No member of the State Bar shall lend his name for the purpose of, or in any way assist in, avoiding the effect of this rule."

I am not suggesting that we adopt a rule such as in the State of Washington, but as it is in effect over there, if any attorney of the State of Idaho wishes to appear, or to file an action, and many of us do have clients on the Washington side of the line, it is necessary to move in open court and secure an order associating the Idaho attorney, and the Washington attorney is in complete charge of the action. Now, you all apprehend that about all there is in the existing statutes in our state is that the name of the resident attorney must appear on the summons. As far as I am concerned, I don't care to see what we call up there—the Washington "Chinese Exclusion Act" —a situation created in this state where we build up a barrier as far as the practice of non-resident attorneys in our state is concernced. We are perfectly willing in the northern part of the state, so far as I know, to take our chances in securing business in our own state and if attorneys from the outside can do it better and the people up there think so, we are perfectly willing that they come into the state and represent clients in proceedings in our state, but we do insist that in all fairness they should come in and be entitled as a matter of comity. As I understand the existing decision in the Supreme Court a non-resident attorney does not have the right or authority to practice law in the State of Idaho, and I believe our present State Bar Act makes that quite clear. We have Supreme Court decisions and state law to that effect, but, as a matter of comment, I think that non-resident attorneys should be permitted to appear before the courts of our own state on the same terms and conditions and subject to the same limitations imposed upon members of the Idaho Bar, and to that end, Mr. President, I wish to submit a rule which was recommended by the Nez Perce County Bar Association at a meeting at Lewiston on April 15th, of all lawyers of the Second and Tenth Judicial Districts. The proposed rule was that,

> "Non-resident attorneys, subject to the provisions of existing statutes, shall be permitted to appear in court on the same terms and conditions, with the same rights and privileges and subject to the same restrictions, if any, which the state wherein said non-resident attorney resides now imposes, or may hereafter impose, upon attorneys resident in this state appearing before its courts."

At the time of its discussion it was suggested by some of the attorneys that the State Bar Commission was working on this subject and that probably we should wait until the State Bar Commission acted before proceeding very far with an attempt to have the District and Probate Courts of the Second and Tenth Judicial Districts adopt this rule. May I call your attention to a peculiar situation in this connection that we have up there. Lewis County is a small county, with, I believe, five lawyers in it. I know of two probate mat-

ters now pending before the probate judge, an estimable gentleman and judge, not an attorney. One of the matters is being handled by an attorney resident in Asotin County by correspondence, I believe. There is no Idaho attorney associated with him. There is another estatc of considerable size being probated in the same county by a member of the Bar of the State of Washington, resident in the city of Tacoma, being handled purely and entirely by correspondence. One of the attorneys of Lewis County, prior to the institution of the last probate proceeding to which I refer, had heen approached by the client of the Tacoma attorney to probate the estate in Lewis county, and then he for some reason decided to hire and employ Washington counsel for that purpose. Now the Lewis County Bar is so small that they feel any suggestion by themselves to the probate court in connection with that situation would be misconstrued by the court as a desire on the part of the members of that Bar to secure the particular business, and for that reason the members of the Bar of the Second and Tenth Districts (I believe I ean speak for them) are very anxious that the State Bar Commission take some position in this matter which will assist us in securing the necessary rules in our probate and district courts. The district court in the Tenth district and the Second Judicial District, I believe, are willing to adopt the rule, but before urging them to do so we have waited the action of this Commission.

MR. MORGAN: Upon behalf of the Bar Commission, I suggest that the attorneys, either of Lewis or Nez Perce County, prepare and file with the Commission a complaint that will reach the probation of those two estates referred to and give us an opportunity to act on them. Now, I think that it is usual for us to formulate rules and "holler" our heads off and still permit things of this kind to go.

MR. GRAHAM: This same matter has arisen from two probate judges. They wrote and asked me what to do. Provo and Ogden attorneys were coming into that county and filing and handling estate matters, and then the county attorney called it to the attention of the probate court, and the probate judge wrote us a letter, and we advised the judge to file no papers filed by any foreign attorney unless they were endorsed by local members of the Bar. The great difficulty with your resolution is that it throws the duty upon the judge to find out what the rules of the other states are, if they come from Washington or Oregon. If it is reasonable, I should think that a specific rule should be adopted for the guidance of the district judges, so that they will know what the rules are.

MR. OVERSMITH: I would suggest that you take into consideration some rules of conduct of the Idaho attorney regarding this courtesy of appearing for a nominal fee. That should be cut out.

MR. GRAHAM: If that is the practice, then the Idaho attorney should be reprimanded.

MR. A. L. MORGAN: On the matter of the formation of local Bar associations, they should have their reasonable rules and regulations enforced by the Idaho State Bar,—that will automatically include that fee schedule situation.

MR. WARE: Mr. Chairman, there is little we can say on that subject due to the fact that we have no machinery to carry anything out along the lines suggested unless and until a rule, or some basis, for the formation of local Bar associations is adopted by the State Bar Commission. Personally, I am very much in favor of membership in the State Bar automatically making one a member of the county or district Bar of the scction of the state in which the attorney resides. I think that the State Bar Commission could very well recommend a model organization or basis of organization of a local Bar association from a study of the form under which, we will say, the Ada County or the Twin Falls County Bar, or Pocatello Bar, are now operating. We are proposing in our own district to include Nez Perce, Lewis and Idaho counties in a Bar association which will include the whole district. The only difficulty is that the members of Nez Perce County, where there are in all perhaps some 25 attorneys, are a little bit reluctant to insist upon the formation of a district Bar which would control the much smaller Bar in Lewis and Idaho counties. I really think that the formation of loeal Bar associations is peculiarly a local problem in each section of the state, but I believe that the State Bar Commission could well afford to appoint a committee or else possibly make certain suggestions which would encourage the establishment of such associations.

MR. EBERLE: I move that the Bar Commission be authorized and instructcd to proceed with the organization of local Bar associations in cities, villages or counties or districts as to them may seem expedient, and to authorize and provide for the formulation of agreements amongst the members of such Bar associations with reference to schedules of fees and conduct of the attorneys of such respective Bar associations, and for the cognizance of such agreements by the Bar Commission, providing for disciplinary measures for the violation of any of such agreements by any member of such local Bar association, and for the appointment of such committees as the Bar Commission may deem best in the formulation of such a program and the execution thereof.

A VOICE: I second the motion.

MR. CHAPMAN: One thing absent in this motion. I don't believe that the establishment or adoption of a minimum fee schedule is really dependent upon the members of the Bar signing any agreement, because those who persist in cheapening the profession certainly won't sign, and we will never have any schedule or never be able to discipline them. I believe what should be done is that some definite percentage of the membership of the Bar in a given district or given association, say, two-thirds of it, when they agree upon what is a reasonable fee schedule for their vicinity and district, that it is a reasonable fee schedule and every member of the Bar of that district is bound by it whether he signs or refuses to sign, and if he does not conform to it, he should be disciplined.

MR. EBERLE: Under that suggestion, with the consent of my second, I will amend my motion by adding that membership in such local Bar association as may be so organized by the Bar Commission,

shall be mandatory and that such membership shall be a condition to membership in the State Bar, and that any agreement with respect to fees or conduct of attorneys of such local Bar associations as may be agreed to by two-thirds of the members of such association shall be binding upon all the members thereof.

MR. GRAHAM: All in favor of the motion say "Aye." All opposed "No." The "Ayes" prevail. We will take a recess until two o'clock.

AFTERNOON SESSION, JULY 13, 1935, 2:00 P. M.

MR. GRAHAM: Gentlemen, if you will come to order.

MR. NIXON: Mr. Chairman, I should like at this time to offer one other resolution. I will read it:

> "BE IT RESOLVED, That the Idaho State Bar hereby extends its appreciation to the Idaho State Bar Commission and committee an arrangements for this meeting, and also to the members of the Bar of Blaine County for their splendid efforts in making this meeting so successful; and
>
> "BE IT FURTHER RESOLVED, that this Association also hereby extends its appreciation to the various speakers and committees who contributed to the success of this annual meeting, and that this resolution be incorporated in the proceedings of this meeting."

MR. GRAHAM: Do I hear a second?

A VOICE: I second the motion.

MR. GRAHAM: It has been moved and seconded that the resolution be adopted. Those in favor of the motion signify by saying "Aye." Those opposed same sign. The resolution is adopted. Are there any other motions we should take up, because we are going to discontinue our program after the next speaker. We have a speaker who is going to talk on a subject we are all interested in. I am going to ask Mr. Hawley to introduce the next speaker.

MR. HAWLEY: In my peregrinations throughout the Northwest I became acquainted with three men in the banking profession,—one of them Marriner Eccles, another E. S. Bennett. These two men have gone very high in their profession. As you know, Mr. Eccles is right-hand man, from the financial standpoint, of our President, and Mr. Bennett is recognized by the American Bankers Association as one of the able financeers, one of the best informed men in his profession. The other man was younger, and I think possibly has not yet reached the zenith of his career. He is the speaker of the day,—a man of ability, rare ability. He possesses to a remarkable degree the knowledge of humanity, which is not concomitant with other ideals or ideas of a successful banker. But, he is more than that. He has a keen sympathy with humanity. I believe that his sympathy is genuine, and while his profession demands many strained decisions and many disappointing negations, nevertheless I am satisfied that when he is obliged to say "No," to one seeking financial assistance, he does it reluctantly from the standpoint of a human being. There is no man in the banking profession in this state who has a better record, who has a better heart, than the speaker. I personally have a very deep appreciation of his kindness; I have a high appreciation of his ability; and I assure you that when Lynn Driscoll speaks to you he speaks to you with knowledge, with understanding, and, above all, with rare sympathy. Mr. Driscoll.

MR. DRISCOLL: Mr. Chairman, Mr. Hawley, gentlemen: After that very splendid and very kind introduction, since you have already applauded it and the speaker, I don't think there is any need for me to go further—we might as well call it a day and go fishing. Mr. Hawley has been very generous in his remarks surely. I have labored in my mind to know how to make this particular subject interesting to you. It is an exceedingly dry affair, and I came to this conclusion; that rather than a formal address, if I can make it more or less an informal discussion, you could get more out of it than in any other way. It is complicated, and at the present time there are only three banking bills pending before Congress, whieh makes it a little more complicated.

If I had realized when John Graham asked me to make this talk to you on the banking legislation pending before Congress, that Senator Carter Glass was going to rewrite the banking bill for the second time, thus necessitating not only a study of the original bill as introduced, but the bill as passed by the House and then another hundred page bill reported out by the Senate Banking and Currency committee, I think I should have found it convenient to have been indisposed today. It is to be regretted that the Bar meeting did not come after the adjournment of Congress, because then you could have had one of the members of your own association present this matter to you and I am sure that with his ability as a public speaker and his experience of the last several months he would have made a far more interesting presentation of the subject than I will.

Congressman Worth Clark, as a member of the Banking and Currency Committee of the House, has spent practically the entire winter listening to college professors, brain trusters, near brain trusters, Wall Street bankers, and other experts and alleged experts on the subject of this bill.

Then, too, had this meeting been subsequent to the adjournment of Congress, it probably would have been possible for me to have addressed my remarks to a certain measure, in place of trying to cover three different bills, namely, the bill originally introduced in the House, the bill passed by the House, and the bill now reported out of the Senate Banking and Currency committee. However, since such is not the situation, I shall base my remarks chiefly on the original bill as presented to Congress and endeavor to point out the more vital changes that have been made by either the House or the Senate in acting on this measure. At best, all I can do is to touch a few of the high spots. To go into a full discussion of all the phases of these bills would require a very considerable amount of time.

The Banking Act of 1935 consists of three titles. Title I deals solely with the Federal Deposit Insurance Corporation law, Title II with the Federal Reserve System, and Title III covers technical amendments to the banking laws.

TITLE I—PREMIUM

Let's first discuss Title I, Federal Deposit Insurance. This title seems to be generally acceptable to both Houses of Congress and to most bankers of the country, the main point of contention being the amount of premium for the insurance to be assessed against the banks. The temporary insurance law under which we have been operating to date, bases the premium on the amount of the insured deposits. When you consider the fact that as high as ninety percent of the total deposits of smaller country banks are insured, while twenty percent or less of the deposits of some of the larger banks of the country are insured, you will readily appreciate that this makes a load on the smaller institutions which is beyond their capacity to meet from earnings. Possibly I can more clearly illustrate just what this means. Recently I had occasion to check with the officers of one of the larger New York banks which has total deposits of something in excess of six hundred million dollars, and they advised me that the total number of their depositors was about twenty-five hundred, whereas one Western bank, with total deposits of about seven and a half million dollars, has over thirty-seven hundred checking accounts alone. If we add to that the number of savings accounts, it would make close to seven thousand accounts, in other words, an average of about one thousand dollars an account, whereas the average in the New York bank is about two hundred forty thousand dollars an account. Assuming that all accounts in each bank were for the average amount stated above, the New York bank would only have about $12,500,000.00 of its six hundred million dollars deposits insured and would pay premium only on that amount, while the Western bank would be paying the premium on its total deposit liability. Therefore, in order to distribute this burden so that it can be handled, the new banking law provides that in place of these assessments for insurance premium being made on a basis of the insured deposits, it shall be based on the total deposits of the institution, regardless of the portion insured. There has been some objection raised to this arrangement by the larger banks, but it has been fairly well disposed of by a somewhat general consent on the part of the larger institutions on the theory that they suffer or prosper in proportion to the success or failure of the smaller institutions and upon the further condition that the amount of the premium assessment shall be kept within certain bounds.

Under the original permanent insurance law the insurance corporation was required to levy an assessment of one-fourth of one percent on all insured banks whenever the "liabilities of the corporation" as defined in the Act for insured deposits of closed banks exceeded one-fourth of one percent of the total deposits of all insured banks. The "liabilities" as thus defined is the amount of the insured deposits in closed banks in excess of the appraised value of the assets of the closed bank. This you will readily see meant that there was no end to the amount for which insured banks might be assessed.

The House bill as finally passed provides a maximum levy of one-eighth of one percent for insurance premium. In other words, an increase of fifty percent over the amount provided in the bill as introduced. This caused a storm of protest from the larger banks. The Senate bill, however, retains the assessment at one-twelfth of one percent. Apparently this will be a matter of adjustment by conference.

We have at the present moment a more complete rehabilitation of the banking structure of the country than has ever been the case in our history. Consequently, I feel that the banking system is sounder today than it has ever been before. To increase this insurance assessment would simply make it more difficult for many banks to meet operating charges under present conditions, which development, of course, would tend to undermine the insurance fund. In other words, unless a bank can be operated at a reasonable profit, it soon becomes an insolvent bank and accordingly a liability to the insurance fund.

Under the Temporary Insurance the maximum amount of an insured deposit is $5,000.00. Under the Permanent Insurance bill the amount of deposits insured, after the permanent insurance becomes effective, would be as follows:

100% up to $10,000.00.
75% in excess of $10,000 and less than $50,000.
50% above $50,000.

Under the terms of the Banking Act of 1935 the amount of an insured deposit remains the same as in the Temporary Insurance Act, namely, $5,000.00.

Under the terms of the original Act for the Permanent Insurance Fund, each bank that was insured was required to subscribe for stock in the amount of one-half of one percent of its total deposit liability, the Treasury was required to subscribe one hundred fifty million, and the Federal Reserve Bank one-half of its surplus on January 31, 1933. The stock thus subscribed carried a dividend. Under the new law, as provided in all three bills, the stock subscription by insured banks is eliminated and the dividend on all stock is eliminated. This leaves the capital structure subscribed by the Federal Reserve Bank and the Treasury Department at a total of about two hundred ninety million dollars.

Under the terms of the Permanent Insurance which will become effective Aug. 31, 1935, unless the Temporary Insurance is extended, insured non-member state banks—that is, banks that are not members of the Federal Reserve System but which now have their deposits insured—must, in order to continue with the Federal Deposit Insurance Corporation beyond July 1, 1937, become members of the Federal Reserve System. The Banking Act of 1935 as originally introduced provided that non-member banks must join the Federal Reserve System by July 1, 1938. The House in passing the bill removed this requirement. The Senate changed it so that any non-member state bank organized after the effective date of the Act of 1935 which has its deposits insured must join the Federal Reserve System by July 1, 1937, and any state bank, now in existence and in the Insurance Corporation which is not a member of the Federal Reserve System, the deposits of which exceed one million dollars,

must join the Federal Reserve System on or before July 1st of the year following which its deposits amount to one million dollars.

Otherwise than as outlined, Title I carries a lot of corrective, technical features which are not especially important for discussion but which are necessary and with respect to which I think there is little controversy.

TITLE III

Let's now consider Title III before passing to Title II, which latter section seems to be the highly controversial portion of this legislation. Title III clarifies the ambiguities of the Banking Act of 1933 and removes inconsistensies.

Looking at it from the banker's standpoint, I think probably the main item in Title III that we are interested in is the amendment to the provision of the Banking Act of 1933 requiring the then existing loans to officers of the bank in which they are employed to be removed by June 15, 1935. The report of the Comptroller of the Currency, Mr. O'Conner, to the House committee, indicated that since the Banking Act of 1933 had become law, something like twenty-eight percent of such loans had been liquidated but it appeared that it would be impossible for the officers to completely eliminate this set of loans by the date provided. Since then, however, Congress has passed a special act extending the time for elimination of these loans for one or two years, I do not recall which. You realize, that under the Banking Act of 1933 a banker is practically outlawed as far as borrowing money is concerned. He is even worse off than lawyers. He cannot borrow money from his own bank, even on good security, and if he borrows money from any other bank he has to make a written report of it to the ehairman of the board of his own bank, stating the date of the loan, the maturity of the loan, the amount borrowed, the security, and the purpose of the loan.

TITLE II

Passing to Title II, which deals exclusively with the Federal Reserve System, I do not imagine many members of this bar are very familiar with the form of the set-up of the present Federal Reserve System and since that information is quite essential for a clear understanding of the proposed amendments, I shall briefly outline it for you.

We have in our present Federal Reserve organization a Board of Directors, known as the Federal Reserve Board, which maintains its headquarters in Washington, D. C. This board is made up of eight members, which consist of the Secretary of the Treasury, Comptroller of the Currency, both of whom are ex-officio members, and six members appointed by the President of the United States, by and with the advice and consent of the Senate. The six appointed members are supposed to be appointed with due regard to a fair representation of the financial, agricultural, industrial and commercial interests and geographical division of the country. The appointed officers hold office for ten years and cannot, for two years after they leave office, unless they serve their full term for which they were appointed, hold

any office, position or employment in any bank which is a member of the Federal Reserve System. Of the six members appointed by the President, one shall be designated by him as Governor and one as Vice-Governor of the Federal Reserve Board. The law says, in connection with the appointment of these members for a ten year period that they: "Shall serve for a term of ten years unless sooner removed for cause by the President." In light of our recent court decisions that provision seems to mean that no President has power to remove members of the Federal Reserve Board except for improper conduct of their office. This Washington board has certain limited jurisdiction over the twelve Federal Reserve banks of the country. I say "limited" advisedly, because at the time of the creation of the Federal Reserve System there was a fight similar in some respects to the fight now going on in Congress over the question of whether the Federal Reserve System should be a strongly centralized system under the complete domination of the Federal Reserve Board, or whether it should be a decentralized system, leaving to the various reserve banks, in a large measure, the control of the administration of the affairs of that particular reserve bank. It is interesting to note that Senator Carter Glass, working with President Woodrow Wilson, was the chief exponent of the decentralized system and those opposing it at the time were the representatives of the New York, Chicago, and other larger financial centers. Today we have the same Senator Glass again opposing the centralized system, but at this time his opposition seems to consist chiefly of administration forces, whereas his associates in the fight he is making are, in a great measure, the large financial interests of the east.

Leaving the Federal Reserve Board in Washington, we have twelve Federal Reserve Banks in the United States. Each has its separate board of directors, consisting of nine members, six of whom are elected by the banks that have a membership in that particular Federal Reserve Bank and three of whom are appointed by the Federal Reserve Board in Washington. This gives you a ratio of directorates of six elected by the member banks against three appointed by the Federal Reserve Board in Washington.

Under the existing law, the Federal Reserve Agent is appointed by the Federal Reserve Board in Washington. He is one of the three directors that the board appoints. He is also chairman of the board of the Federal Reserve Bank. Legally, he has the power, if he chooses, to function as the executive of that bank. In practice, over a period of years since the inauguration of the Federal Reserve Act, the Governor of the Federal Reserve Bank has functioned a great deal in that capacity but the Governor is simply an employee of the Board of Directors of that particular Federal Reserve Bank and is not a member of the board. This has caused much overlapping of duties and in some instances there have been near serious conflicts as between the Federal Reserve Agents or chairman of the board and the Governors of these banks. So much for the present organization of the Federal Reserve Board.

It is proposed in Title II that the positions of Federal Reserve

Agent, Chairman and Governor in the Federal Reserve Banks all be consolidated. It provides that the Governor of the Federal Reserve Banks, who will be the person that carries forward this consolidated function, shall be elected by the directors of the Federal Reserve Bank, but he must be confirmed by the Federal Reserve Board. That is where a lot of the protest comes in from bankers over tbe country. They contend that this eentralizes the control of these individual Federal Reserve Banks in the Federal Reserve Board in Washington, which in turn is appointed by the president. It seems inconceivable to me that any worthy person who might be elected by the directors of a Federal Reserve Bank, which action is an expression by member banks through delegated authority because the member banks control the board, having a ratio of directors of six to three, would be rejeeted by the Federal Reserve Board at Washington without proper cause. Today the Federal Reserve Board may appoint the statutory executive of the Federal Reserve Bank without so much as consulting the directors of the Federal Reserve Bank. Under Title II this Governor, elected by the Directors of the Federal Reserve Bank, the great majority of whom are elected by the member banks, is charged to the account of the Federal Reserve Board in conneetion with its three appointments to that directorate.

The next question in connection with the Federal Reserve Banks that has aroused criticism is that Title II provides that no director of the Federal Reserve Bank may serve more than two consecutive terms of three years. It has been said that this will make it impossible for some especially valuable man in the district to continue to serve on the Board. Title II, however, states: "Two *consecutive* terms of three years". A director might be off the Board a year and if he is an exceptionally valuable man, the bankers can put him back at the end of that year. The purpose of this provision is to prevent the development of cliques and to rotate and encourage a little broader representation for banking and industry on the local boards of the Federal Reserve Banks.

However, the Governor and the Vice-Governor may serve continuously, but must every three years be re-elected and confirmed by the Federal Reserve Board, that is, the Washington Board. There may be a point of contention there. It is contended by some that such a recurring confirmation would make them subservient to the Federal Reserve Board in Washington. Frankly, I do not fear it. If a weak sister should attain this position, not only would the Federal Reserve Board have the right to refuse his confirmation, but the Board of Direetors of the Federal Reserve Bank which, let me repeat, is controlled by the member banks, also may refuse to re-elect him. It works both ways.

The Federal Reserve Agent, or chairman of the board of the Federal Reserve Bank today is a direct appointee of the Federal Reserve Board in Washington and the local Federal Reserve Bank has nothing whatever to do with his appointment or his reappointment. Therefore, I cannot see how Title II brings the banking system more under political control. I think it tends to do just the contrary. The Senate

bill provides for the continuance of the Federal Reserve Agent, but eliminates him as an executive of the Federal Reserve Board which of course removes still further any Washington control.

Let us now pass to the Federal Reserve Board in Washington. There has been quite a bit of criticism of Title II because it provides that the Governor of the Federal Reserve Board must be designated each year by the President. Under the existing Act there has never been a legal test as to the power of the President to remove the Governor, but in practice the existing law has always been accepted as giving him that power. The present Fcderal Reserve Act requires that the President designate a member of the Board to serve as Governor. The provisions of the law read as follows:

> "Of the six persons thus appointed, one shall be designated by the President as Governor and one as Vice Governor of the Fcderal Reserve Board. The Governor of the Federal Reserve Board, subject to its supervision, shall be its active executive officer."

This has been consistently interpreted that the Governor serves as Governor at the pleasure of the President. His term of office as a member of the Board is provided by law, hut not his term of office as Governor of the Board. When a member of the Board is no longer designated as Governor, he is still a member of the Board unless he resigns, which he usually does when he is no longer designated as Governor.

Under the present law, if he is not continued as Governor, he will, if he has any self-respect, leave the Board and what he is confronted with then is that for two years be cannot become connected with any banking operation in connection with the Federal Reserve System.

Title II clarifies this matter in two respects: First, by providing that the Governor is to serve as such until further order of the President in place of re-appointing him every year. Second, it provides that the Governor of the Fcderal Reserve Board shall be deemed to have served his full term of membership on the Board when he is no longer designated as Governor. In otber words, if he is no longer designated as Governor, under the new Act, he will not be confronted with the problem of not being able to resign from the Board and engage in banking business for two years as the law provides that he will be deemed to have served his full term and therefore the two year limitation does not apply.

Consider a person who is serving as Governor and is not financially independent or who desires to engage in no other vocation than banking. Isn't he going to tolerate more from the administration if when he is placed in the position of leaving the Board, that is, if when his designation as Governor ends he must sit idle for two years before he can enter the banking business, as the law now provides than he is if he is not re-designated as Governor he can immediately go back into the banking field.

The House Bill proposes no change in the number of members. The Senate Bill eliminates the Comptroller of the Currency and the Secretary of the Treasury as members of the Board still further re-

moving control of the Board by the Administration and changes the number of appointive members to seven in place of six, makes their terms fourteen years in place of ten, and provides that no more than four members shall be of the same political party. Neither shall members be eligible for re-appointment after serving the full term. The Chairman of the Board is appointed for four years in place of one, as under our present law.

Collateral to the provision mentioned for a Governor being deemed to have served his full term if he is not re-appointed, there is provided in Title II an increase in the salaries of the directors of the Federal Reserve Board. There is provided a pension based on the number of years of service with automatic retirement of new members after they are 70 years of age, and retirement at 70 at the option of present members. Therefore if a Governor is not re-appointed he has that pension and under Title II he can immediately go into the banking business if he decides to quit. Isn't he more independent in that case than he is under the present conditions?

I may be wrong, but that is the way it looks to me. The Senate Bill eliminates both the pension provision and provision for the Governor's term being served in full when he is no longer Governor.

Another point that there has been some discussion about, relates to the qualifications of members of the Federal Reserve Board. The Fedcral Reserve Board under existing law consists of six members appointed by the President, and confirmed by the Senate, with the Secretary of the Treasury and the Comptroller of the Currency as ex-officio members, making a total of eight. The existing law provides that there shall be represented commerce, agriculture, and industry in the membership of the Board. Title II changes this to provide that members of the Board shall have had experience *or* education, or both, to qualify in formulating cconomic and monetary policies, rather than represent any group or combination of groups. There has been considerahle opposition to this change. To me, from a practical standpoint it doesn't mean much one way or the other, but the Senate reinstated the former qualifications. It seems to me that the President in making appointments, and the Senate in confirming them, will size up any proposed member as being a suitable person for the Board as they sce the situation at the time, regardless of the specific wording of the statute, and further that it would be difficult for anyone to charge that such a person does not represent commerce or agriculture or industry, or has not had sufficient experience to pass upon financial and economic policies.

Title II has been criticised in connection with its provisions for eligibility of paper for rediscount with the Federal Reserve Banks. Specifically it provides that in addition to the paper that may be rediscounted under the present statutes and under the Federal Reserve Board rules and regulations, the member bank may borrow on its bills payable collateraled with sound assets. That is the same thing that has been provided during the emergency in what we call Federal Reserve Application 10-B.

On the surface there is quite a bit of criticism of this phase of

Title II. I think it is important that this additional service be provided for the member banks rather than as now provided in existing law with respect to Application 10-B in which latter instance the publicity and notice of its opcration advises everyone that an emergency exists. That is the most effective way to create or accentuate an emergency.

We have today, according to the Federal Reserve reports, a little over two billion dollars of rediscountable paper in the entire Federal Reserve System. Many of your smaller institutions do not have paper that is eligihle for rediscount, but they do have sound assets and from my experience as a country banker, I know many times we have rediscounted paper with the Federal Reserve, that has been technically eligible, that was not as good as much of the other paper that we had that was sound but technically ineligible.

The Senate Bill as reported out changes this provision to the extent of making a one percent penalty on the regular rediscount rate for discounting this type of paper.

If it should become a law that a bank to have its deposits insured must be a member of the Federal Reserve System and these small banks over the country are forced into the Federal Reserve System, they ought to be able to get some service from it, and this change in the rules governing eligibility of paper is one of the most vital importance to them. The privileges in connection with making loans on real estate mortgages are libcralized in the proposed Title II. I think it was very unfortunate that the original draft of the bill went out suggesting loans up to 75 percent of appraised value, bccause it created prejudice as to the entire bill. The House turned out the bill with a 60 percent limit and a further limitation that no bank can invest more than its capital and surplus, or 60 percent of its time deposits, whichever is the greater sum, in real estate mortgages.

The issuance of currency is a matter that has been criticised. Under the present law, the Federal Reserve Banks issue Federal Reserve Bank notes, against rediscountable paper, plus 40 percent gold certificates. This paper is set aside or ear markcd. That has been a cumbcrsome operation. Title II provides that the notes will be issued without pledge of assets but they shall constitute a first lien on all assets, with the specific requirement that there shall be a reserve of 40% in gold certificates. The suggestion has been made that the specific provision should be made that no Federal Reserve Bank may issues notes in excess of the amount that the present coverage requires in the way of statutory rediscountable paper. I think this should be provided in the law bccause while it makes no practical difference, confidence in currency is affected by the psychology of the situation.

The vital, the fundamental, point in controversy with respect to Title II and the one which the larger institutions are giving much attention and are most opposed to, is the Open Market Committee as set up in Title II. I have by no means covered the subject of Title II in a fully explanatory manner, simply skimming over a few of the high lights in the time available. The point in connection with the

Open Market Committee is the last item I will discuss and I will rush through it in just a few minutes.

For several years before 1932 the Federal Reserve Banks organized informally an Open Market Committee for the purpose of coordinating the purchase and sale of certain types of securities such as bankers acceptances and government obligations on the open market. This committee consisted of a representative from each Federal Reserve Bank. I think in practice the Governors of the Federal Reserve Banks acted in that capacity throughout. This movement was given legislative acknowledgment in 1932. The existing law provides that this committee of Federal Reserve Bank Governors shall meet at least four times a year, or as many times oftener as conditions merit, the committee to formulate the policies of open market operations. Their recommendations are to be submitted to the Federal Reserve Board; it to approve the plan and issue the regulations. If the Federal Reserve Board rejects the recommendations, then nothing is done, but further than that, after the Federal Reserve Board approves the recommendations of the Open Market Committee, any Federal Reserve Bank that so chooses may disregard them and not enter into such operation. The new bills all provide that the Federal Reserve Banks must comply with the findings of the "Open Market Committee."

At the time that the Open Market Committee was created it was felt that in the financial situation of the country, credit could be eased during deflation by the Federal Reserve going in at certain times and purchasing securities on the open market of the limited character as provided in the statute, and thus feed money into the banks and relieve the credit situation, and that when there was too much inflation they could sell on the market.

It has been found by experience, since that time, that this alone will not control the situation and it did not in 1928 and 1929. There are other factors that have to enter into it, such as the fixing of discount rates and the fixing of reserves.

The bill as introduced in the House provided that three members of the Federal Reserve Board, and two Federal Reserve Bank Governors, would be the Open Market Committee. That has not been acceptable to the bankers in general, and I think, acceptable to very few, even, of those who are working on behalf of this bill. For instance, the action of the three members of the Federal Reserve Board, which constitutes a minority of the Board, with respect to Open Market operations, could be nullified if the majority of the Federal Reserve Board did not agree, by the Federal Reserve Board taking action to fix discount rates and reserves in such a way as to offset the Open Market operations planned by the minority of the Board. The Federal Reserve Board now has the right to fix discount rates, as you know. It has the right to fix reserves under the present law when five members of the Board approve and it is sanctioned by the President.

It would seem that the members of the Federal Reserve Board should be competent to act in that respect without going to the President. After the bill was introduced, Governor Eccles, as I recall it, made the suggestion that the Open Market Committee consist of the Federal Reserve Board and five Federal Reserve Bank Governors, the latter, however, to act in an advisory capacity without vote. That has not been satisfactory to the banks. They want any representation by the Federal Reserve Bank Governors to be voting representation.

The American Bankers Association, as you know, recommended that the Secretary of the Treasury and the Comptroller of the Currency be eliminated from the Board, and that eventually, as retirement came about, the Federal Reserve Board be reduced to five members, and that that Board of five members, with four Federal Reserve Bank Governors (the latter with vote) comprise this Committee which would function in all three capacities, the open market operations, fixing of reserves, and fixing of discount rates.

The Secretary of the Treasury, it has been reported, was agreeable to reduction of the Board, but it was reported that the Administration did not relish the idea, feeling that the Secretary of the Treasury and the Comptroller of the Currency should continue in their ex-officio capacities. Naturally, these ex-officio members, and I am advised such is the case, would object to serving on a Board without a vote.

The last compromise that was suggested, and which it has been indicated the Administration might approve, is that this Open Market Committee shall consist of the full Federal Reserve Board and five Federal Reserve Bank Governors, all with a vote. This is the provision contained in the Senate bill. Consequently, if the Federal Reserve Governors who were members of the Committee could get two members of the Federal Reserve Board, they would have a majority and if there should be a political board or a trend toward a political board, it would seem that there would at least be two members of the Board who would join with the Federal Reserve Governors, who are representing directly the banks, in preventing anything too far out of reason.

It would seem we must have some control, some responsibility. The present plan of the Open Market Committee has not always worked, and I think you can readily see that it is defective. Just what compromise will eventually be agreed upon, of course, I do not know.

MR. MARTIN: I move you that we extend a rising vote of thanks to Mr. Driscoll for the splendid address he has given to us.

A VOICE: Second the motion.

MR. GRAHAM: We will express our appreciation by a rising vote, and personally I want to thank Mr. Driscoll for appearing before us and giving us a lecture on a subject that we are not familiar with, and we appreciate your kindness Mr. Driscoll.

There is another matter which I thought might be brought before the Commission, and that is this: We have had some grievance against the bankers, and I believe if that grievance were aired before the bankers that they would be willing to join hands with you. That

is, we are charging the bankers all over the state with practicing law. Now, that practice has grown up to such an extent tbat the country banks cannot get rid of it. They are forced to take care of it. Mr. Driscoll suggested that they might pass a resolution which would help aud possibly remove the difficulty. Mr. Driscoll.

MR. DRISCOLL: I would like to say this: I fully concur in your remarks. There are too many bankers practicing law, although if I were a lawyer I wouldn't kick because we haven't made any money doing it. But to express my own feeling about the country hank, they don't know about the Shattuck case; they don't know about the infringment of the law that they are committing when they go ahead and draw wills and this, that and the other thing, and I think if you could find it convenient to send a representative before a meeting and talk to them about the matter it would be very desirable, not only for the Commission but from the bankers' standpoint.

MR. HAWLEY: I move you that the President and the Secretary compose a letter, and a copy be sent to every banker in the State of Idaho, epitomizing the decision of this court in the Eastern Idaho Loan & Trust Co. vs. Shattuck case, and also in the E. C. S. Brainard case, so that the banking profession would know just what practicing law is, what constitutes the practice of law, and be informed that in drawing any instruments beyond the very ordinary notes and mortgages, they are practicing law and therefore are guilty of contempt.

A VOICE: I second the motion.

MR. DRISCOLL: I will say that if you or someone will get such a letter written, I will see that it is brought before the bankers.

MR. GRAHAM: That is very kind of you.

MR. A. L. MORGAN: You have heard the motion. All of those in favor of the motion will signify by saying "Aye." Those opposed "No." The motion is carried, and it is so ordered.

MR. HYATT: The prosecuting attorneys' association met on July 12th and elected the following officers: Wm. J. Hannah, of Orofino, president; Edward Babcock, of Twin Falls, vice-president; and Frank Rettig, of Jerome, Secretary; and expect to have a program next year.

(Meeting adjourned.)

PROCEEDINGS

FIRST ANNUAL MEETING

of the

JUDICIAL SECTION

of the

IDAHO STATE BAR ASSOCIATION

HAILEY, IDAHO
JULY 10, 1935
AT 2:00 P.M.

Proceedings Had at First Annual Meeting of the Judicial Section of the Idaho State Bar

Held at Hailey, Idaho, On July 10, 1935, at 2:00 P. M.

PRESENT:

SUPREME COURT

Hon. Raymond L. Givens, Chief Justice.
Hon. James F. Ailshie, Justice.
Hon. Alfred Budge, Justice.

DISTRICT COURTS

Hon. Chas. F. Koelsch, Third Judicial District. Chairman.
Hon. Bert A. Reed, Eighth Judicial District.
Hon. Doran H. Sutphen, Fourth Judicial District.
Hon. Gillies D. Hodge, Second Judicial District.
Hon. T. Bailey Lee, Eleventh Judicial District.
Hon. Guy Stevens, Sixth Judicial District.
Hon. C. J. Taylor, Ninth Judicial District.
Hon. Adam Barclay, Eleventh Judicial District.
Hon. Jay L. Downing, Fifth Judicial District.
Hon. James R. Bothwell, ex-District Judge, Eleventh Judicial District.

JUDGE KOELSCH: Gentlemen, I see that there are nine of the district judges here, three Supreme Court justices, and a number of ex-judges of both Supreme and District courts, and while this meeting is primarily one of the district judges, it is an experiment following, as I understand it, the example that prevails in the American Bar Association, to have a Judicial Section. This is presumed to be the Judicial Section of the Idaho State Bar.

For a long time I have entertained the idea that the business of the courts of this state could be helped along a great deal by having proper rules in the district courts. I say that because I find that some of the district courts have no rules at all while others have rules so varied and so different from those prevailing in other districts that it is really difficult for one lawyer who happens to have business in another district to familiarize himself with the rules of that district. It certainly would be a comfort, to say the least, to lawyers to have uniform rules as far as possible in the trial courts. I also entertain the idea that justice could be better administered by allowing the procedural law almost entirely to be formulated by rules rather than by statute, and, believing that way, when the Bar Commission asked me to prepare the program for this Judicial Section, I put those subjects on the program. The first number on the program is "The Inherent Power of Courts to Formulate Rules." We are fortunate in having Judge Ailshie to present that subject to us. Judge Ailshie.

JUDGE AILSHIE: Gentlemen, I have concluded that in discussing this subject you would be more interested in having a cross-sec-

tion of the professional opinion of the members of the Bar and Bench with respect to the law, and instructors of the law, throughout the country, than you would be in hearing my personal views on the matter. So I endeavored to collect some of the things that I think are most authoritative and come from perhaps the most eminent authority on the subject, from judges and deans of law schools and eminent professors, on the subject of rule making powers, and I have occasionally with that included some of my own observations, which will not serve you any purpose perhaps other than to introduce the next thought.

I have been requested to discuss a subject here today which is really so old that it is coming in vogue again, namely, "The Rule-Making Power of the Courts." This, as you will observe, is a very comprehensive but not very definite subject. It may appear even more indefinite, and obscure, after I shall have finished this paper. At any rate and just whatever it may be, it is a power that has been exercised by English courts for nearly five centuries. Rules of the Court of Common Pleas were in force and recognized as early as 1457 during the reign of Henry the VI. The power of the court of King's Bench and Chancery to adopt "general rules or orders" governing the practice and procedure appears to have been recognized and taken as a matter of course throughout the development and growth of the common law.

It appears that in this country soon after the adoption of the Federal Constitution and in 1792 the following incident took place in the newly constituted Supreme Court of the United States:

> "The Attorney General having moved for information, relative to the system of practice by which the Attornies and counsellors of this court shall regulate themselves, and of the place in which rules in causes here depending shall be obtained, the Chief Justice, at a subsequent day, stated, that the Court considered the practice of the courts of King's Bench and Chancery in England, as affording outlines for the practice of this court; and that they will, from time to time, make such alterations therein, as circumstances may render necessary."
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> (10 Ill. Law Review 171, 2 Dallas, 411, 1 L. Ed.)

In Beers v. Haughton, 9 Peters 329, 9 L. ed. 145, Justice Story, referring to the previous cases of Wayman v. Southard, 10 Wheat. 1, 6 L. ed. 253, and Bank of U. S. v. Halstead, 10 Wheat. 51, 6 L. ed. 264, said:

> "It was there held, that this delegation of power by congress was perfectly constitutional; that the power to alter and add to the process and modes of proceeding in a suit embraced the whole progress of such suit, and every transaction in it, from its commencement to its termination, and until the judgment should be satisfied. . . . And it was emphatically laid down, that a *'general superintendence over this subject seems to be properly within the judicial province, and has always been so considered.'*"

Dean Pound of the Harvard Law School, in discussing the authority of the reviewing court to adopt a code of rules for the government of inferior courts, has said:

> "As to trial courts, the historical argument already made is decisive of the power of the reviewing court of general jurisdiction to govern procedure by general rules, if not precluded by legislation. As the English judicial organization stood at the time our constitutions were adopted, trials were not had in the courts in Westminster, as a rule. Trials at bar in the superior courts were rare. Causes were heard at circuit before the King's justices or commissioners of assize and *nisi prius*, so that a justice of the King's Bench might try at circuit under a commission of assize and *nisi prius* a cause depending in the Common Pleas or vice versa. In other words, the trial courts were independent tribunals, quite as old as the superior courts. But the proceedings at circuit were reviewed on motion for new trial, motions in arrest, motions for judgment and the like in the superior court in bank at Westminster. When our constitutions were adopted, practice for these cases was regulated by general rules of the superior courts at Westminster, some of which had been in force since the seventeenth century.
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> "It would seem, therefore, that the supreme court of one of our states, which has always been looked upon as the historical equivalent of the Court of King's Bench, might constitutionally be given the power to regulate the practice in the causes it has the power to review in bank, as was the doctrine at common law as between the court at Westminster and the circuits.
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> "It should be noted that the statute in Colorado, enacted at the instance of the bar association of that state, proceeds upon this very theory.
>
> "Moreover this power of the highest court of general jurisdiction of the state, representing the King's Bench in the common-law judicial organization, to make general rules of practice which should govern also in the practice of inferior independent tribunals whose proceedings it had the power to review, was recognized in American legislation until the later tendency to govern every detail of procedure by statute caused the power for a time to become forgotten."

Just here may I pause to say that I have no great patience with the statement that is so frequently made by newspaper and magazine writers and, too often by members of our own profession, that the English are so far in advance of us in matters of practice and procedure in the dispatch of litigation. A fair and impartial consideration of the general run of judicial business in England as compared with the same class of litigation, in the same character of courts in this country, will give our courts as high a rating at any period in our history as the English courts can claim. Of course we have had more instances of great delay and others of downright miscarriage of justice than they because, sometimes, of laxity of the courts or the condition of our practice and procedure and the great number of courts and enormous volume of business transacted. But they have had some of the same experience in England: As an extreme example, the Tichborne case which ran for 188 days and through a period of some 45 years. (See 21 A. B. A. Journ. 107.) There are other things, however, to be considered in connection with this: In the first place, for every single case they try in England, we try hundreds in our state and Federal courts; in the second place they only have one set of courts and one judicial procedure. England

is one state and Parliament legislates for the entire British Isles. We have 49 judicial systems in this country—one Federal and 48 state. There is more litigation in the State of New York than in all the courts of England, and that litigation is carried on under the enactments of two separate and independent legislative bodies,—the Congress and the state legislature. The very nature of our form of government and the character of our litigation render comparison in the handling and dispatching of judicial business of very little value. And I think you will all agree that we would not consider surrendering all our judicial business to Federal courts exclusively.

The geography of the two countries necessarily plays a large part in the administration of the laws. The whole of England might be set down in the state of Illinois and still have room enough left for a couple Rhode Islands. England has a small area, 50,840 square miles, while we extend across an entire continent, with climatic conditions ranging all the way from tropical to semi-arctic, and comprising 3,622,933 square miles,—71 times the size of England.

While the reports, law reviews and text books disclose a great deal of discussion on the rule-making power of the courts, I have not, in my limited research, found where anyone has ventured a definition of the particular things that can or should be covered by a set or code of rules; in other words, just where matters of practice and procedure terminate and we enter upon the field of substantive law is indefinite. We do find, however, where some of the courts in recent years have been confronted with the issue of determining whether or not some specific rule violated a statutory or constitutional right of the litigant or fell within the rule-making power of the court.

In 1933 in the case of Cleveland Ry. Co. v. Halliday, 188 N. E. 1, the Supreme Court of Ohio was called upon to determine whether or not the court of Common Pleas had committed reversible error in refusing the demand of the plaintiff for trial with 12 jurors. The court had there adopted a rule that where a jury was demanded it should be composed of six lawful electors *unless a demand for a greater number* be filed before the case appeared on the published list. The court held "this rule of court is invalid. It conflicts with general law and it is not authorized under the rule-making power." The opinion was written by Justice Allen, (the feminine member of the Ohio court) in which it is said:

> "The question here presented is whether a rule of court as to waiver of jury trial prevails over a valid statutory enactment upon that subject. This question requires the consideration of the scope of the rule-making power of the court. As held both by this court and by other courts of last resort throughout the country, aside from common-law or statutory grant, the power to make rules of procedure is inherent in the judicial department. . . . This statute relates in its specific terms to rules dealing with procedural matters and the business of the courts. The rule-making power also extends to procedural matters only. . . . It is true that this court has held valid a statute providing for waiver of jury under rule of court. . . .
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> "We are conscious of the practical exigencies which led the court of common pleas of Cuyahoga county to promulgate the rule in question. No criticism is made of its motives, but holding as we do that trial by jury is a substantial right, and not a procedural matter, holding as we do that the statute has specifically outlined the way in which a jury may be waived, we are compelled to rule that this rule of court is invalid. It conflicts with general law, and it is not authorized under the rule-making power."

A very widely cited case is that of State ex rel. Foster-Wyman Lumber Co. v. Superior Court, 267 Pac. 770, wherein the Supreme Court of Washington approved a rule adopted by that court for the direction of the trial courts in the taking of testimony by depositions, and the terms and conditions under which such might be done. The rule had been adopted under authority of a legislative act authorizing the Supreme Court to prescribe "from time to time the forms of writs and all other process, mode and manner of serving writs and process of all kinds, the taking and obtaining evidence, of drawing up and entering and enrolling orders and judgments, and generally to regulate and prescribe by law the forms for, the kind and character of the entire pleading, practice and procedure to be used in all suits, actions, appeals, and proceedings of whatever nature." The court sustained the rule.

The real controversy in that case appears to have arisen over the issue as to whether or not the legislature might constitutionally confer upon the supreme court the power to make rules governing the inferior courts. The opinion seems to hold that *the power to make the rule inhered in the courts originally*, and the issue reduced itself to the query as to whether or not the legislature might concentrate that power in the supreme court. The reasoning of the case is interesting.

One of the most outstanding cases of recent times, discussing this question, is that of Kolkman v. People, 300 Pac. 575. Kolkman was convicted in the trial court and appealed to the Supreme Court, and among other things he attacked the action of the trial court in *commenting on the evidence*. The constitution of Colorado contained practically the same provision as ours vesting the judicial power of the state in the courts but also contained a provision conferring on the supreme court "general superintending control" over the inferior courts. The legislature had enacted that "the supreme court shall prescribe rules of practice and procedure in all the courts of record and change or rescind the same. Such rules shall supersede any statute in conflict therewith." (1913 Sess. Laws Colorado 447.) The Supreme Court adopted a rule reading as follows:

> "The rules governing comments by district judges on evidence shall be those now in force in the United States District Courts."

The Supreme Court sustained the rule and upheld the trial court in commenting on the evidence. The opinions are scholarly in their discussion as well as their various angles of approach to the subject. Three majority opinions were written and two dissenting opinions. It is worth the time of any Judge or practicing lawyer to read these

various opinions. In concluding the leading majority opinion Mr. Justice Alter said:

> "The judicial power of the state is vested in the courts; the legislative and executive departments are expressly forbidden the right to exercise it, and the courts, charged with the duty of exercising the judicial power, must necessarily possess the means with which to effectually and expeditiously discharge that duty; this duty can be performed and discharged in no other manner than through rules of procedure, and consequently this court is charged with the power and duty of formulating, promulgating, and enforcing such rules of procedure for the trial of actions as it deems necessary and proper for performing its constitutional functions. In our scheme of government, the responsibilities thereof are presumably equally divided, and each department must perform its own tasks, and accept the responsibilities therefor. If we assume that for many years the courts have surrendered, to a certain extent, the rule making power to the legislative department, and if we assume that such a practice, over a long period of time, gave validity to the exercise of that function by the legislative department, or that the legislative statutes upon the questions of procedure, and the enforcement of those statutes by the courts, amounted to an adoption thereof by the courts of such statutes as rules of court, all has now been set at rest by the solemn act of the legislature in passing a statute recognizing the constitutional power of the courts to make its own rules for its own procedure."

In connection with the discussion of the Colorado case, it may be well to note an expression contained in Sec. 7-207 of our statute. It is there said:

> "In charging the jury the court may state to them all matters of law which he thinks necessary for their information in giving their verdict; *and if it state the testimony of the case it must inform the jury that they are the exclusive judges of all questions of fact.*"

So far as I know the Supreme Court of Idaho has never discussed or passed upon the meaning or scope of the expression "and if it state the testimony of the case," as employed in this statute. It will be a matter of interest and undoubtedly elicit a lot of able discussion from members of the bar, and perhaps from the court itself, if some trial judge should enter upon a review of the evidence in a case, either in connection with or independently of his instructions to the jury. It would be of value to the profession to know just what the legislature intended by this expression and what the Court would say.

A similar provision is contained in the California statute (Sec. 608 C. C. P. Cal.) In People v. Perry, 4 Pac. 572, the trial court cited what he understood the evidence to be and then added: "There certainly could be no misunderstanding with regard to . . . ." The Supreme Court held that there was no error in the statement of the trial court for the reason that the court had advised the jury that the credit to be given any evidence was left to the jurors. Similar holdings have been made by the California Court from time to time. (Gately v. Campbell, 57 Pac. 567.)

At the annual meeting of the American Bar Association held in Boston in 1911 Honorable Thomas Shelton of Virginia presented and secured the adoption of a resolution providing for the appointment of a committee, with a view to securing the passage by Congress of an act vesting in the Supreme Court the rule-making power for all the Federal courts in cases both at law and in equity, and reciting that it was desirious "that a complete uniform system of law pleading should prevail in the Federal and state courts," and for the adoption of such a system of rules for use in Federal courts as might serve as a model for adoption in the state courts. The bill eventually passed and the Supreme Court of the United States is now vested with full power in that respect.

The nature of Federal courts, the powers they exercise and the chief subjects of litigation therein render it improbable that the hope entertained by Mr. Shelton, that the states might adopt the same set of rules and thereby have uniform rules throughout the state and Federal courts, may ever be realized.

Professor Sunderland of the University of Michigan has very well summed up the difficulties in the way of ever attaining a uniform system of practice and procedure in both the state and Federal courts to this effect:

> "The bar and the people in the several States are quite likely to feel that, to preserve their own judicial integrity and independence, control of the processes of their courts should be kept in their own hands. The amount of litigation carried on in the federal courts is insignificant compared with that transacted in the courts of the States. To permit the federal government to regulate the procedural rights and remedies administered in the state courts might seem too high a price to pay for the advantages to be derived from uniformity of procedure in the relatively few cases brought in the courts of the United States.
>
> "Furthermore, opportunities for experimentation are indispensable for developing and maintaining a satisfactory system of procedure. The 48 States are laboratories in which experiments are constantly going on. New methods which prove successful in one State are tried in others, so that each State is able to enjoy the benefit of the discoveries made by all the rest, so far as it cares to do so. This freedom of action has greatly facilitated and stimulated the improvement of American procedure. There has been a far more widespread activity and interest in securing a better administration of justice during the last 25 years in the United States than there has been in England. With its centralized judicial system, England was driven to the procedural revolution of 1873 in order to liberalize its technique of litigation. For fifty years thereafter comparatively little was done, in spite of much popular dissatisfaction."

Dean McKusick of the North Dakota Bar and Law School, in a report made to the Bar Association of that state in 1934, discussed the power of the courts to make rules and the process through which many of the courts, especially of the original northwest territory, came to surrender this power to the legislative branch of government, and concludes by making an appeal to the profession to call to their assistance their best talent for the purpose of meeting the problem with which he deems courts are unmistakably confronted at this time:

"Some may ask this very pertinent question,—if the courts have implied or inherent power to make rules how have the legislatures taken over rule making power as one of their functions? History records the answer to this question. Historically we observe that our judicial system had its beginning in a cut and dried organization equipped with powers to govern its own procedure. The Courts thus constituted one hundred years ago accepted this responsibility largely due to the fact that judges in these states were few and worked together, presenting a unified and consistent body of procedural rules. As population increased, the natural result was an increase of judges, with localized powers and inability to cooperate.

"In the northwest territory for example, three judges were sufficient for a given section afterwards a state. They rode the circuit, tried the cases and brought back their tough problems in the form of appeals for united action. After fifty years had passed, necessary usurpation of the rule-making power by the legislatures came into vogue because of the loosely knit judicial organization. As one historical account states it, "The courts had become district units, as a bench they were helpless." The popular will naturally expressed itself in the organ of government which was responsive and in this movement the entering wedge of legislative usurpation of the rule-making power in procedural matters took material form. This is old ground but it does no harm to refresh our memories on this point. . . .

"The bench and bar stand indicted by the laity for the present condition existing in legal procedure. Why then should the legal profession under the fire of such criticism be shackled and shorn of power to remedy the existing deficiencies which admittedly prevent the realization of justice in its truest and highest sense?"

We have a somewhat different condition when we come to consider the rule-making power under the Constitution of the State of Idaho. The framers of the constitution evidently intended that the legislature should have no power to prescribe rnles governing the conduct of litigation in the Supreme Court, either in the exercise of its original or appellate jurisdietion; and so they made the express declaration that "the legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a coordinate department of the government." (Sec. 13, Art. 5, Const.) They then turned their attention to the matter of appeals and the exercise of the powers of the various courts, inferior to the supreme Court, and said: "But the legislature shall provide a proper system of appeals." This of course refers to the method of taking cases from one court to a higher court; and then they added "and regulate by law, when necessary, the method of proceeding in the exercise of their powers, *of all the courts below the Supreme Court*, so far as the same may be done without conflict with this constitution."

So it will be seen that the framers of the Constitution of Idaho intended to expressly prohibit the exercise of any legislative power in the methods of proceeding in the exercise of any of the powers of the Supreme Court. No question ever arose relative to the exercise by the Supreme Court of the powers conferred upon it by Sec. 13, Art. 5, until in 1902 in the case of Mahoney v. Elliott, 8 Ida. 190, the Supreme Court, by a *Per Curiam* opinion, held the act of February 2, 1899 ('99 Sess. Laws, p. 6) valid and binding upon the court. Section 3 of that act provided that

> "unless by agreement of parties causes in which writs of error or appeals are taken to the Supreme Court of the State of Idaho from the counties of Kootenai, Shoshone, Latah, Nez Perce, and Idaho or counties hercafter created therefrom, shall be heard at Lewiston; and causes in which writs of error or appeals are taken to said Supreme court, ..." from the other counties "or counties hereafter created therefrom, shall be heard at Boise, . . ."

That case does not appear to have received any consideration upon the question of the constitutional or inherent powers of the court, either from briefs of counsel or by the court, and no reference whatever was made to Sec. 13, Art. 5 of the Constitution. The same question arose again in 1920 and in an opinion written by Justice Rice, concurred in by Chief Justice Morgan and Justice Budge, the case of Mahoney v. Elliott was expressly overruled, and the court there held tbat under the constitution *the legislature may not prescribe the time or place of hearing*, or determining any cause pending upon appeal in the Supreme Court. This was only an assertion by the court of its constitutional powers.

Now in conclusion allow me to suggest: In the first place, there can be no room for question or doubt but that the power of the Supreme Court, to make any and all necessary rules governing the transaction of the business of that court, is plenary; in so far as the rule-making power may be exercised by any court. In other words, so far as the rules promulgated do not transgress upon the field of substantive law, the court is unrestricted. In the second place, it would seem that the trial courts retain their inherent power which has always been exercised by common law courts to make rules governing the conduct of business of the several courts, except in so far as that power may be limited by exercise of the legislative power conferred by Sec. 13, Art. 5, "to regulate by law the method of proceeding in the exercise of the powers of all courts below the Supreme Court, in so far as the same may be done without conflict with the other powers conferred on such eourts by the constitution."

It would therefore seem that, whatever conclusion you may reach as to the extent of the rule-making power of the trial courts, it would be expedient and beneficial for the trial judges throughout the state to make such rules as they deem necessary for the conduct of their business and have them *uniform throughout the state*. In other words, if only such rules should be adopted as can be applied in all the district courts alike, it would be a long step in the interest of uniformity and perhaps simplicity as well. I am not an advocate of numerous rules and regulations. We ordinarily have too many. It is generally dangerous to undertake to be too minute, definite and specific or to attempt to define and enumerate every step to be taken. Well stated, general rules should be of assistance to the judges and the members of the bar as well. Lawyers and courts of last resort ought to concede to the trial judges the right to exercise a power commensurate

with their judicial responsihilities and indulge the presumption that they possess the intelligence and fidelity to duty of average members of the legal profession.

Now, gentlemen, I have tried to collect for your edification such expressions as I thought of some value and as appealed to me, and give you a resume of what I have discovered or have been able to gather on the subject of the rule making power. It is one that has been discussed a great deal; in fact, many committees, not only of the American Bar Association, but of various bar associations, have been investigating and making reports from time to time for the last eight or ten years. A very exhaustive report to the American Bar Association is published in pamphlet form, and any of you that desire may get a copy through the secretary of the Association.

JUDGE KOELSCH: Under the plan of the Commission this will be reported to the Bar meeting day after tomorrow, and perhaps we will not even then be able to discuss it, but that should not keep us from some discussion of the subject at this time. Some points surely should afford ground for discussion; for instance, the question as to whether or not the district judges should formulate and adopt these rules, or whether they should be formulated and adopted by the Supreme Court in order to attain uniformity. That is one thing the Bar requests, and yet in the early part of Judge Ailshie's discussion he shows that it is impossible to have them entirely uniform because conditions are not such that they can he. In our state different conditions prevail, so that any rules that are made would apply to some districts and not to others. However, there are certain fundamental rules that should be uniform. I can give you one instance where lack of uniformity resulted in a wrong and perhaps an injustice. In the Third District we have what we call "Rule IX" which provides that if a case is on the calendar, and nothing has been done for sixty days, it goes onto the miscellaneous calendar, unless restored to the active calendar, on motion. If it stays on the miscellaneous calendar for a year, at the beginning of the next term it is called, and unless justification is shown for this delay or some reason is shown why the delay has occurred, it is dismissed. There was a case pending in which there was an appearance by both general and special demurrers, but nothing else was done for sixty days, and the case went onto the miscellaneous calendar; it remained on the miscellaneous calendar for a year, and at the beginning of the September term it was called and nobody being present at such call, it was dismissed under "Rule IX." One of the attorneys resided at Pocatello and one at Weiser. They were not familiar with that Rule, and, as a matter of fact, at the very time I dismissed that case negotiations were going on for settlement or some adjustment of the case. These negotiations continued for some length of time, and after the expiration of six months one of the attorneys came in and asked that the case be reinstated, and I found under the decisions of the Supreme Court that could not be done. So I think there are certain fundamental rules that could and should be uniform throughout the state. It was with this idea, if there are any certain rules that could be uniform, that I asked Judge

Sutphen, one of the most studious of our judges, to present to us today "A Suggested Code of Rules for the District Court." Judge Sutphen.

JUDGE SUTPHEN: Mr. Chairman and gentlemen, I perhaps misunderstood just what was to be done. I took for granted that we were to open a discussion here for the purpose of framing a suggested code of rules. I have a compilation here of the existing rules in the various districts. I have grouped them under various subjects so that we would have the material before us. I have no objections to suggesting a code, hut I find that it would be impracticable to do so until we have first discussed it; in other words, in attempting to draft a suggested code I found that I got a part of one paragraph and then I was stumped. I knew how I would have to proceed in this district, but after I got to the other districts I saw I was in no position to speak. I will proceed directly to the various rules and to the subject matter covered hy the various rules. I will not read all of the rules, but I will briefly call your attention to some of them. I attempted to include in this compilation all of the rules of the various districts.

Taking up the subject of the calendar: Rule I, Calendar, Duties of Clerk:

> "Immediately prior to the commencement of every term, the clerk shall make up a calendar of all criminal cases, including appeals from inferior courts, and of all civil cases at any issue pending in the court, or in which the time for appearing is shown to have expired. The clerk shall note opposite each case briefly the nature of the action, the names of attorneys and upon what issue the case is pending, and in criminal cases whether the defendant is in custody or has been admitted to bail."

I understand that practically covers the practice in all of the various districts. I did not include in the rule the statutory provisions. Then, we come to this:

"The calendar shall consist of —— divisions." I found this situation: Some districts apparently had one calendar, and some, the Fourth for instance, have only two divisions of the calendar. We have only what we call the Law Calendar and Trial Calendar. In other districts where we have two judges, in the Fifth District, you have the Odd and Even; in other words, they divide the calendar into Odd and Even, and Odd goes to one judge and Even to the other; and in some districts, like the Third, they have a Miscellaneous Calendar, which takes care of what we call the Off Calendar and, and then they have the Criminal Calendar and Motion Calendar and Trial Calendar, and I find these various calendars comprise portions of our work in our Law Calendar and our Trial Calendar, and they also incorporate in them part of our Off Calendar cases.

In attempting to suggest a rule, I read the other fellow's rule and I am most likely to adopt, or suggest, the practice that we have in our own district, with which I am familiar, and I saw that it became quite apparent that the only way we could work this out was by general discussion. I suggest we discuss that and see whether or not

we can solve that problem. I have no solution. It appeared to me it might be done this way: We might have general rules for making up the calendar, but not as to divisions.

Another division of the calendar was the Call of the Calendar. Of course, in the districts where they have motion days and a number of calls of the calendar, the rules would have to be somewhat different than in other districts where no motion days are had.

The rule that I suggest is this:

> "The calendar shall be called at the opening of each term (I presume that is true of all courts) and at such other times as the Court or Judge may designate."

That is all I have in regard to the call of the calendar. I don't know how to work that out. Our practice is simply to have one call of the calendar on the opening of the term.

In the First District they have the Preliminary Call, the Secondary Call, and Peremptory Call of the calendar. There seems to be a good deal of variance in this matter of the call of the calendar. I believe we probably should leave that to a matter of general discussion. My personal impression is, as we have it here, that the calendar shall be called at the opening of each term and at such other times as the court may designate.

I notice in the First District they have as a part of the calendar rules:

> "Civil causes in which issue is joined, during the term, after the calendar has been made up, may be placed on the calendar and tried during said term, by the consent of the parties, and not otherwise."

That is different from our practice, and I would rather hesitate about adopting that practice in this district. Our custom is to set the case on the calendar on motion ex parte at any time. Motion is required, but we don't require notice in cases of that kind. Cases off the calendar, that is, cases that have been once on the calendar and transferred off, require notice, but cases that have been on the calendar may be placed on the calendar on motion ex parte.

Now, another question involved in this same subject matter:

> "At the call of the calendar all motions or demurrers or other proceedings involving only issues at law may be called for hearing immediately following the call of the calendar, and parties must be ready to try them without prior setting thereof."

I take it that is the general rule, but I would not make that as a final statement. You must remember that on each of these subjects we find some districts have no rule at all; we may find on one subject an adopted rule in only one or two districts, and very few of the subjects are covered by a rule in more than four districts. Continuing the same rule:

> "All attorneys having matters pending before the court must be present or be represented by someone at the call of the calendar; otherwise, the case may be stricken from the calendar."

Now, the rules differ greatly. Some make the case subject to dismissal. Our custom here is to strike it from the calendar. It is not a dismissal. Our practice permits reinstatement on notice and proper showing, but I rather object to having it dismissed absolutely just because the parties fail to appear, and the court is liable to find that justice has not been done in the case. However, once a case if Off the calendar, and no action is taken, it should be subject to dismissal after a period of time, and to provide for that I would suggest that this rule might cover the subject:

> "In any case in which no action has been taken by the parties for one year, it shall be the duty of the clerk, when requested so to do by the Judge, to mail to counsel of record notice of such fact, and if no action is taken within thirty days after the mailing of such notice, or good cause shown for not doing so, a dismissal may be entered by the court."

That rule might have to be rewritten to suit others. That is not exactly our custom. I was trying at the time to work out something that would harmonize with some other rules, but I am afraid it doesn't, and it doesn't meet our custom. Our custom is simply this: We list it on this Off Calendar list, about once a term. I don't call it because it is useless to do so; the great majority are cases alive and the parties are working out some solution, and while they are working out a settlement our custom is not to press those cases, but it is my desire to see that no case is left permanently on our calendar that should be dismissed, and I go to the attorneys and say, "How about these cases? I wish you would check them over and advise me as to all cases which should be dismissed and have them dismissed." But it is probably not good policy to require dismissal at the expiration of one year, because we have a number of cases I know of that have been on the calendar for three or four or five years, and I think Judge Barclay had quite a time working out the situation when he was attorney for the Canal Company. You had a large number of these cases. I think we had about 150, if I recall correctly, that stayed on the calendar list to be worked out, and it took some time to work out.

JUDGE BARCLAY: Yes, and by leaving them on there, they were settled.

JUDGE SUTPHEN: And it is left in the hands of the Court so that dismissals are not made too arbitrarily.

Now, I find that some of the districts have a rule in regard to the hours of the court. I am going to say briefly that I don't think that is necessary, and I will pass that. However, any of these matters I have passed I shall be glad to have called up again, because somcone may have something to report.

Then we have another set of rules, "Rules of Daily Order of Business." A number of districts have such rule, but I personally doubt if it is necessary.

Rules in regard to Chambers. Of course, that necessarily has to be fixed by each Judge, depending on the place of residence.

Motion Days—Notice of, and Practice: That is a difficult subject and I find a large number of rules from the various districts on

that subject. However, in this district we don't have Motion Days, and the statutory provisions in regard to practice and notice I have generally found sufficient, and apparently even some of the rules in regard to notice and practice are practically in line with the statute. Personally I am rather disinclined towards establishing Motion Days. We tried it and it just didn't work out and was not satisfactory.

We find also this subject, "Applications to Dissolve Injunctions or Discharge Attachments." The statute seems to cover that subject quite well. I find a rule on that subject in the First District. My impression after reading the statute and reading the rule was that it was really unnecessary. Perhaps the Judge from that District or someone from the northern part of Idaho could explain that rule better than I. Another subject, I believe, that has been covered by rules is "Injunctions, Modification and Dismissal," but I will pass that for the present. These various rules are here and anyone who wishes may read them at any time. I will not take the time to read them now.

Then we have a rule on "Defendants on bail in Criminal Cases." That should be in connection with our call of the calendar, I presume, and that rule is simply that a defendant out on bail should be required by the court to be in court at the opening day of the term and if he fails to show up at that time, his bail would be subject to forfeiture; I think that is the practice anyway, although I didn't find a statute on that subject and perhaps a rule might be appropriate.

I find a rule on the subject of "Depositions," and I feel there is some question as to the validity of that rule. It seemed to conflict with the statute and probably should be carefully checked before adopted. I think the statute fully covers the subject. It pertains to the method of publication of the depositions, and the statute explicitly sets out how it should be done, and this rule is one of the elements of it. I might say this: There are a good many of these rules that we adopted long years ago and no change has been made; practically all the rules have been adopted by predecessors of the present incumbents, and in many cases the statutes have been changed since the rules were adopted, and in many cases the amendment of the statutes has made the rule unnecessary.

One of the subject matters which I had heard discussed frequently as one of the rules that should be made uniform is the subject of ex parte divorces. We have a rule on this subject in the Fifth District, the Sixth and the Ninth. We have the custom in our district here although we have had no formally adopted rule on the subject.

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

I really think that is a good rule with this exception (and this is true of a good many rules) there should be a general rule to the effect that "The foregoing rule shall in special cases be subject to such modification as may be necessary to meet emergencies or avoid injustice and great hardship." I just reeall a case that I had some

time ago, in which I broke that rule. If I had not done so, I would have placed the county under the expense of caring for the wife and children for some time, perhaps taking care of them permanently; in other words, the husband left after beating up his wife and leaving her destitute, and she had an opportunity to ride back to her people back East, in an automobile with some parties that were just leaving. If I had invoked the rule, she would have had to stay longer than the party who was driving east could have stayed, and the result would have been that she would have been on the county and we would have had the added expense of transporting her and her family to her home. However, that would not be usual in these cases. That rule should be discussed and perhaps made uniform throughout the state. I think it is improper for one district, or two or three districts, to have this rule and others not, because it is not long before the divorce business is going to another district, and we don't want competition between districts in matters of that kind.

"Continuance" is another subject of rule, and we have rules in the First, Sixth, Eighth and Ninth, and I have suggested here Rule VII of the Sixth District:

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

That sounds to me like a very good rule, though we have had no such difficulty in our district.

"Amended Pleadings, and Time to Plead." I have changed that somewhat. I think that division should be made, "Time to Plead." There are various rules. In case the demurrer is overruled, the party is given some time, for instance, where the court makes no special provisions in regard to it in his order, some have one day and some have three days and some have five days, and I think the Federal court has ten days. I think perhaps that should be a uniform rule as to the time which is to be allowed after a demurrer is sustained or overruled. I have suggested here that we adopt the rule of the Third District in that respect.

> "When a demurrer or motion to reform a pleading is sustained, the pleader shall have three days to amend, unless the Court shall fix a different time; when a demurrer or motion to reform a complaint is overruled, and no answer is on file, the answer shall be filed within three days, unless the Court shall fix a different time. When it appears that a demurrer or motion has been interposed for delay, the Court may require the party filing the same to plead or proceed instanter."

On the subject of "Amendments" I have suggested Rule VII of the Eighth District:

> "In cases where the right to amend any pleading is not of course, the party desiring to amend, except when the application is made during the trial of a cause, shall serve with notice

> of application to amend, an engrossed copy of the pleading with the amendment incorporated therein, or a copy of the proposed amendment, referring to the page and line of the pleading where it is desired that the amendment be inserted, and if the pleadings were verified, shall verify such amended pleading or such proposed amendment before such proposed application shall be heard."

"Motion to Strike Part of Pleading." I have suggested Rule XI of the First District, which is the rule that requires the party moving to strike out any part of the pleadings to be explicit about what part he is striking and the grounds upon which the application is made. That rule might be adopted, although I think it is quite customary and I think the courts always require them to do so if their motion is to prevail.

I find that some of the districts have a rule in regard to "Sham Pleadings." That subject might be discussed. I will just read one of the rules here, Rule XXI of the First District:

> "Any party interposing a sham, frivolous or irrelevant demurrer or motion to any complaint or action, shall not be allowed to answer over, except upon such terms as may be imposed by the Court, and also shall be required to file an affidavit of merits therein."

That same rule we find in the Eighth District and a similar rule, somewhat different, in the Third.

"Deposit of Fees." I don't believe it will be necessary to bave a rule on that. The statute provides that, and there is no need of the court making himself or the clerk a collection agency.

Then here is a subject matter that causes the court some embarrassment. Tbat is the withdrawal of papers. Some of the courts have rules that no papers shall be withdrawn from the clerk's office without an order of the court. I am rather inclined to think that a rule of that kind is liable not to be observed, and I am more favorably impressed with the rule of the Second District, which is as follows:

> "No paper or record belonging to the files of the court shall be taken from the office or custody of the clerk without the knowledge of the elerk and only upon the written receipt of a member of the bar residing in Latah County, or of one authorized by such attorney to receipt for the same, speeifying the paper or record taken, and in no case shall any sueh paper or record be detained from the custody of the clerk for a longer period than five days at one time, and upon request of the clerk such paper or record shall be immediatcly returned. Non-resident attorneys may withdraw such papers and reeords only upon written order of court filed with the clerk. It is hereby made the duty of the clerk to see that this rule is strictly observed."

I personally have not had any trouble, except occasionally the clerk mentions some minor trouble, but we have always worked it out without any grief. I have left it entirely to the clerk. He requires attorneys to place a receipt in the file, for the file and also the particular papers that he is receiving, and he is supposed to return it. The clerk has a card index and knows where the file is at any time in case he wants it. But I can see that there might be a need for some rule of this kind. In view of the fact that a number of districts have rules

on that subject it might be one that should be taken up and a uniform rule made.

There is one subject in which I am personally more interested than in any other; that is, I think that we should have a uniform rule on instructions, so that we could all conform to one practice in regard to that matter. I will explain our rule in this district, and I think it is a rule in the Second District, the Sixth and Ninth. We require instructions to be written on ordinary white typewriter paper, with the number of the instruction left blank across the top, and no endorsements on it at all, so that it can be used, if the court decides to give it, by handing it to the reporter and being incorporated in the instructions. That saves a lot of time. We also require that a copy of all instructions shall be submitted with the original, and these copies are stapled together with a cover sheet, which states the name of the plaintiff or the defendant and requests the court to give the following instructions, and these are numbered in order, and at the bottom of each page is given the citation of authorities. The originals we don't use we tear up, but the copies are returned to the clerk with the endorsement on them, either given, refused or modified, and so we don't have to sit down and write out particulars of modifications. In other words, this shows the given instruction, will show in what respect it was in fact modified, and then of course the attorneys are served with a copy of the request for instructions, and the instructions are resubmitted at the close of the evidence, or as soon thereafter as possible. We recognize it takes a few minutes before they can be banded out. We instruct they be handed out immediately afterwards or as soon as possible. I believe that if that custom or rule on that subject could be adopted in all districts, it would be quite a help. In going to some districts I have to spend time in getting out my instructions, and I find it takes considerahle more time to work that out. "Interrogatories"; the same might be said with respect to requested interrogatories. They should be submitted in the same form.

We find on the subject of "New Trials and Bills of Exceptions" a rule in one district. In checking that up I have just this comment. Their rule was probably drawn before the 1919 amendment of the statute, and at least would have to be revised before giving it out. In view of the present statute, I do not think there is any necessity to have a rule on that subject.

"Briefs." Some districts have a rule in regard to briefs and apparently it is a matter of advice to counsel rather than a rule. I suggest that merely advice would not be necessary in a uniform code of rules, though it might be good adviee.

I find "Service of Findings and Objections To." I have suggested here that the rule of the Sixth District, Rule X, be adopted. I bclieve that provides that upon decision of the court, the court requests the winning counsel to prepare findings and conclusions and judgment, and requires him to serve a copy upon the opposite party five days before the findings are submitted to the Judge and gives him an opportunity to object. I think perhaps most of them follow this custom. I don't in each case tell tbem that they must do that. However,

a uniform rule on that subject I should think would be a good thing.

Next I find a rule in regard to court reporters' transcripts in the Third District, and I shall let Judge Koelsch explain the necessity for that. Perhaps that was adopted some years ago. I believe there has been some change in the law since that rule was written.

"Appeals from Inferior Courts and Methods." That is also a rule of the First District, and that is covered by statute. In other words, the legislature has prescribed the fees and under our authority we have no right by rule to levy any tax or charge in any proceedings, and if this increases the fee or requires payment of a fee which the statute does not require, I am inclined to think it might not be valid; and that is also true of the subject, "Cases Transferred from Other Counties," in which they require that a $10.00 fee be paid, and my thought on that is that it should be $7.00 or $12.00 or whatever provision is made in regard to the cost; in other words, I rather doubt the necessity for this rule. I have not had a case in which the situation arose which apparently called for that rule, and I am hardly qualified to speak on that.

"Causes Transferred from Justice Court Under I. C. A. 10-207." The same thing should be said in regard to that. I question whether the charge made there, can be made. A discussion of this subject might be helpful, especially where the appellant or the party having his case transferred does not pay the necessary statutory fee, and there might be something done so that the case can be dismissed. Judge Koelsch, I believe you can explain this.

JUDGE KOELSCH: It might be difficult for me to explain. These were there when I got there.

JUDGE SUTPHEN: Then there is a rule that,—

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

and I presume that that rule is for the protection of the attorneys. If the attorneys would like to have a rule of that kind I have no objection, but it probably should be uniform if used at all.

"Naturalization Matters." The rule I suggested here is the rule of the Third District, Rule No. XXI, and that simply provides that the first and second day of each term in each year is hereby designated for hearing petitions for naturalization.

That completes the subjects covered by adopted rules in the various districts. Undoubtedly these districts have and follow a number of customs for which they have no printed rules, but I have here a letter from which I want to read before I stop. This is a letter from Judge Hunt, to whom the discussion of this subject was originally assigned.

> "It would be a good thing in my opinion if the district judges could get together at least every other year and discuss their mutual problems. I have not prepared any outline that might be used in a discussion concerning district court rules, but shall merely jot down some of the little difficulties that we have encountered in this district. Conditions are so different in our various districts that it may be that in some of them these few things have not arisen to annoy the judges or the bar.

> "The matter of keeping one's docket clear seems to me to be of vast importance to counsel, litigants and witnesses and also is of importance to the judges in their effort to hold down the expenses of the district court. It therefore occurs to me that demurrers and motions which have been filed at least five days before the first day of each and every term of court should be disposed of on the first or second day of the term as a matter of course. If counsel do not appear to present their matters, then I believe they should be taken up on the court's own motion and the ruling entered. If that were done, it would eliminate cases being filed, a demurrer interposed, and then the case remaining on the docket for an indefinite time in this condition. It seems to me that all cases at issue should be dismissed on the first day of each term unless counsel appear and request that the same be set for trial. I feel that because in so many cases the parties are able to get together and dispose of their differences, cases should be put over the term unless on motion of counsel, but that a second continuance be not granted unless good cause is shown by affidavit. Unless good cause is shown for a second continuance, I feel that the action should be dismissed.
>
> "Regarding divorces, I believe the rule should be uniform that no divorce should be granted until the statutory time for appearance has expired notwithstanding that counsel may agree that the matter may be heard sooner. While we know that collusion exists in a large number of divorce cases, still I believe that the record at least should be in such condition that collusion is not shown on the face of the record. I further suggest that we go back to the old rule in divorce cases, to wit, that at least two witnesses be necessary in corroborating the complaint unless documentary evidence is used in lieu thereof.
>
> "In one's own district the matter of a schedule of attorneys' fees in mortgage foreclosures and so forth is easy to arrive at since both the court and counsel are familiar with the usual and ordinary fees allowed. When, however, a judge goes to another district and is compelled to grant judgment for attorney's fees, he is more or less up in the air when it comes to determining what the reasonable fees should be. Conditions in our state are net so different in various parts thereof that it would not be possible to agree upon a uniform schedule of fees. This suggestion might not meet with the approval of our counsel, and of course could not be agreed upon unless we had a meeting of the district judges from time to time where the matter might be discussed."

I might say in regard to that matter he sent me a copy of the Los Angeles Bar rule in regard to attorney's fees. I will read that after I get through with this letter.

> "Regarding disqualification of judges, until recently in this district counsel rarely filed an affidavit of prejudice for the purpose of disqualifying a judge. It was customary for counsel to simply ask the court to call in another judge in any and all cases where a litigant or his counsel for any reason desired another judge to try the case. We never made it a practice to inquire why or for what reason another judge should be called in for it was our policy to step aside always without question if any reason at all developed in the mind of the litigant or his counsel concerning the propriety of one of us trying his suit. This custom has, however, become subject to abuse, and therefore we have adopted the policy of insisting that an affidavit of prejudice he filed.

"Regarding cost bills, I have been called frequently into another district to try suits. Invariably in each contested case after you feel that the matter has been finally disposed of, we are presented with the matter of motions to strike cost bill, motions to tax, and so forth. Apparently the attorneys rely upon certain customs that have undoubtedly developed contrary to statute and rules of the district. It would seem to me that that matter of serving and filing cost bill should be uniform in all districts.

"Regarding instructions, no two districts seem to have the same rule regarding service of requested instructions upon opposing counsel and furnishing the same to the court. In one district where I have tried cases the attorneys apparently don't prepare instructions, but simply at some convenient time during the trial request that the court instruct upon certain phases of the lawsuit. I believe that counsel should prepare instructions well ahead of time and serve the same upon opposing counsel and give the original to the court for his consideration early during the trial.

"Regarding dismissals of appeals from Probate court, several of the districts have a rule providing that in all cases of appeals from the Probate court if the fees are not paid by the appellant then the respondent may pay the same and have the case dismissed in the district court. This is a good rule, which should be statutory and apparently is not. I believe that this rule should be uniform in all districts.

"Since the recent act of the legislature in amending the statute regarding disqualification of judges, both Judge Reed and I have been called out of the district a great deal to try cases. I believe as time goes on we are going to be more and more called into other districts, and this situation undoubtedly prevails in other parts of the state. A uniform set of rules would serve to make it easier for all concerned in trying cases away from home. The only way that I can see that a uniform set of rules could be adopted would be to have a general discussion at the meeting of the State Bar and the meeting of the judges that occurs at the same time, and after a general discussion a committee be appointed to draft a uniform set of court rules. There might be some difficulty in getting the various district judges to adopt the rules that the committee might submit, but I am sure that enough of the districts will adopt them so that it would be of considerable help."

This California rule in regard to attorneys' fees provides in all default cases, for the first $1,000 or part thereof a rate of 10% with minimum of $75; for the next $9,000 at the rate of 3%; for the next $40,000 a rate of 2%; for the next $50,000 a rate of 1%; and for all above $100,000 a rate of ½ of 1%. In contested cases it requires a minimum of $100 and 10% for the first $1,000; for the next $9,000 a rate of 4%; the next $10,000, 3%; the next $30,000, 2%; the next $50,000, 1%, and for all above $100,000, ½ of 1%. All applications for compensation for extraordinary services rendered in connection with mortgage foreclosures or probate proceedings must be accompanied by an itemized statement of services rendered.

I have some other proposed rules that I have heard discussed, taken mostly from the uniform trial rules in other states; their statntes and constitutional provisions are so different from ours that I don't think I will take up the time today. I think we have snfficient material for discussion if we confine ourselves to the rules that are

now in existence. I have the rules of the Federal court and some other rules which might assist any committee that might be appointed to frame suggested rules.

JUDGE KOELSCH: I think this is a thing that can only be settled by general discussion. It will be impossible to go through all these suggested rules. That will have to be worked out by the district judges who are present before they are recommended to the convention tomorrow or the next day.

We have a rule with reference to divorce cases that no divorce should be granted unless the statutory time after service has expired. I might say that in one case when a woman had a divorce case pending in our court, and during the pendency and before the time had expired, she had a chance to go into the consular service in South Africa, I took just her testimony, and waited for the statutory time to expire, when I had the corroborating testimony, and then granted the divorce.

The practice with reference to instructions I think we have got down pretty well in the Third District. Counsel will hand me the instructions they propose as early as possible. Of course, it cannot be done until towards the close of the case because sometimes changes take place. They hand two copies of the instructions to the judge, one of them with the citations on which they will rely noted on the bottom of the instruction, and the other one so that it can be used later. There is one point I shonld like to hear discussed either today or tomorrow. Last winter a group in Boise met, and I was called in there to discuss the question of changing the statute, which now says that all instructions are deemed excepted to, so that only those instructions that counsel really want to except to should be excepted to, and let him point out those that he wants excepted to, and, failing to do so, he would be precluded from afterwards assigning such an error.

Another point I should like to hear discussed is the general demurrer. In cases where a general demurrer is filed, but submitted without argument, that general demurrer may or may not contain a vital question, a question that really should be sustained, but counsel fails to indicate what it is, and the other side is up in the air and, of course, the court does not have time to investigate the complaint to find whether or not the demurrer should or should not be sustained. The practice in Oregon has been when a general demurrer is filed it must be accompanied with a brief pointing out the questions expected to be raised hy it. In my judgment that would be a very good rule to adopt throughout the state. The subject is open for discussion.

JUDGE BOTHWELL: What would be the effect on the question in the Supreme Court? The qnestion would be raised there. You never waive the general demurrer.

JUDGE KOELSCH: No. I think it is unfair to the trial court not to submit the point and then to overrule a general demurrer that is really vital, without having any inkling as to the grounds of the demurrer, and being reversed. They file a general demurrer, and the court hasn't time to investigate it, and the other side might consider it merely an appearance; the court overrules the demurrer and, as a

result, he is reversed in the Supreme Court. All that might be obviated if a little brief were filed pointing out the vital points. What is the pleasure of the house?

GENERAL MARTIN: On this question of rules I believe it is generally felt they should be uniform throughout tbe state. The judicial council appointed by the State Bar Commission worked out a bill which we presented to the legislature providing for a council of judges to prepare uniform rules for the state. This council, if it were worked out, would be composed of the senior judge from each judicial district and the chief justice of the state, to work out a set of rules. Uniform rules worked out should not be too many, only those on important subjects which would apply to all of the districts, and many things should be left to the judge in the district to arrange, matters that would apply very largely to conditions in his district.

I was impressed with that discussion of the call of the calendar by Judge Sutphen. In a large county where a large amount of business is transacted, with a resident judge at that point, the calendar should be called at stated times, and in a district of several counties served by one judge necessarily those times must be farther apart and should not be made uniform throughout the state. The making of calendars and matters regarding the manner in which instructions should be handled, and setting of cases, could be made uniform. The matter of demurrers, I like very much the suggestion that the chairman made in regard to the general demurrer. Of course, most of us know that we file these general demurrers for time, without any thought that they have any real value. Other times they have real value but the attorney presenting the case does not care to press it at the time the demurrer is filed for some reason. Where a general demurrer is filed counsel should accompany it with some brief or statement as to the point of the things that his general demurrer covers, or in support of the general demurrer, so that the court may be advised.

I favor legislation which would create among judges some judicial body that would adopt these rules, and when they were adopted they would be binding upon all of the districts of the state.

JUDGE KOELSCH: There is no program—this being the first time, it is up to us to formulate our program. Necessarily we cannot take a miscellaneous collection of rules that have been adopted by the districts, and which have been covered here by Judge Sutphen, and discuss them, hut if a committee were appointed they could before the Bar meeting adjourns suhmit them to the general association, and do it rule by rule, and have it discussed and either reject it or accept it. It seems to me that would be the rational way to proceed.

JUDGE TAYLOR: I move that a committee of three be appointed, and if they can in the short time they will be here, suggest a code of rules, that it be reported baek to this body or the State Bar for action; and if they find the time too short to report back to the Bar, that this body have authority to continue as a committee for another year.

A VOICE: Second the motion.

JUDGE KOELSCH: You have heard the question. Those in favor say "Aye." Those opposed, same sign. It is carried.

JUDGE REED: I move we adjourn.

A VOICE: I second the motion.

JUDGE KOELSCH: We will adjourn until ten o'clock tomorrow morning.

Thereafter the chairman appointed the following committee to draft the suggested code of rules:

JUDGE DORAN H. SUTPHEN, JUDGE C. J. TAYLOR and JUDGE BERT A. REED.

At ten o'clock A. M., Thursday, July 11th, the above named eommittee met at the District Court Room of the County Court House, with the chairman, Judge Chas. F. Koelsch, and drafted "A Suggested Code of Rules for District Courts," which appears in the Proceedings of the Idaho State Bar for the morning session July 13, 1935.

NOTICE

Suggestions, criticisms, comments, and additions to, proposed uniform rules for District Courts should he mailed to Hon. Chas. F. Koelsch, Boise, or to members of the above committee.

ATTENDANCE REGISTER

Ailshie, James F. ..... Coeur d'Alene, Idaho
Amhrose, George L. ..... Mackay, Idaho
Anderson, J. H. ..... Blackfoot, Idaho
Babcock, Edward ..... Twin Falls, Idaho
Bailey, C. A. ..... Twin Falls, Idaho
Barclay, Wayne A. ..... Jerome, Idaho
Benoit, Harry ..... Twin Falls, Idaho
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Bresnahan, Leo M. ..... Boise, Idaho
Budge, Alfred ..... Boise, Idaho
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Condie, Gibson ..... Hailey, Idaho
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Reynolds, Henry L.	Maywood, Ill.
Ricks, Newell K.	Jerome, Idaho
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Soule, Grant	Dubois, Idaho
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Thoman, J. T.	Twin Falls, Idaho
Thompson, H. B.	Pocatello, Idaho
Van Winkle, Roy	Hailey, Idaho
Ware, Marcus J.	Lewiston, Idaho
Wilson, Asher B.	Twin Falls, Idaho
Worstell, H. E.	Wallace, Idaho

INDEX