IDAHO STATE BAR COMMISSION

By_____, Secretary

PROCEEDINGS

of the

IDAHO STATE BAR

VOLUME XIII, 1937

THIRTEENTH ANNUAL MEETING

Proceedings of the

JUDICIAL SECTION

Third Annual Meeting

Volume III

IDAHO FALLS, IDAHO

July 22, 23 and 24

OFFICERS OF THE IDAHO STATE BAR

COMMISSIONERS

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

OFFICERS—1937-38

A. L. MORGAN, President
J. L. EBERLE, Vice-President
SAM S. GRIFFIN, Secretary
300 Capitol Securities Bldg., Boise, Idaho

LOCAL BARS' SECTION OFFICERS

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H. E. RAY, Idaho Falls, Secretary

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

Clearwater Bar Association (Second and Tenth Districts), Alex Kasberg, Lewiston, President; Weldon Schimke, Moscow, Secretary.

Third Judicial District Bar Association, Frank Davison, Boise, President; Oliver M. Koelsch, Boise, Secretary.

Fifth District Bar Association, W. C. Loofbourrow, American Falls, President; John W. Clark, Malad, Secretary.

Seventh District Bar Association, Frank Ryan, Weiser, President; John T. Kenward, Payette, Secretary.

Eighth Judicial District Bar Association, W. B. McFarland, Coeur d'Alene, President; George W. Beardmore, Sandpoint, Secretary.

Ninth District Bar Association, Wm. S. Holden, Idaho Falls, President; Faber F. Tway, Idaho Falls, Secretary.

Eleventh Judicial District Bar Association, Ray D. Agee, Twin Falls, President; N. K. Ricks, Twin Falls, Secretary.

PROCEEDINGS

MORNING SESSION

Friday, July 23, 1937
10:00 A. M.

PRES. ANDERSON: We will come to order now. We have with us the Mayor of the fair city of Idaho Falls, who is going to tell us where to go, and what we can find when we get there.

MAYOR CLARK: I can welcome you not only as Mayor of the city of Idaho Falls, but as one of the members of this Association. I know that you who have not been here before, and you who have been here before, will find Idaho Falls just what you expect of it, a city of the first class, and one that is going ahead.

We have had some little disturbance here during the first day of this session because our friend Mr. Meek, who is also a member of this profession has been with us too. But, regardless of that fact, gentlemen, I assure you that Idaho Falls is a little principality of its own, and those boys who have moved away from Nampa and Caldwell and Idaho Falls and taken up their residence down in the Capital, don't need to come over here to take care of us, because we take pretty good care of our own city. I might tell you, however, that yesterday morning they thought it would be a good opportunity to put me on the carpet, because there have been a few things said about this city in the press, which I assure you are wrong. But, it has been spoken of as the city where things were a little free and easy. So, yesterday morning into the office walked these two distinguished gentlemen, Mr. Meek and Mr. Yeaman; and they said, "Now, we will just tell you what the law is, and what you are going to do," and a little hint of impeachment proceedings, and a few other things in between the lines. I said, "Boys, you are in the wrong city. You don't understand the situation here. Now, we don't have any of those things that you are complaining of in this city; we are strictly law abiding, and they do not exist." I saw my friend Meek look down at the floor for a moment, and he said, "Well, Chase, I would like to believe you, but I just went over here to the barber shop to get a shave, and while I was in there some other fellow in the barber shop pushed a button, and it seemed like they understood the signal because in a moment or two a fellow came in with a bottle of beer in one hand and a nice, big slug of whiskey in the other, and he sat right there in my presence and put them under his belt. So, I still believe they are drinking whiskey in Idaho Falls."

But, anyway, I think the main trouble with him was it just made him a little dry when he saw it go down. And it will be all right now, and he will forget about it, now that he is associated with us, and Mr. Yeaman has left town.

We want you to enjoy your stay in Idaho Falls. We feel very proud of our city; we think we have an outstanding city; we do not claim it is any better than the ones that you have, but we still claim it is very, very good. I hope you will take in the different things we have here, look over our municipal plants, look over our city parks,

and try our golf course, and see if you don't agree with us that we have a good one here.

I know you are going to have a good session of the Bar. I don't think you will get into too much politics, and if you will forget all those things now we will have a nice quiet session, particularly in view of the fact that liquor is so scarce. I thank you.

PRES. ANDERSON: Thank you, Mayor Clark.

The next order of business is the appointment of a Resolutions Committee. Any of you who have resolutions that you want brought before this body should deliver them to the Committee as early as possible so that they may receive proper consideration, and be brought up in proper order. The Chair is pleased to appoint on that Committee Judge Mary Smith, Chase Clark and E. B. Smith.

The next order of business is the Report of the Secretary.

MR. GRIFFIN: When this program was being formulated it was thought that an unusual address should be inserted, something that had a little romance in it. So they put in the Secretary's Report, and this will be the entertainment part of the program this morning.

The Board of Commissioners, consisting of Walter H. Anderson, Pocatello, President, A. L. Morgan, Moscow, Vice-President, and J. L. Eberle, Boise, has, since the report at the 1936 Payette Lakes meeting of the Bar, held six meetings.

In the last report attention of the Bar was called to cases of illegal practice of law, prosecuted by the Board through its committees, and the progress in securing Court definition of what constituted practice of law. Since such report two other cases have been instituted in the Supreme Court, and are now pending therein. In one of such cases, in ruling upon demurrer to the Bar's complaint, the Supreme Court clarified a previous decision in the language as follows:

> "Hence, to represent one's self as being learned in the law and 'particularly in matters connected with all kinds and types of conveyancing and in the preparation of * * * probate papers in probate matters' is, in effect, to assume the character of and to impersonate, and to hold one's self out as, a lawyer, and as such, especially well qualified to prepare all kinds and types of conveyances, also to prepare papers in probate matters. So that where such a person is employed, under the circumstances alleged in the petition, to prepare deeds, whether in the matter of an estate, or otherwise, the employment is necessarily based upon an assumed and pretended skill of the person so employed to do a certain type of work, particularly well, and when paid, he is paid for the actual work of preparation (no matter how or in what manner an instrument may be prepared), as well as for his assumed and pretended learning and skill in the premises."
>
> In re Mathews, ... Ida. .....; 62 P. (2) 578

The Court further says, with respect to the contention of defendant, that In re Eastern Idaho Loan & Trust Co., 49 Ida. 280, had held mere clerical filling out of skeleton blanks was not the practice of law,

> "It is clear therefrom that this Court, by the quotation relied upon by defendant merely sets forth the nature and kind of work, to-wit, filling out skeleton blanks for the conveyance or incumbrance of property, which it was contended by the defendants in the Eastern Idaho Loan & Trust Company case, supra, insurance men, realtors, and bankers had a right to do * * * . As a matter of fact, careful reading of the said matter which immediately precedes the quotation relied upon by defendant Mathews, at once discloses a mere mistake in punctuation, that a period was used instead of a comma" (after the words "to do") * * *
>
> "The practice of law as generally understood is the doing or performing services in a court of justice, in any matter depending therein, throughout its various stages, and in conformity with the adopted rules of procedure. **But in a larger sense, it includes legal advice and counsel, and the preparation of instruments and contracts by which legal rights are secured, although such matter may or may not be depending on a court."** (Bold type, the Court's.)

Upon final decision and definition the Board expects to pursue further the matter of illegal practice of law in Idaho.

Another major activity of the Board was a complete revision of Bar Rules. These, other than relating to admission to practice, were mailed to every attorney in the State. This revision was a real labor, both by the Board and the Supreme Court. Some most important changes or additions are:

Somewhat analogous to the matter of illegal practice is the new rule relating to non-resident attorneys, Rule 116. In substance, it permits non-resident attorneys to appear in the Idaho Courts or before Idaho Boards or Commissions only upon the same conditions as the non-resident's Courts permit therein appearance by an Idaho attorney, and in addition requires association with an Idaho resident attorney. Your particular attention is directed to the requirement that such associated Idaho attorney (1) must be personally present at all stages of any proceedings; and (2) must comply with the local fee schedule in such case.

Also, the new rules abolish reciprocity admissions of foreign attorneys to practice. Since their adoption an applicant for admission, whether or not previously practicing in another jurisdiction, must be a bona fide resident of Idaho for six months prior to application, and must take and pass the required examination. (Rules 102, 112).

While educational requirements for admission, i. e., high school graduation, two years of general college study, three years of day school law, or four years of evening school or law office, study, remains as for several years past, more detailed proof thereof is now required. Correspondence schools are, just as in the past, not recognized. Where office study is presented, the attorney supervising such study must he prepared to give, under oath, a very detailed account of the study and his supervision thereof, and that it was pursued in his office and under his personal supervision. (Rule 108).

Of particular interest to Idaho attorneys is the official adoption by the State Bar and the Supreme Court of the Canons of Professional and Judicial Ethics of the American Bar Association (Rule 151), and their adoption by the By-laws of the Local Associations (Rule 187,

subdivision IX). The Canons are printed in the pamphlet of Rules heretofore sent to every Idaho attorney.

Further, Idaho attorneys should note that they are members of their local association organized under Rules 186 and 187; and that such local associations are authorized to adopt minimum fee schedules, and to fix penalties for, and adopt machinery for prosecution of, violations. (Rule 187, subdivisions X and XI).

While the Rules for Disciplinary Proceedings against attorneys remain substantially as before, changes have been made to eliminate delays, and technicalities, and to provide a means for reinstatement of suspended attorneys. Disbarred attorneys may not be reinstated, but must reapply as any other applicant for admission. (Rules 152-176).

Inasmuch as the Bar must operate through the individual members of the Bar, and Committees, it is obviously essential that members and committees promptly perform requested duties or services. In this connection, the Board, in requesting assistance or appointing committees, takes into consideration the situation of the lawyer so requested so as not unduly to embarrass, or burden, him. It ought to be unnecessary to call attention to Rules 153, 175, and 181 (c) (d), which impose the performance of such duties and provide disciplinary action for failure to perform.

Since the local association system is able to reach every attorney, and thus every attorney if he wishes can have an opportunity to express his views, and take part in the activities and interests of the profession, even though not able to attend the Annual Bar Meeting, the importance to each attorney of taking active interest and participating in his local association meetings cannot be too greatly empha sized. To further the influence of every attorney upon the State Bar the Board has created a Local Bars Section of official local association delegates, meeting the day before the general Bar meetings, wherein can be brought together the opinions of all the local associations upon matters of common interest, to be communicated thereafter to the general meeting and to the Board. It is hoped that thus the Board and the State Bar can more nearly and clearly reflect the opinions and wishes of the rank and file of the Bar. But this requires the active support and interest of that rank and file.

Without too much detail, it may be said that the Board members have spent many very full uncompensated days, and some nights (without counting travelling time), in attending to the interests of the lawyers of Idaho. Aside from revision of rules, legislative matters, preparation of two examinations, preparation of program for this meeting, attendance at local Bar meetings, investigations of illegal practice, and routine matters, fifteen complaints have received attention; five, having been satisfactorily adjusted, were dismissed; one resulted in suspension for non-payment of license fees; in one, contempt for practice by an attorney delinquent in payment of license fees resulted in the attorney applying for, and being granted, permission to withdraw his admission to practice, and to have his name stricken from the roll of attorneys; in one the attorney was admonished with

respect to his conduct concerned in newspaper comments upon courts, beyond legitimate criticism; one involves contempt in filing alleged known false pleading in Court, now pending; two, now pending as contempt cases, involving illegal practice; one dismissed for lack of evidence of illegal practice; two, disciplinary action ordered, pending, involving failure to account; two, one for failure to account, one for failure to take action after payment of fees, are under preliminary investigation.

Two admissions on certificate from other states (prior to the new Rules) were recommended; four were rejected.

Six applicants for examination were rejected upon their applications and investigation thereof.

Six applicants failed examination, and were therefor rejected.

Two applicants passed examination, and were recommended.

(The foregoing does not include the grading of June, 1937 examination.)

An attorney, suspended for non-payment of license fees, was, upon performance of conditions imposed, reinstated.

Two applicants for examination in prelegal education were permitted such examination.

FINANCIAL REPORT

APPROPRIATION

Balance July 14, 1936	$ 3202.15
Receipts, license fees to July 14, 1937	2705.00
Total	$ 5907.15

EXPENDITURES

Office expense	$ 1321.10	
Travel	790.86	
Meetings	254.00	
Publication 1936 Proceedings	377.48	
Examinations	227.91	
Discipline	190.00	
		3161.35
Balance in appropriation July 14, 1937		$ 2745.80
Six years' receipts (1932-1937)		$16513.00
Six years' expense (1932-1937)		17294.60
Excess of expense		$ 781.60

LICENSED ATTORNEYS

	1936	1937	Average 1931-37
Northern Division	122	124	127
Western Division	277	274	275
Eastern Division	131	133	131
Non-resident	26	25	24
	556	556	557

The following deaths have been reported since the last meeting:

A. B. Barclay, Jerome
Fred C. Erb, Lewiston
C. H. Edwards, Boise
James H. Forney, Moscow
L. B. Green, Mountain Home
Harlan D. Heist, Shoshone
Gustave Kroeger, Boise
Lewis A. Lee, Idaho Falls
Luther M. Lyon, Boise
Paris Martin, Boise
C. A. North, Twin Falls
Charles O'Callaghan, Bonners Ferry
John H. Padgham, Salmon
Edward E. Poulton, Moscow
D. W. Standrod, Jr., Pocatello
Wm. A. Stene, Caldwell
Edmund W. Wheelan, Sandpoint

PRES. ANDERSON: The next order of business is the appointment of a Canvassing Committee to canvass the returns on the voting for a Commissioner for the Eastern Division. I deem myself disqualified to appoint that committee. I will ask the Vice President, Mr. A. L. Morgan, to make the appointment.

MR. A. L. MORGAN: Mr. President, on that committee I will appoint W. S. Hawkins and Murray Estes, of the Second District, and E. B. Smith, of the Third District.

PRES. ANDERSON; Members of the Idaho Bar:

For the annual address of the President of the Bar I have chosen the subject of the Responsibility of the Bar. I do not know whether this title is apt or not, but it seems to be the only appropriate designation of my remarks.

In order to lay a proper foundation for what I desire to say, it is necessary that we should go back to the very inception of the legal profession. In the earliest period of the history of the legal profession, lawyers, as we know them in our time, were unknown. There was no distinct legal profession. In that remote period of legal history, the men of learning were almost entirely confined to the clergy. It was inevitable that the laymen, when disputes arose among them, should turn to those learned men of the priestly class. It was, too, an illative consequence that this field was fertile for the idea of a system of jurisprudence to develop. It was but natural, in time, for the decision of questions to follow former precedents. Perhaps precedents first reposed in the memory of the clerical class. In this manner no doubt the practice of following precedents had its inception.

Another notion was to take root in a field so rich with possibilities, and that was that these men claimed to administer law, not of men, but of God. This formation of law had a number of distinct advantages from the viewpoint of the clerics. The fear of the unlettered was preyed upon to compel obedience to the administration of law by

the clerics, and this belief lent, in a manner, a security to the priesthood to leave the administration and interpretation of law in their hands. The ignorant and uninformed, for a long time, were made afraid to interfere with or question the wisdom, the honesty and the integrity of the clerics in the administration of law, in their hands, where, it was supposed, that God had placed it. Kings were thought to be chosen of God, so the priests made some pretense along the same line with reference to their right to perform judicial functions and to practice law.

Another outgrowth of this condition was the contention that all systems of law emanated from the hand of God. This doctrine of the divine origin of human laws thus enabled the clerics to contend that they, God's ministers, were chosen of God to administer God's system of law for the government of men in material matters as well as from a spiritual standpoint. The two offices of the priests blended well together so long as the laymen subscribed to the view that all laws, mundane and celestial, were of divine origin. Under this system, the priesthood had an exclusive monopoly on the affairs of the laity.

In the course of time, men became dissatisfied with the administration of material law by the clerics. They abused the trust reposed in them. They often overreached those seeking their advice and assistance. It is of dissatisfaction with the existing order of things, when that dissatisfaction is well grounded, that progress is born; so from this situation developed an independent legal class—the legal profession. The new administrators of material law made no claim of inspiration from a higher power. They appealed to the power of reason rather than prayer for guidance. It would serve no useful purpose to review the different forms of trial that decided the rights of men since the advent of the legal profession until our time. Such matters as trial by wager, battle and the like are not within the purpose of my remarks.

The clerics tenaciously clung to the claim of right to practice material law and adjudicate cases arising between members of the laity. They resisted any encroachment on any source of their claimed right of revenue. They combated any attempt to take away any part of the emoluments of what they contended was their legitimate offices; but a legal class, independent of the clergy, had come into the march of civilization and had made a permanent place for itself in that procession; so the only weapon at hand, to be wielded by the clergy, was that of propaganda against the legal profession. Since that time, the priestly class has permitted few opportune occasions to escape to cast upon the legal profession aspersions of more or less serious nature, and this is true even though there is no hope of again occupying the former position held by the clerics.

The strongest proof that in the early times there was a studied effort on the part of the priestly class to cast discredit upon the legal profession is found in holy writ and throughout its pages the Pharisees and the lawyers are classed together, and even on one occasion it is reported of the lowly Nazarene:

"And he said 'Woe unto you lawyers also, for ye load men with burdens grievous to be borne, and ye yourselves touch not the burdens with one of your fingers.'" (Luke 11.46)

It does not take a great deal of reasoning power to reach the conclusion that Jesus Christ never used this language that is attributed to him by men having motivating purposes far from anything relating to spirituality. It should be borne in mind until Gutenberg carved type from the wood of the apple tree, that holy writ reposed in script in documentary form, and that the custodians of these documents were the priests, thus making it easy enough to insert an advantageous phrase here and there, when the incentive was sufficiently strong to do so. In the first place, all lawyers, good or bad, honest or dishonest, right or wrong, were included within the condemnation set forth above. They were included, as a class, regardless of whether they were guilty of the things stated in the charge or not. It is inconceivable to believe that at all times all of the lawyers and all members of the legal profession would come within the broad provisions of this sweeping impeachment.

So, from the very beginning, the legal profession has had to meet, refute and combat slander, and the battle does not seem to be abating in our time, and as regrettable as it is, the opponents of the legal profession are gaining ground.

If the lawyers do not have today the respect and confidence at the hands of the laymen that the lawyers are entitled to by reason of their intelligence, training, education, honesty and integrity, in a great measure, the lawyers themselves are responsible. How many times have we heard slanderous statements made of and concerning individual members of the bar, that we knew in our own minds were wholly unfounded? And yet we remained silent instead of going to the defense of the attacked member of our profession. By our very silence, we tactily approved what had been said.

In my opinion, it is not the shyster, the ambulance chaser, or the unethical practitioner that has deprived the lawyers of that esteem to which they are in reality entitled, but it is another class of lawyers, who are often looked upon as being at the very head of the bar. We all know that lawyers who act as lobbyists in legislative bodies find as a favorite argument to defeat any bill that will affect the interests of their clients, who in general are the major corporations, to urge that the bill is advocated in the interest of the lawyers; and that any bill that the lawyers advocate, want or support is wrong and ought to be defeated, thus sowing the seeds of such belief in the minds of the laymen who are members of legislative bodies, and in recent times farmers and laborers have predominated in the legislative halls. It is an effective argument—one that usually spells defeat to the bill. Then the members of the legislative body, that are thus persuaded to vote against such a bill, go home as living, walking advocates of the corporate lobbyist and scatter the same opinions among their neighbors, followers and constituents that the lawyers were seeking some advantage or law inimical to public interests and selfish to themselves, and they thus explain why they voted against the defeated bills at the behest of the corporate lobbyist.

It necessarily follows that if the legal profession is not accorded the respect and confidence to which it is entitled, that this same feeling must be entertained with regard to the courts and judges, who are merely lawyers clothed with the judicial ermine; so we have today unwarranted attacks upon the judiciary. The judiciary, it cannot be gainsaid, is the sure bulwark for the protection of the rights and liberties of the people. Some of the attacks are subtle and covert, while others are brazen and bold. I would like to refer briefly to two or three books written by men who find themselves ready to put forward any argument that is inimical to our judicial system.

Jerome Frank, a prominent New Dealer, former general counsel for the now defunct A.A.A., and still holding a government position, has written a book entitled The Law and the Modern Mind. This book is of the type I have referred to as being an attack upon the courts, subtle and covert in character. In this book, the learned author advocates that there is no law on any subject until the court has spoken, or the legislature has enacted such law; that the judges make and do not declare the rules of common law; that both lawyers and judges are not conscious of the true functions that the courts actually perform; that the courts are in truth and in fact law-givers and that the courts do not know this; that they deceive and delude themselves first and the laity secondly into believing that the courts declare law and do not make it; whereas, it is contended the reverse is true—that the courts make law and do not declare it. Therefore, it is easy to argue that the courts, in rendering a wrong decision, are not applying existing law to facts, but are making bad law, and that courts are directly responsible for their decisions and are not bound, in making a decision, by any prior existing rules of law; that the courts are responsible in the same manner and to the same extent in making a wrong decision as the legislator, who votes for a vicious bill.

It takes no laborous effort to prove the fallacy of any such legal heresy. If a trial judge made a decision, and he had a right to make the law to fit the decision, then there is no right of appeal. The trial judge in hearing the case and deciding it is performing his function that the Constitution confers upon him, and if he enacts a vicious rule of law, then no one has any right to review and reverse that decision, because he is merely performing a constitutionally conferred jurisdiction, if the Frankish notion—or shall we say—if the Frankenstein monster— is correct. If a judge makes a rule of law to fit each individual case that comes before him, then it is utterly useless to report the decisions, for the next judge that follows him, like the next legislature, may repeal, alter or modify the law, thus enacted by his predecessor.

The deplorable thing in connection with the Law and the Modern Mind is that its vicious doctrines have been actually taught in some of our law schools and universities, thus inculcating into the plastic minds of the tyros of the law a doctrine that courts are composed of men who are either dishonest or imbeciles in that they make rules of law; but yet are not conscious of this, or do so, knowingly and conceal that fact from the people.

Mr. Frank claims to be a lawyer, and in connection with this claim, I want to say that if I held the opinions he claims of the legal profession and judiciary, I would surrender up my license and disclaim any connection with a profession that, according to Mr. Frank, is so replete with ignorance, or worse—fraud, deceit, corruption and sham.

Of the type of book that is a bold attack upon the courts is one by Goldberg and Levenson, entitled Lawless Judges. This gentleman and lady have apparently gone through the reported decisions over the last forty or fifty years and have picked out each decision that appears to have been erroneous or wrong and held it up in the pages of their book as horrible examples of the misconduct of the judiciary. Many of the decisions are by the learned authors colored. In others, the facts are garbled; and in yet others, only isolated statements, perhaps the purest sort of dicta, are selected.

Of the same general character as Lawless Judges is the recent and much talked of work under the title of the Nine Old Men, by Pearson and Allen.

Since the lawyers and judges have been so much brought into disrepute by the propaganda throughout all of the times, we find the executive of this country feeling himself thus emboldened to attempt to pack the Supreme Court of the United States by puppets who would do his will under his immediate direction. It is submitted that were it not for the long and extensive campaign of slander against the lawyers and the courts that men of the type of Jerome Frank, Goldberg and Levenson, Pearson and Allen would not dare to make the outrageous assaults that they have upon the judiciary and the judicial system. It is thought, were it not for this background of propaganda, that no chief executive would feel himself sufficiently supported to attempt what we all know has been attempted.

How well have the lobbyists of the corporate interests within the borders of our own state accomplished their purpose by using the argument that any bill in the interest of the lawyers, or that the lawyers want, ought to be defeated? It is almost impossible to even elect a lawyer to the Legislature. The minds of the lay legislature have been so thoroughly prejudiced and poisoned against the legal profession that it has become impossible for any bill to make its way through the legislature even though it affects the lawyers and the lawyers only. When it was attempted to pass the law organizing the Idaho State Bar, the bill could not be gotten through the legislature until it was passed more or less as a joke, after being introduced by the Livestock Committee of the legislature.

We all know that in the last several sessions of the legislature that there has been attempts to legislate against our fees to limit and hamper us in any effort that we might make to better our own condition. From this same situation, produced by the slandering and maligning of the legal profession, has been the incubator that has hatched out numerous and divers lay boards and commissions, thus showing that the laymen who are in the legislature are unwilling to entrust the decisions of their controversies to any tribunal presided

over by a lawyer; so thus we have the lay legislator, wherever possible, creating lay boards for the decisions of their controversies.

I, for one, am old-fashioned enough to believe that it is our duty, not only as members of the legal profession, but as a duty imposed by the obligations of citizenship, to combat and resist every effort or move that is made to take away from the courts their legitimate jurisdiction.

What is the remedy for this situation? I am not certain. One of the things, perhaps, would be a due regard and proper consideration of each member of the bar for other members of the bar. But another thing that would certainly eliminate the effective weapon used by the lobbyist—that would be the promulgation of a rule of ethics that an argument before legislative bodies that a bill was introduced and attempted to be enacted into law in the interests of the lawyers and was for that reason wrong and inimical to the best interests of society should be looked upon as unethical when advocated by a member of the bar, directly or indirectly, and dealt with as any other breach of ethical conduct.

PRES. ANDERSON: The next order of business is the report of the Prosecuting Attorneys Section. I believe Mr. Hawkins was elected president yesterday.

MR. HAWKINS: Mr. Chairman: Yesterday afternoon, in keeping with the other activities that were mentioned this morning, and discussed upon the streets of Idaho Falls, the Prosecuting Attorneys were visited by one of the two honorable gentlemen whom Chase Clark mentioned, who presented to that association the problems of the Idaho Liquor Control Commission, as presented through the press in the last few days. After some considerable discussion a resolution was adopted, which I will read.

"Whereas, the Liquor Control Commission of the State of Idaho met with the Prosecuting Attorneys' Association of the Idaho State Bar, and outlined its future policy regarding the enforcement of the Idaho Liquor Control Act, looking to the strict enforcement of said law,

"Now, therefore, be it resolved, that the Prosecuting Attorneys of the State of Idaho stand ready to do their full duty with reference to the enforcement of said law and will extend their full cooperation to the Commission and to the Department of Law Enforcement in the uniform enforcement thereof throughout the State."

The problems which were discussed at that meeting more or less concerned only the Prosecuting Attorneys. Perhaps some of you who have served in that capacity will recall that when the State Legislature passed emergency laws the Prosecuting Attorney was generally the last individual in the county to get a copy of the law, and the first to be asked as to what the law was. We have a Legislative Committee and we are going, through that committee, to urge the Secretary of State to mail to each Prosecuting Attorney a copy of emergency laws as soon as passed and signed by the Governor. That

will help the Prosecuting Attorneys in informing the general public as to these emergency measures.

Another problem to Prosecuting Attorneys is that our laws give to Commissions and Departmental Heads powers to promulgate rules and regulations, and often the Prosecuting Attorneys throughout the State who are called upon to enforce those rules and regulations do not have copies of them. Many times the agent who is working out of that Department or for the Commission does not carry with him a complete set of the rules. He has a letter, or something else, upon which he is acting. That particularly is true with reference to Fish and Game, and Department of Law Enforcement regulations, traffic regulations, and things of that nature. Sometimes it is hard to prove, on a traffic violation, the rule promulgated by the Department of Law Enforcement. But, if we have a copy in proper form we can prove it to be a rule promulgated by the Department, and it simplifies the duties of the Prosecuting Attorney in that particular prosecution.

Of course, the problems of Prosecuting Attorneys are many and varied. It is difficult for an association to sit down and solve generally the problems of Prosecuting Attorneys; conditions are so varied in the various counties. In one county we have a certain type of people, perhaps miners, men who are single, and transient in type; another might be composed of farmers; another lumbermen; and the problems of the Prosecuting Attorneys are therefore not uniform.

However, we had a splendid representation; we had twenty-one counties represented at the meeting. This is as good or even better attendance than was ever had before at a Prosecuting Attorneys' convention.

PRES. ANDERSON: The report of the Local Bars Section. Mr. Evans, I believe, is the Chairman of that Section.

MR. EVANS: Mr. Chairman, and members of the State Bar. We held a meeting yesterday of the different Local Bar Associations of the State, and were somewhat at a loss to know what matters we should discuss. Most of our time was given to the discussion of the proposal of increasing the fees to be required of members of the State Bar from $5.00 to $7.50 a year.

I think the members of the State Bar show a very lamentable disregard for their own welfare, and this morning I have heard things stated in this meeting that shocked me as a member of the Bar and as an American citizen. However, this is probably not the time to go any further with that matter, so I will stop there. I haven't the report of the proceedings of this Section. Mr. Ray has that report, and I shall call upon Mr. Ray to give the minutes of the proceedings of the Local Bar Association Section, so that you may be advised of just how far we went and how little we accomplished.

MR. RAY: Mr. Chairman, I can at least tell you how little we accomplished. The only action taken by the Local Section yesterday was a resolution adopted to recommend to this body that the fees of the State Bar be increased from $5.00 to $7.50 per annum, with the

idea that the added revenue shall be devoted to the purpose of paying the expenses for some individual or individuals in enforcement of the rules and the Law against the illegal practice of the law; particularly these small community Justices of the Peace, who concede themselves to be Chief Justices, and the realtors—which I believe is a copyrighted term—who practice law.

There was discussion on various questions and problems of the Local Section, but no formal action was taken on any of them, and, consequently, I take it that it is not to be brought to this body. The notes that I took have not been typewritten, and perhaps they should never be.

PRES. ANDERSON: Local Bar Organization, discussion by Mr. Paul Hyatt, of Lewiston.

MR. HYATT: Mr. President, and members of the Idaho State Bar, I want to make it clear that there is nothing new that I am going to tell you, and, further, that none of these ideas are my own. I think what I have to say would be better said to those who do not attend Bar meetings. Those of you who do come here will probably know everything that will be given to you.

I think it is not improper to briefly review some of the history, aims and objectives of Bar organization, and the place of the Local organizations in the scheme for Bar integration. In the early colonial days the bar associations followed the plan of the English law societies; they were voluntary, unincorporated associations and they existed independent of the state; they were outside the jurisdiction of the courts, but they did have charge of the admission and qualification of members of the bar, and the disciplining of attorneys after admission. When the colonies separated from England it seemed the prevailing spirit of the time that anything English should be frowned upon as encroaching upon ones privileges. As a result we had no bar organizations in this country until about the year 1870, and persons licensed to practice prior to that time were unhampered by any standard of ethics and they made unbridled use of their right to practice law. About 1870 the lawyers in the several states seeing the necessity for the Bar taking these matters into its own hands, and realizing that organization was the keystone to anything that they wanted to accomplish, set out to form voluntary bar associations in the several states. The efforts of these organizations were moderately successful, and the encouragement they had resulted in the formation of the American Bar Association in 1878. However, the weakness inherent in a voluntary organization soon developed and became apparent, particularly the problem of enforcing the discipline of those who were outside the membership of those organizations; further, there was an inability to mobilize the Bar as a whole to accomplish the objectives of the organization. This movement for the integration of the Bar came about largely under the direction and guidance of the conference of Bar Association delegates of the American Bar Association. About 1919 it was proposed that proper governmental machinery should be set up, and legislation enacted incorporating the State Bar Associations

with the entire Bar as members, and giving to the Association powers of government and administration.

Prior to 1923 Idaho had a voluntary association of lawyers. We had about 600 members of the bar, and only 100 belonged to the voluntary organization and paid $2.00 biennial membership fees. Of course, those same weaknesses that I have just mentioned were apparent in our own organization. So, in 1923 bar integration, by legislative act, came to Idaho, which act was amended in 1925, and all members admitted to practice were automatically made members of that organization. The objectives of this act, apparently, were to give a legal status to the Bar, and to provide machinery for functioning; to control, subject to the Supreme Court's supervision, admission to the Bar; to handle the disciplining of members, subject to the supervision of the Supreme Court; and with, or without, the request of the Governor, the Supreme Court or the Legislature to make recommendations upon any matters relating to the courts, the practice and procedure of courts, the practice of law and the administration of justice, and after investigation and study to report the same to the annual meeting of the State Bar, and report the action of the Idaho State Bar to the Supreme Court, to the Governor and the Legislature.

Now, it will be seen that in this State, as elsewhere, the particular objective of Bar organization is the administration of justice, and all of the duties and powers of the State Bar and its Commissioners come within that general heading. However, there is a further thing, and that is the improvement of the condition of the lawyers in general. The public demands of us common honesty, speedy justice and a high standard of service. But, if we are going to give that, we have also got to have improvement of the conditions of the lawyers, financially, and in other ways. One of the prime objectives of the State Bar, and the betterment of the conditions of lawyers generally, can be realized, and the Commissioners of the Idaho State Bar realized that there was a necessity for further integration of the State Bar, and they have accomplished that by the creation of these Local Bar Associations by court rule; and I think it is generally recognized that that, along with the legislative act, is one of the proper and legal methods by which bar integration can be accomplished. The Supreme Court of this state, in adopting this rule, said: "It is felt that the time has arrived when the members of the profession, in order to discharge their full duties and responsibilities, must act collectively, as well as individually."

It was realized that on account of the geographic conditions in this state it was impossible for everybody to attend the State Bar meetings, on account of the long distances, and if we are going to have any kind of an organization it has got to reach right down to the forgotten lawyer and he must know what the State Bar is trying to accomplish. The Supreme Court rule provided that the Board of Bar Commissioners of the Idaho State Bar should have the power to divide the State into Local Bar Associations, and to fix and establish the territorial limits of each Association, also to adopt uniform rules to be approved by the Supreme Court, applicable to and regulating the conduct of members of such organizations. You will find on the back of your program the number of Local Bar Organizations that have been formed, and are now functioning in this state.

It was stated here that we did not accomplish very much here yesterday in our Local Bar meeting, but I think we made a good start. These meetings will be a clearing house where the problems of the lawyers in the various parts of the state can be brought up and discussed. In other words, we have our Local organizations, where we can bring up our problems and objectives, and then we can come in here in a common meeting and exchange our ideas, and can then go back to our Local organizations, and I think a great deal will be accomplished by the lawyers of this state. I may have a certain problem that I can bring up at these meetings, and may learn how that problem is being handled in some other part of the state. I believe by this method that we will be brought a little closer together.

It has been stated here yesterday that lawyers can't accomplish anything in the legislature. I think the reason for that is that we have not had the proper kind of organization to accomplish anything. I realize the prejudice against lawyers. But still the public looks to the Bar for leadership in the various problems that come up, regardless of whether they touch lawyers individually, or not. And I believe if we had a compact, well oiled, working organization—which we can have by these Local Bar Organizations—that we can get what we want. There are five hundred and fifty lawyers in this state; there are enough in each county to contact, and have some influence with, every member of the legislature, and there are certain things which we want to accomplish and which I believe we can accomplish if every Local Bar Organization will get to work. And in that connection I believe the Supreme Court should have made attendance at meetings of these Local Bar Organizations compulsory.

The reason I review the history of Bar organization is simply to give the idea that we are making progress. This thing is new, but we are making progress, not slipping backward. The attendance in some instances has been disappointing, but we are never out of something to do, and we have lots to talk about. The meetings of my own Local Association always run over time. I believe if this rule were made compulsory so that lawyers had to attend these meetings they would become interested, and in that way the problems would be put before them and they would be willing to accept their responsibility. And this is a responsibility that rests upon every member of the Bar of the State of Idaho. We have several problems before us. The State Bar of course has already undertaken the work of admission to practice, and a lot of good has been accomplished, as you will see from the reports; they have also undertaken the problem of disciplining members; they have also undertaken, to some extent, the work of handling the illegal practice of law. I think today that is one of the biggest problems that we have before us, and in order to wipe out the illegal practice of law it is going to take the work of these Local Bar Organizations; in other words, they are going to have to assist.

Then there is another thing—improvements in our procedure and in our law. Every now and then we run into some matter of procedure, where we see that an improvement should be accomplished. We might make a note of it, but we never do anything more about it. We all know we want certain changes, and I believe they could be accomplished if they were offered before the Local Bar Associations for discussion, and then passed on up here for action.

Finally, in connection with this matter there is the matter of the condition of the lawyers themselves. The purpose of these organizations, of course, is the better administration of justice. The lawyer exists primarily for that purpose, but incidently he has got to live, and we want to make these Local Bar Associations effective to raise his standards of living financially, and to bring back to him the field of work that he should have and to which he is entitled.

In closing, I don't want to overlook the voluntary organizations of the towns and cities. I think there is a great need for their existence. If they do not exist for any other purpose than that of getting the lawyers together in a sort of good fellowship they have been worth while.

PRES. ANDERSON: The next order of business will be the report of the Judicial Section. Judge Sutphen.

JUDGE SUTPHEN: Mr. President, and members of the Bar of the State of Idaho. The Judicial Section met in session yesterday afternoon, with three members of the Supreme Court, and six members of the District Bench, and one ex-judicial member. The report of the proceedings will appear in the printed report of that meeting, and I don't believe it will be necessary for me to go into detail, but just hit the high spots.

The first matter discussed at the meeting pertained to the proposed Uniform District Court Rules, which were before this meeting last year. I believe you had some considerable fun with those rules. However, after some discussion, we decided, in view of the fact that there was only six members of the District Bench present at the meeting out of sixteen, to pass that until another year, with the hope that more members might be present.

Following that discussion we were favored by a paper read by Judge Winstead on the subject of Publicity Control. It was a very interesting and instructive paper. It will appear in the printed proceedings, and I hope that each member will take the pains to read that paper. To the members of the Judiciary, I feel that we should study it, and many of the suggestions should be put into practice.

Chief Justice Morgan then criticized our present practice of having the counsel for the prevailing party make up the findings of fact and conclusions of law. He also suggested that the conclusions of law be accompanied by citations of authority on which the Judge relied. This criticism called for considerable comment. We took no formal action upon those suggestions or criticisms.

Following that the subject of Judicial Ethics was discussed, Justice

Ailshie leading that discussion. It was decided that the subject was of such general interest, that arrangements be made to have Judge Ailshie address this Bar on that subject.

We were also favored by Doctor Warner, of the Blackfoot institution, who spoke to us in regard to the treatment and care of those unfortunates whom we are sending up to that institution, who have lost the power of control through excessive use of liquor and narcotics.

A number of other subjects were discussed, among which was that of making suggested reforms in practice and procedure. After considerable discussion a resolution was passed, which I believe creates a vehicle by which we may be able to accomplish some reforms in that regard. This resolution was introduced by Judge Taylor, and was adopted unanimously. I will read the resolution:

"Be it resolved, that the Legislative Committee of the State Bar be requested to draft an act to be presented to a future legislature providing for an annual meeting of the District Judges with the Justices of the Supreme Court at some appropriate date in January, the date to be fixed by the Chief Justice, for the purpose of discussing and acting upon proposals for legislation intended to improve and simplify the practice in the courts of the state; and providing that it shall be the duty of the Judges and Justices to attend and take part in these proceedings, and that their actual expenses be paid out of the State Treasury as their other expenses are now paid."

Such a meeting will not in any way conflict with the present meeting of our Judicial Section, and probably will tend to create more interest. That is the thought back of it.

PRES. ANDERSON: The next matter coming up for consideration is Suggested Procedure for Oral Argument in the Supreme Court, by Chief Justice Morgan, and discussion lead by Mr. Marcus J. Ware. We will hear from Chief Justice Morgan.

JUSTICE MORGAN: Mr. President, let me first occupy sufficient time to briefly compliment Mr. Carey Nixon who has had and performed the duty of arranging this program. He was chairman of the program committee, and as nearly as I can understand it—with all due respect to the members of it—Mr. Nixon found it necessary to do the work himself. And he did his work well. In this connection let me say that Mr. Nixon has expended a great deal of time and some money in the performance of his duty, and this Bar owes him a vote of thanks. He communicated his suggestion to me that I deliver a little talk on the subject you have just stated, and he gave me to understand, and I believe it is a correct understanding, that he called upon me to perform a duty, and was not merely inviting me as a privilege to come here, or not, as I saw fit. That is the correct view to take of it, in any event; and that was the view Mr. Nixon expressed. It was a command; it was an order from one in superior authority, because each and all of us, Mr. President, in matters of this kind are under the control and supervision of the Bar Commission and its committees, and we should so recognize those duties and perform them to the best of our ability.

I want, too, to say that I am fully persuaded that the life and the very vitals of the Idaho Bar reposes in your Local Bars in your respective communities. This Bar cannot survive without them, due, as Mr. Hyatt says, to the geographical situation of the State. And it is for that reason, and with that thought in mind, that I have made a formal request that this matter about which I propose to introduce a discussion not receive final action at this Bar meeting, but that it be referred to the Local Bars for discussion there, and that the Local Associations communicate their wishes to the Supreme Court in the matter.

I strongly suspect that Mr. Nixon foreshadowed what would be inflicted upon you, so he further required me to reduce my remarks to writing. I did so, and much to my surprise, when I reduced to writing what I had to say, it didn't amount to a good size valentine. It occupies almost two typewritten pages, and I am going to read them. That may be one of the reasons why I am also persuaded that it might be a good idea to present cases in the first instances to the Supreme Court by typewritten briefs, rather than to have them accompanied by oral argument.

Procedure in the supreme court has been placed, by the constitution, under the exclusive control of the court itself, and no legislation is required to authorize changes therein. However, because the members of the bar are vitally interested in the manner in which their clients' cases are to be heard and submitted, the court would hesitate to make a change in procedure against the wishes of a majority of your members.

I have considered the advisability of asking the court to amend its rules so that each justice would study the briefs in each case and the court would attempt to render a decision therefrom unless, after such investigation and study, it is of the opinion oral argument should be had. It is with the hope of getting an expression of the wishes of the members of the bar of the state, I submit that question for your consideration. It is not my purpose to argue the question, but to point out what seems to me to be some advantages to be derived from making the change, and to invite discussion.

Under the present practice, when the transcript and briefs in a case have been filed, it is set down for oral argument which, if it is to be presented on the merits, is limited to forty minutes on a side. In many cases numerous points are involved on the merits and forty minutes on a side is insufficient time to properly present them. In a great majority of cases the members of the court have not read the briefs nor examined the record and are, therefore, not prepared to derive as much benefit from oral argument as they would be able to do were they familiar with the case.

The question may present itself as to why the justices do not familiarize themselves with the cases before argument without a change of the rules. I am not sure of the answer to that question, but it is not so important as is the fact that we do not do so. If we were required by rule to attempt to decide each case without oral argument it would be necessary for us to, and we would, become sufficiently familiar with those cases where oral arguments are found to be necessary, to intelligently listen to them when they are made.

Should the proposed change in the practice be adopted each justice would carefully study every case in an effort to decide it. If in this effort difficulties were encountered rendering oral argument advisable, it would be called for and counsel would be notified of the points upon which the court desired assistance. Argument would be limited to these points, but the time in which it is to be made, would not be limited.

I should like to have a full discussion at this meeting of this proposed change in procedure, but believe it would be well for us not to attempt to dispose of it, finally, now. Permit me to suggest that this matter be submitted to meetings of the members of the bar in the various districts, and that after full discussion, by the entire membership the court be advised of the wishes of the legal profession with respect to it.

Mr. President, in addition to this, permit me to say that Mr. Justice Givens asked me to present to this meeting his regrets because of his inability to be here.

I personally desire to leave this further suggestion, supplementing something that I have listened to here between the lines in what our Chairman of the Judicial Section said. But six out of sixteen members of the District Bench is a very small representation, and we found ourselves gravely handicapped by it. I hope we will see to it that the idea is communicated not only to the Judges of the State, but to the members of the legal profession as well, that the attendance on these meetings is a duty, rather than a privilege, and that we are all expected to be here. I thank you.

MR. WARE: In discussing the proposed change with reference to oral argument before the Supreme Court which Chief Justice Morgan has presented, there are a few things which appeal to me very strongly. After being assigned this discussion I went into the subject not a little with various members of the Bar in our Section of the State, and sounded out the attitude of our Clearwater Bar on it, and there seemed to be two questions with reference to oral argument.

In the first place, there is the thought presented by attorneys who believe that oral argument is of very little use to the Court, and for that matter serves a client very slightly. That arises, in my opinion, from certain inherent weaknesses in our present system of oral argument, which Chief Justice Morgan's proposal is calculated to cure.

On the second point, some attorneys feel that if the Supreme Court assumed to pass upon cases without oral argument that clients would be deprived of the right or benefit of oral argument. That seemed to be the great fear with some of them. However, I believe that after a careful consideration of the proposal as made that that fear becomes groundless. The two great weaknesses of the present system of oral argument, as pointed out by the Chief Justice, are perhaps the unfamiliarity of the Court with the case at the time of the oral argu-

ment, and on the other hand, and greater than that, the unfamiliarity of counsel for appellant or respondent with the points or issues which the Supreme Court may be interested in or concerned with or in doubt about.

Then again there is the question of time for presentation, which the proposal is calculated to clear up. I have noticed instances myself where, in the course of the brief forty minutes allotted to an appellant —who perhaps is more at a disadvantage than the respondent in that respect, because of the necessity of a statement of the facts—questions interposed by the members of the Supreme Court at times have consumed no small portion of the forty minutes. In at least one instance that I recall counsel in the whole course of his argument was thrown off from what he intended in the first instance. I believe that if the points were submitted in advance, oral argument would more certainly fill its true function.

Perhaps the most controversial point on this subject is that it in effect makes mandatory the present Rule 47, which permits counsel on either or both sides to submit a case without oral argument; the Supreme Court, however, reserving the right to order argument if it so desires, with the implication that the points are designated by the court. When I first started to consider the matter I rather took issue with the proposal of submitting a case for decision in advance of oral argument. It seemed to me that perhaps if many cases were decided without oral argument that there would be a greater tendency for more petitions for rehearing. On further thought, however, it occurs to me that perhaps the procedure would lessen the propensity of attorneys to file petitions for rehearing before the Supreme Court. If counsel were advised of the points in which the Court was really interested, perhaps they could more fully and adequately present their case in the first instance, and render the necessity of filing a petition of less importance.

Now, there is one matter in which this rule, I believe, will be of great assistance: Often times counsel on either or both sides become so engrossed with his particular theory of the case, or the particular issues which he believes are determinative of the case, that some point which is perfectly obvious to a disinterested attorney, or Judge reading the brief or listening to the argument, is entirely overlooked by him. In fact, I believe that there are no small number of decisions by our Supreme Court which have turned on points which are not suggested by counsel on either side, either in oral argument or in the briefs. I don't say that that is any very great number, but that has occurred. Now, if the Supreme Court set the case and submitted all questions in advance, that whole matter would tend to be cleared up, and counsel would have an opportunity to present the particular issue suggested which had occurred to the minds of the court. My own personal conclusion is that the rule would be a good one to try out. I think attorneys sometimes are prone to be a little bit opposed to any changes or innovations in our procedure, but I am of the firm opinion that it will overcome and tend to eliminate the inherent weaknesses of oral argument at the present time. And I further believe that

since the Supreme Court is composed of lawyers who have gone through the same difficulties that we have that we can safely rely upon them according us the privilege of oral argument whenever it seems necessary or advisable. In fact, I doubt very much whether the court would tend to cut off all argument in any particular instance, unless it was just upon some matter that was apparent on the face.

JUSTICE MORGAN: Mr. Ware, what do you think of the suggestion that it be referred to the Local Organizations instead of attempting to be disposed of here at this time?

MR. WARE: I think that is a very wise thing to do. I think it will help strengthen interest in the subject, because it is a matter which affects the Bar as a whole. I believe it can be handled wisely by submitting the question so that those attorneys who do not attend the Local meetings can pass upon it by ballot from their respective communities. For example, in our own Bar some of the attorneys reside eighty or ninety miles, and I believe there is an attorney at Elk City, some hundred and fifty miles from where we usually hold our Bar meetings. So for that reason, in our district, I feel we ought to submit it by ballot.

JUSTICE HOLDEN: In your investigation have you found if any other appellate courts have adopted this suggested procedure?

MR. WARE: I couldn't find anything. There doesn't seem to be any. The strong point of Chief Justice Morgan's suggestion was brought home to me in a particular case argued before the Court this last year. I was counsel for one of the parties appellant. Three Judges heard the oral argument in the first instance; all five Judges participated in the decision, and the decision was a three to two decision. There was a division on the part of the members who heard the argument, and on the part of the members who did not hear the argument. A rehearing was granted, and the case was reargued before the Court. I hesitated to cover the whole ground of the case before the court again, because I knew there were at least three members of the court who had heard the oral argument. On the other hand, I know that counsel for both appellants and respondents were confronted with a feeling that if they did not go over the whole case there were two Judges who had not heard the oral argument. The result was that counsel for both sides chose the lesser of two evils and bored the three members of the Court who had heard the argument with a reargument. I really think if the Court had then in operation the rule suggested by Judge Morgan it would not have been necessary to cover the whole case again, and counsel could have served their clients just as well. As a matter of fact, there were only one or two points in issue, and counsel could have limited their discussion to them. For that reason, I am heartily in favor of the rule.

MR. EVANS: I am heartily in favor of the suggestion of Chief Justice Morgan that the matter be referred back to the Local Bar Associations for further discussion before this body takes final action.

If the cases presented on appeal to the Supreme Court be disposed of upon written briefs only it will very materially increase the cost of

the appeal because of the necessity that counsel will be under, to endeavor to cover all possible arguments that they may have in support of their proposition in the briefs which having to be printed would add materially to the cost of presentation.

Another thing: oral argument frequently gives to counsel an opportunity to elaborate upon the points raised in their briefs, by the addition of matters which have occurred to them since the preparation of the brief and the time fixed for oral argument, and thereby can present the matter more completely and effectively to the Supreme Court, and secure a fairer decision.

Mr. Ware suggested that attorneys are naturally conservative in matters of this kind, and are not inclined to depart from established procedure, without just cause and full consideration of the results to be effected. I will frankly confess that I am one of those conservatives, and I would hesitate to see any change of this character made by our Supreme Court, in limiting the right of oral argument, until the matter has been thoroughly considered in all of its phases by the members of the Bar.

MR. J. F. MARTIN: I doubt if anyone will seriously try to defend the present system that we have of oral argument of cases in the Supreme Court. This is a conclusion that I have come to from appearing in that Court probably too many times. Particularly, an appellant is under a tremendous handicap in trying to present his case in forty minutes to a Court interested in, but completely ignorant of, the particular case being discussed. No man, in my judgment, can intelligently go over the facts of his case in one half of the allotted time. If he takes twenty minutes to go over the facts he can just skim the surface; and in that twenty minutes he is stopped and questioned—and if he is not it is a rare occasion—and he tries to answer as best he can, in a hurried manner, the questions presented by the particular Judge; he is thrown off his trend of thought, and must gather himself up and start over again. The forty minutes that an appellant has, is practically thrown away. The Court would get little more than just the gist of the facts and the high spots of the points. Too often have we read in an opinion where this or that assignment of error was raised but not discussed in oral argument, and therefore is waived. No lawyer intends to do that, but he simply cannot cover the field.

We as practitioneers can certainly be no worse off with a change. It may help to give the Court better assistance by simply letting them take our briefs and decide the cases. I have tried it both ways; and the cases that I have submitted without argument have been just as satisfactorily decided as the others.

Personally, I am for trying it. Probably we will have to go into more detail and trouble in the preparation of our briefs. I think that the limit might be raised for which costs could be allowed on the printing of the briefs—limited as we are now to forty pages. That could be made up in the difference in the cost of traveling to the Court and back, and in the time consumed.

JUSTICE BUDGE: I want to express my opposition to the resolution in just a few pointed words, so that you will understand why I oppose it.

I have had quite some experience both on the Trial Bench and on the Supreme Bench, and I know that I have been very much benefitted by argument of counsel, often as much as from reading and studying their briefs. So long as I am on the Supreme Bench I want to have the privilege of looking counsel in the face and asking him questions, whether or not he expends his argument explaining questions that are more or less in doubt. I don't expect them to read their briefs. I can do that. But, I expect them to make more clear and more definite the facts in the case and the law to be applied to the facts. Some of the greatest principles of law that have ever been announced in this or any other country have been spoken by men extemporaneously, right in the heat of argument as they have discussed their cases before the Supreme Court. There is no Supreme Court that I know of, that denies the right of oral argument.

When your client comes to you he expects you to stay with it from the inception of that case until its final conclusion. He expects you to appear before the Supreme Court and defend his cause. That's what he hires you for. That is a part of your sacred duty; that is my opinion of your duty. I don't think that you have any right to desert your client in the Supreme Court, and simply pass up your record and say, "Here, you take the cold record and decide the case." And, gentlemen, I want to tell you at times it is cold enough. We don't see and observe what the trial court does. I want a little life, a little vitality, a little human touch, and a little closer connection with counsel. I want them to feel that they can talk to me; and if forty minutes isn't long enough let them ask for sixty minutes, let them ask for whatever time they want to present their questions, and present them intelligently.

If we were going to have a practice as they have in Virginia, that might be a little different. In Virginia the appellant prepares his transcript on appeal, and his brief on appeal, and that is submitted to the Supreme Court; and they go over them and if they find that the question has been settled, or there is no debatable question involved, they deny the writ of error and dismiss the action. If they find they are in doubt, or believe the case should be argued, then they notify opposing counsel to file his brief, and then both sides go to the Supreme Court and argue the case. But, under this resolution, as I understand, the briefs are simply submitted to the Court, and the Court is supposed to read the briefs and decide the question.

Mr. Martin says the Court is unfamiliar with the subject. I don't know whether that is altogether true, or not. Each man on the Court knows, before the case that he writes is given to him, that he is going to write that case. I have read the briefs in my own cases, at least, and I have read the assignments of error, and I know the questions involved. True, I may not have read the entire transcript, but I am familiar with the case, and so is every other member of the Court familiar with the case and knows something about the questions

involved. So we are not entirely ignorant of the questions involved in the cases presented.

I am in favor, of course, of submitting this question to the various Local Bar Associations for discussion. I think you have a debatable question here.

MR. A. L. MORGAN: There is a certain amount of misapprehension shown here in the discussion of this matter, due to the fact that cases will not necessarily be submitted without argument. In other words, the Court may decide in those instances where no argument is necessary. Judge Budge tells us that he wants the opportunity of meeting the attorney and of listening to his explanation, and getting the human touch. But, I apprehend that there is no reason why he would not be in a better position to do that, if he is thoroughly familiar with the record, better than he can as the matter now stands. There isn't any reason why, even if there is going to be an argument, that the court should not be familiar with the record. The Judge says he wants to propound questions to counsel. Now, with all due respect to the Court, I want to say that I have been embarrassed time and time again in having to say to the Court that the question which he was asking was not involved in the litigation. If they were familiar with the record the question would never have been propounded.

Whether the case is to be submitted without argument, or not, it is better in my opinion that the Court be familiar with the record prior to the time that the argument is heard.

JUSTICE AILSHIE: I am not rising as a member of the Judiciary, but as a member of the State Bar. I have spent in front of the Bar from time to time, some thirty-two years, in Idaho, and for some fourteen years back of the Bar—not the bars, but the Bar—and I have seen this matter from both sides. I have always insisted that an attorney who is presenting a case on appeal, whether he was prosecuting it, or defending it, ought to have at least an hour. Among the various arguments that I have advanced for that was one that perhaps is trivial; that the Supreme Court of the United States, which is the last word in this country, have always deemed it worth while to allow a man one hour to present his case in that Court, no matter how trivial the case. They may say to you sometime "You need not argue that point any further." but they never cut you off from one hour. If those "nine old men" up there—and I say that in quotations— thought it was of sufficient importance, to enable them to hear a case thoroughly and determine it, to allow one hour argument, we in this State ought to do the same thing. We are no more competent, and no better able to grasp the thing in forty minutes than they are. And the fellow who has the laboring oar ought to have a few minutes advantage because he has to state the facts in the record, and the other fellow starts out with that advantage.

I have always been in favor of oral argument, for the reason that I think when a man sits down and is interested in writing a brief he says a lot of things in the brief that he won't get up in front of the Court and argue, and he will back water on them. I have seen that

occur. He makes statements that won't bear discussion. Oral argument often eliminates a lot of useless questions. I like to hear the argument, and I liked to argue my cases. I had the satisfaction of having unloaded on the Court my voice on the questions, and my clients at least felt that they had had a hearing before the Court of last resort.

I disagree with Mr. Martin. I don't believe that he will read in the opinions just the statement that he has made. The statement was that the assignment was not discussed in the brief nor upon oral argument, or, that it was waived on oral argument. Sometimes a man makes an assignment in his brief, and after he gets to the argument, says he doesn't rely on it.

Another thing, too—that of questioning by the Court. While I think some attorneys are disconcerted, perhaps, rather than thrown off their argument, there are some attorneys that that makes quicker, or whets their wits, and gives them an opportunity to see what is in the mind of the Court, and brings them to the real point in the case. I do agree that there can be too much discussion and too many questions. I am heartily opposed to argumentative questions coming from a Judge, whether trial or appellate.

JUSTICE MORGAN: I seem to have tangled the matter up, instead of clarifying the situation. Probably nobody misunderstands my motives as do the members of the Supreme Court. There never was any intention, and I don't believe it will be found in my remarks, to abolish oral argument. The intention was to get the Supreme Court to familiarize themselves as nearly as they could without oral argument. And then if they run into difficulties that ought to be decided they may call for argument on the points in question. Probably the appellant should be penalized for filing frivolous argument in order to bring about delay in the administration of justice, as this Court has done on several occasions. That case could be decided, could it not, without in any way depriving anyone of the opportunity of coming down and shaking hands with the attorney after the argument is over? Now, I am the most socially inclined individual on earth, and I like to shake hands with people, particularly on election years, just as well as anyone does. But, we might forego that in cases of people who file their appeals frivolously, and in cases of people who ought to have their cases dismissed and be penalized. In other cases we may find there is no debatable questions presented, or it is something that has been decided very, very frequently; and in such cases considerable time and expense could be saved.

In reply to my friend, Evans, and the fears he entertains, let me say this: He lives over the other side of Pocatello, and the cases he presents to our Court are presented in Pocatello. I have attended Court when as many as thirty cases were taken under advisement at one time, and they were heard at the rate of four or five cases a day. I wonder just what kind of an animal the average practitioner thinks a member of the Supreme Court is, if you expect, in the matter of a week or ten days to submit arguments as rapidly as that, and depend upon the oral argument to convey to the Court the disputable facts

and the technicalities of the law. What kind of a condition do you think, my friend, your case will be in when we reach it at the end of the calendar after we get back to Boise and attempt to decide it?

The fact of the matter is my friend Evans could elaborate in the first place just as much as he can under the present practice, but he would be a good deal safer in failing to do so if he knew the Court was going to take advantage of the opportunity it had to find out what was in his brief before he made his argument.

It is true, as Justice Budge has stated, that we draw our cases by number, and we know in advance which one we are to undertake to prepare a decision on. And, it is equally true that while one-fifth of your Court knows what you are talking about, the other four-fifths do not.

Now, I believe that the opposition to this is going to be found to arise from those who have probably given it very little consideration. I inquired whether any state in the Union had adopted it, and Justice Ailshie thought that Alabama had such a rule. I wrote for information and they had not. Again, I want to say that unless a goodly majority of the Bar desire that we do this, it certainly is not mine. But, I believe your cases will get better attention if more attention is paid to them before oral argument. I think we will find out more about this if we hear from the Bar after the Bar has given it consideration.

MR. GRAHAM: I have enjoyed this very much. I have labored in the darkness as to what the practice of the Supreme Court has been. The lid has been taken off, and we have now been apprized that the practice is that only one Judge examines the record, possibly, in the case that is going to be submitted to him, and the other four Judges don't know anything about it. Now, it's one thing to argue a case to Judges who know something about the record when you start; and it's another thing to argue a case before the members of the Court who don't know a thing about it. When you prepare your appeal you take up everything from hell to breakfast, lest the Court overlook some of them, and when you come to the argument you find that you haven't time to cover them at all.

I think it is the duty of the members of the Court to apprize themselves of all the cases, whether they are going to write the opinion, or not, so that they can intelligentiy listen to the argument, and if they have any interrogation to make they can intelligently ask the question.

Then there is the matter of presenting an important case in forty minutes. I am not endowed with that ability. If you get up and state the facts in twenty minutes your time is half gone, you take ten minutes to open the case and call attention to the points, and the remaining ten minutes for rebuttal. If some suggestion would come from the members of the Court as to the particular issues or propositions they wish to hear you on it would be a great help to the members of the Bar.

JUSTICE MORGAN: Mr. Graham, if upon full investigation by the Court, and all five members, it was found that there was no real question to be presented in the case, do you see any real reason for having oral argument?

MR. GRAHAM: Only this; that would deprive me of the pleasure and the privilege of telling the Court that they are wrong.

JUSTICE AILSHIE: I don't want this Association to adjourn with the notion of the manner of consideration of cases in the Supreme Court as has been stated by Mr. Graham. Of course I am unable to speak for anybody but myself. I do not believe that there is any case decided that the briefs and records are not examined by the Justices before they concur or dissent in an opinion. As to how many examine them before the oral argument, I don't know about that, but I don't make it a practice of examining the records and the briefs before the oral argument, more than to get the assignments of error and the points relied upon. I have those digested in a book and during the course of the argument I have those before me. That is as far as I have examined the case prior to oral argument. I feel the oral argument is for the purpose of giving the Court the general nature of the case. But, before it is finally decided, and before the opinion is written by the man on whom the case falls, I think every Justice examines the records and briefs.

MR. GRAHAM: I did not wish to be understood to say that the members of the Court did not, after the argument, examine the record.

JUSTICE AILSHIE: My investigation and inquiry of Judges of the Courts of last resort among the states has disclosed a great variety of methods. I know it is not the prevailing method throughout the country for the Judges to become familiar with the record and questions presented prior to the oral argument. It is the rule in some places for them to do so. It is a question of which is the better, and which is the greater saver of time.

PRES. ANDERSON: I am informed that there are quite a number of the wives of the members of the Bar present, and that something will be arranged for their entertainment during the time that their husbands are at the banquet. It is suggested that we try to get those who are here to admit whether their wives are with them, or not. Will you please indicate?

MR. GRIFFIN: I will make it my duty to see whether you have been telling the truth, or not.

PRES. ANDERSON: We will stand adjourned until two o'clock.

AFTERNOON SESSION

Friday, July 23, 1937

2:00 P. M.

PRES. ANDERSON: The next order of business is Examination of Titles—The Lawyer's Problem, by Mr. Otto E. McCutcheon, of the Idaho Falls Bar.

MR. McCUTCHEON: Mr. President, and members of the Association. These remarks primarily are to be addressed to the younger

members of the Bar. Perhaps not because I think you old fellows can't be convinced, but perhaps because you know more about this subject than the speaker.

To begin with, let me say that the Wood Livestock Company fell into difficulties and finally the business passed into the hands of a bond-holders' committee. That committee thought it was necessary to buy a small piece of land in Spencer, in Clark County. The abstract to the property was sent to a lawyer by the name of Edwards, who lives in Los Angeles, and the letter which he wrote concerning that title is in my hands, having come a few days ago, and it is so much to the point I think you will enjoy hearing it:

"Dear Sir:

"I have examined the abstract of title in seven parts covering Lot 52 of the so-called Spencer Town Site, in Clark County, which you are preparing to buy and herewith render my opinion.

"Don't buy the damned land. It has been my sorrow and burden to look over several horrible examples of a title examiner's nightmare, but this alleged title takes the cutglass fly smatter. It is my private belief that you couldn't cure the defects in this title if you sued everybody from the Spanish Government (who started this mess) on down to the present possessor of the land, who is in there by virtue of a peculiar instrument optimistically designated by the abstractor as a General Warranty Deed.

"In the first place, the field notes of the Spanish Grant do not close. I don't think it possible to obtain a confirmation grant since the last unpleasantness in 1898. In the second place, there were 19 heirs of the original grantee, and only three of them joined in the execution of the conveyance unto the next party in this very rusty chain of title, which is a major defect in the first place.

"We might rely on limitation here, except that I am reliably informed that nobody has succeeded in living on this land for a period of two years before dying of malnutrition. Laches might help out, but anybody who undertakes to buy land under a title acquired by laches is like the man who sets out to carry the cat home by the tail —he is going to acquire experience that will be of great value to him and never grow dim or doubtful.

"The land has been sold for taxes eight times in the last forty years. The last purchaser sued the tax collector a month after he bought it for cancellation of the sale on the ground of fraud and misrepresentation. He doubtless had grounds, but this incident will give you a rough idea of what kind of muzzle-loading smooth-bores have been fritzing the title. Nobody has ever redeemed one of these tax sales—glad to be rid of it, no doubt.

"On January 1, 1908, a gentleman who appeared suddenly out of nowhere, by the name of Ellis Gretzberg, executed a quitclaim deed, containing a general warranty of title (! ! !) to one Peter Parkinson. Parkinson, the prolific old Billy goat, dies, leaving two wives and seventeen children, the legitimacy of two of them being severely contested. I am not being funnier than the circumstances indicate. He actually left two wives and it appears never to have been legally adjudicated who he had done wrong by. Each of the ladies passed away in the Fear of God and the Hope of a Glorious Resurrection and left a will devising this land to her respective brats. A shooting match between the two sets of claimants seems to have assisted the title slightly by reducing their number to six and substituting eleven sets of decedents. One of the prevalent causes of defect in this title seems to be the amorous proclivities and utter disregard of consequences prevailing in this neighborhood.

"Your prospective vendor derives title by virtue of an instrument concerning which I have previously remarked. It is executed by a fair majority of one set of the offspring of Peter (Prolific) Parkinson, and is acknowledged in a manner sufficient to pass a County Clerk with his fee prepaid. Outside of the fact that it does not exactly describe the property under search, the habendum clause is unto the grantors, the covenant of general warranty does not warrant a thing, and it is acknowledged before it is dated, I suppose it is all right.

"I might mention that this land was the subject of trespass to try title between two parties who appear in the abstract for the first time and one of them recovered judgment awarding title and possession. We may waive this as a minor defect, comparatively speaking.

"I would advise you to keep the abstract if you can. It is a speaking testimonial to the effect of notary publics drawing instruments, county clerks who would put a menu on record if a fee was tendered, and jacklegged jugheads posing as lawyers.

"You can buy the land if you wish. There are at least 573 people who can give you as good a title as your prospective vendor, not counting the heirs of the illegitimate son Prather Linken who died in the penitentiary in 1889.

"Very truly yours

"Edwards.

"P. S. You owe me $200 for headache powder."

When I was requested to make these observations it was suggested that perhaps some time should be devoted to the attitude of lawyers who undertake to examine abstracts of title, in respect to certain things which occur time and time again. Of course, in the time which is at my disposal I cannot touch everything which might come to an examiner's attention. But, here are a few of the observations which I desire to make:

ATTITUDE OF EXAMINERS

The attitude of the examiner towards some of the problems regarding the titles in his locality, I am sure, is that in advising his client he has in mind what some other examiner may say. Of course he can write an opinion on a title which raises all the questions which occur to him, but he may sit down with his client and say that the chances are that the possession of a purchaser will never be disturbed,

in which case the prospective purchaser may go on with his deal. On the other hand, if the prospective purchaser gets the impression that a subsequent vendee will require a particular title to be quieted, the client is justified in requiring his vendor to go to the expense of quieting the title.

During the last few years no doubt you have seen opinions on titles prepared by representatives of the various governmental agencies, and some of their requirements have raised questions of great difficulty touching titles which local examiners have felt to be merchantable. My own impression as to those examinations has been that a large number of the examiners occupy subordinate positions and have to report to, or have their work examined by, superiors in office, so that the subordinate examiner has been afraid to pass the slightest defect whether real or imaginary. To illustrate this point, I might say that a client of mine dealing with the Department of the Interior had a most unhappy time with the examiners who were looking after the titles to land proposed to be bought for a migratory bird refuge. The client in question was a single man when he acquired title to the tract of land described in the abstract. Several years later he was married and several years after that his wife died. Unquestionably the tract of land was separate property of the client, but we had a rather troublesome time satisfying the examiners in the Attorney General's office on the question of whether the subsequent residence of the wife on the property of the husband was sufficient to convert the property from separate into community property. While in this particular case we dealt with a long established department of the government, it is illustrative of the attitude of examiners for various lending agencies of the government which were created since 1933.

To illustrate further, while the act of 1929, Code Section 7-1109, requires judgments of the Federal Court to be recorded in a county where land of a judgment debtor may be located, the examiners for the R. F. C. still require certificates from the Clerk of the Court clearing the property of Federal Court judgments and bankruptcy proceedings. The question arises here as to how far back the certificate should reach and what names should be submitted to the clerk for his search.

Every examiner meets the same questions time after time. What is to be done with regard to instruments which fail to show the marital status of the parties? Generally an affidavit is regarded as sufficient, and probably the Bar should not raise any question in such a case where the affiant is reputable.

Here let me say that one should be very careful when dealing with an abstract which shows a grant to a woman. A case which I have in mind showed a deed to a woman by the name of Gladys Smith, and there was an affidavit accompanying the abstract that at the time of the deed she was an unmarried woman. As a matter of fact, she was a married woman and had two children, and her husband died within a very few days after the date when she acquired title to the property. She subsequently married a man named Boyd, and they

moved from here to Boise where they acquired some more property. Boyd died, and his estate was probated in Ada County, and it also included the probating of the property in this county; it was probated as the community property of those two, and decree of distribution was made to the heirs of Boyd. Whereas, at the time of the death of Mr. Smith the statute required that the community property should be divided between the surviving wife and the children, there were two children, each of whom had a one-third interest who were never heard of, even, in the probate proceedings in Boise. So that even if you do have an affidavit, you can't be too careful. Of course, you might clear yourself, because the affidavit was there and perhaps a part of the abstract, but you can't be too careful even in accepting affidavits without question.

With respect to proceedings in foreclosure cases, it is my impression that a synopsis of the entire case should be abstracted giving the essential dates including filing dates. Unfortunately I have found many errors in proceedings of this character. The same is true with probate proceedings, and certain questions regarding decrees of distribution are discussed hereafter.

Regarding restricted covenants, on account of certain rules of evidence the examiner cannot be too careful in his construction of such instruments. The question of restriction is for the court, and while evidence undertaking to show the meaning of the words used is not admissible ordinarily, an agreement restricting the use of the land conveyed may be proved by parole. The office of a deed is not to express the terms of a contract of sale, but to pass the title pursuant to the contract. An agreement which shows a part of the consideration for the sale restricting the use of the property, is not merged in the deed, and does not qualify or in any way affect the title to the land; and the admission of parole evidence to prove such an agreement is no infringement of the rule that parole evidence is not admissible to contradict, vary, or explain a written instrument.

Should not the abstract show a map and description in order to be a true abstract of platted land? My reply to this question is that such a map or plat should always be included, and I feel that plats of record prepared and certified in accordance with the statute may be accepted without question. It is to be noted, however, that a large number of examiners and representatives of non residents require surveys by engineers, and further requirements are made to show location of sewers or drains and water supply pipes which may be invisible on the surface, and examinations of property to determine whether there are any encroachments over head such as electric light wires, telephone or telegraph lines, radio antenna, and such like. There are also various other problems here in Idaho, some of which I shall discuss.

While I am not inclined to urge that the abstract companies shall be put out of business, yet it is felt that the adoption of the Torrens system of registration of titles or the issuance of title certificates of insurance would be of great service to the public.

THE OLD STATUTE RELATING TO SEPARATE ACKNOWLEDGMENTS BY THE WIFE

This statute was repealed by the ninth session of the legislature of 1907. Of course many abstracts of title reach back much farther than that date. Locally, we find in abstracts of Idaho Falls property several cases where there was no separate acknowledgment of the wife. The titles here are comparatively young, and in fact there are persons living who have known Idaho Falls property since the townsite was platted and who can give affidavits proving that neither the wife nor any member of her family ever resided upon or occupied any portion of the property as a home. In such a case if the examiner is satisfied to accept an affidavit of non residence or non occupancy of the property by the wife, or any member of her family, he will pass the title on the theory that the power of disposition of community property vested in the husband until 1913 when the statute was passed which requires the signature and acknowledgment of the wife in transfers of community property, regardless of the character of the property as a residence of the wife or members of her family.

We have the case of Co-Operative Savings and Loan Association vs. Green, 5th Ida. 660, which holds that a mortgage was void where the acknowledgement was not made on examination apart from her husband. The examiner may take the extreme view and hold the deed void, in which case a suit to quiet title would be necessary, and that is the position which is taken by the highly technical examiners.

The legislature passed in 1907 what is now Code Sec. 54-729, and the same session passed the act, Sec. 54-707, which abolished the medieval statute requiring a separate interview between the wife of a prospective grantor of land and the notary public, so that for more than thirty years the law has followed the modern doctrine that the wife does not need the protection from her husband which an inoffensive notary public might give. But we must all admit that possibly the old statute had its good points. However, after the lapse of thirty years it is felt that such an apparent defect in a title may be safely waived.

There may be objection to that conclusion, because if the deed was void it cannot be cured by the pass of time. However, the statute which was passed in 1907 does undertake to say that such a deed, if recorded, is sufficient to give notice to a subsequent purchaser.

SUITS TO QUIET TITLE

The bugbear of suits to quiet title is found in the contents of an affidavit supporting an application for an order for the publication of summons. The statute, Section 5-508, says that due diligence must be used to find the defendant to be served, but the affidavit "shall be sufficient without setting forth or showing what efforts have been made or what diligence has been exerted in attempting to find the defendant." Perhaps these questions would be simple if it were not for the decision of the Supreme Court in Lohr vs. Curley, 27 Ida. 739, where it was held that the statute does not dispense with the use of

due diligence to ascertain the residence or post office address of the defendant, and the mere assertion of diligence in the affidavit is not a compliance with the statute. Where it is shown that by the exercise of ordinary diligence such search would have revealed the whereabouts of the missing defendant, the court will be deemed not to have acquired jurisdiction of him by publication of a summons. This decision appears to me to cast considerable doubt on all proceedings which are based upon substituted service by publication. In effect the case of Lohr vs. Curley holds that if a defendant so served can convince the court that the plaintiff was not diligent, the proceedings to quiet title can be defeated. Of course the sort of showing which would convince one judge might not be sufficient to satisfy another. In my own experience I know that an examiner of titles for a large life insurance company will not pass such a title where the order for publication of summons is based on the form of affidavit which we ordinarily use in this state. He says, and perhaps rightfully, that the question remains open to attack by a defendant so served, unless the affidavit for the order for publication shows with particularity what diligence was used in the effort to find the defendant. Locally, we accept the affidavits after the expiration of one year from the date of the decree where a defendant has been served by publication and has defaulted. See Sec. 5-905, which prescribes the time within which an application may be made for relief on a judgment by default.

PROBATE PROCEEDINGS

It is hard to understand how the purchaser of the property described in the case of Glover vs. Brown, 32 Ida. 426, got into the difficulties which arose following the probate sale. There was a deed of gift recorded in Canyon County July 16th, 1896, which appeared in the abstract of title. The property became the separate property of Marietta Glover, but it was probated as community property in the proceedings entitled, "In the Matter of the Estate of Marietta Glover, deceased," and the entire property was distributed to George S. Glover as the surviving husband. Subsequently as a single man George S. Glover mortgaged the property for $5,000.00, and this mortgage foreclosed and the property sold. George S. Glover was adjudged insane and was confined to the asylum at Blackfoot until his death on November 30th, 1918. Before the sale on foreclosure was completed letters of guardianship were issued on the estate of George S. Glover, incompetent, and the property was sold and a guardian's deed was executed and delivered. The money realized from the guardian's sale was used to pay off the judgment on foreclosure of the mortgage and thereby the land was redeemed.

Certain children of Marietta Glover commenced a suit to quiet title and to set aside the decree of distribution in the matter of the estate of Marietta Glover, deceased, and that was finally done.

There were three positions taken by the members of the Supreme Court. Judge Budge held that collateral attack might be made upon the probate decree. Judge Morgan dissented from the portion of the prevailing opinion which held that a decree of a probate court distri-

buting property other than as directed by statute to be in excess of its jurisdiction and void, and also from that portion of the decision which holds that the action in the district court was a direct and not a collateral attack upon the decree of distribution. He also dissented from the portion of the decision which holds that the validity of probate proceedings may be attacked for fraud. Judge Rice dissented and held that a decree of distribution by the probate court is subject to collateral attack in a proper case, and held that "a decree of distribution of the probate court is entitled to all the presumptions in its favor which are applicable to a decree of a court of general jurisdiction. In the absence of any proof of notice, extrinsic to that contained in the record in the office of the county recorder, it seems to me to be manifest that a purchaser would have a right to rely upon the subsequent decree." Judge Budge therefore holds that validity of probate proceedings may be attacked for fraud and the jurisdiction of a court of equity to compel restoration of lands fraudulently acquired by such proceedings is clear.

In view of the three opinions filed in the Glover case an examiner approaches the question of determining the effect of a decree of distribution with much trepidation.

Douglas vs. Douglas, 22 Ida. 336, is another case to be well remembered when a probate proceeding appears in the abstract. This is the celebrated case which holds that the law of a sister state controls in determining whether land bought in Idaho is community or separate property. But I leave this phase of the subject by asking a question: should the title examiner conduct an inquiry for the purpose of making up a—shall we call it a pedigree—of the money used for the purpose of buying Idaho real estate?

DEEDS PURPORTING TO CREATE JOINT TENANCIES BETWEEN HUSBAND AND WIFE WITH RIGHT OF SURVIVORSHIP

Locally, we have been finding in abstracts of title deeds purporting to create joint tenancies. The first of these deeds which were prepared by members of a real estate concern which has been mentioned in the Supreme Court reports as practicing law without a license. I think quite generally these deeds have been prepared by real estate people.

A phase of the law of titles which is beginning to appear locally is represented by deeds, prepared by real estate dealers, to husband and wife as joint tenants with the right of survivorship. At a very early date in the case of Phelps vs. Jepson, 1st Am. Dec. 33, the Connecticut courts said these titles were held under "the odious and unjust doctrine of survivorship." Most of the states legislated against this doctrine. Our own statute which is Code Sec. 54-104, provides that "every interest created in favor of several persons in their own right is an interest in common, unless acquired by them in partnership, for partnership purposes, or unless declared in its creation to be a joint interest, or unless acquired as community property." Also Sec. 54-508 provides that "every interest in real estate granted or devised to two

or more persons, other than executors or trustees, as such constitutes a tenancy in common, unless expressly declared in the grant or devise to be otherwise."

The familiar Sec. 31-907 defines community property as being "all other property acquired after marriage by either husband or wife." One such case appeared in an abstract where the death of the husband had occurred, and the decision made was that regardless of the language of the deed, the estate of the husband should be probated so as to establish the fact and the date of death; whether testate or intestate, and to establish heirship and give notice to creditors.

The considerations which moved me to this conclusion are somewhat along the following lines:

1. The statute defining community property expresses the policy of the law with relation to the rights of married women, and the law also provides that all the community property shall be subject to the indebtedness of the husband and the community excepting, of course, where a homestead has been selected before the death of the husband, and also subject to the right of the probate court to carve out a homestead for the benefit of the wife and family.

2. Under the statute, 31-913, the husband cannot sell, convey or encumber the community real property unless the wife join with him in executing and acknowledging the instrument of conveyance. However, one joint tenant may alieniate or convey to a stranger his part or interest in the realty and thereby defeat the right of the survivor. (Wilkins vs. Young, 55 Am. State 162; Midgley vs. Walker, 45 Am. State 431.) Such a conveyance passes only the interest of the grantor in the property, and a like conveyance by the grantee to the grantor does not reestablish the joint tenancy. The unity of title is then destroyed and the joint tenancy is at an end. The grantee and the remaining joint tenant hold by several titles and as tenants in common. This theory prevails where there are but two joint tenants. Under the theory of joint tenancies, therefore, the husband may sell his interest in real property without the wife joining in the instrument which transfers the title, and the wife could do the same thing in so far as her joint interest is concerned.

I take it that under the existing law the wife has no power of alienation of her interest in community property, even by deed of gift to her husband, and certainly not by any sort of deed to another person. Perhaps the deeds have been procured by the husband, so that there is no agreement evidencing that the wife accepts the title not as community property. If the wife was confronted with a deed which was to herself and her husband as joint tenants, with the right of survivorship, it might be that she wouldn't accept it, even as we do not accept a deed to a husband which says in substance that it is to be held as the separate property of the husband, or, if it goes to the wife that it is to be the separate property of the wife. In either of those cases we do not have the consent of the other, so that the only safe way to do is to assume that it is community property, regardless of the statement in the deed, and hold accordingly.

3. There is no agreement evidencing that the wife accepts title not as community property.

These are a few of the problems which seem to me to be important. They do not cover the whole field. While I feel that an examiner should help a business deal to be made, the responsibilities of the lawyer are great and the longer one is at the bar the more conservative he becomes, whereas in his youth he may be tolerant of apparent defects. However, it is difficult to explain to a disappointed client whose title one has passed that one is right and the examiner who rejects the same title later is wrong.

MR. NIXON: About two months ago Mr. E. B. Smith, President of our Local Bar Association in Boise, threw another duty on me, being chairman of the committee to study this question of the examination of abstracts, and see if there were some of these points that the attorneys in each local place could agree that they would pass, and what rule should be adopted with respect to that matter. We have five gentlemen of the Bar in Boise who do considerable title work, who were invited in on this committee, and we have held several meetings, and have expected to make a report to our Local Bar Association, but we concluded to withhold that report until we had had the opportunity of listening to Mr. McCutcheon. Mr. McCutcheon gave a very fine talk, and I was particularly interested in it for the reason that practically everybody in here was paying rapt attention to his remarks.

One matter that we were trying to work out in connection with the examination of abstracts was what to do with this separate examination of the wife. That question always pops up in every title.

MR. DAVISON: For a great many years in Ada County in the examination of abstracts we have been confronted with a fear that seemed to rise in every attorney's mind that he would pass a title that someone else would object to and say was defective, and there would have to be an action to quiet title. I think that fear has had more to do with handicapping and preventing fair examinations than anything else. It got to a point where one attorney would say a title was bad, and start in to quiet title, and another attorney would examine that proceeding to quiet title and say that wasn't good, and then there would be another proceeding. Now, there is a third proceeding started right now on one matter which goes back to a defect in the initials of a man's name, sixty or seventy years ago, and has to do with a fractional forty-acre tract which has been divided up into acre-, acre and a half-, and two-acre tracts. There are probably twenty-five owners in that tract now. Two years ago a very able attorney in Boise brought an action to quiet title. Another attorney got hold of that abstract and decided that action to quiet title wasn't good. That man was a good attorney, also. He brought an action to quiet title. And right now there is a third action to quiet title, because some attorney has decided that the two actions before weren't good.

Now, the public is getting word of this. It seems to me that we ought to try to take a sensible view of these things. Now, I say three attempts to cure that defect by an action to quiet title isn't right.

I know a widow woman living down the valley. I don't think her house is worth over $250.00, and I doubt whether the land is worth more. I saw her abstract three years ago, and three actions to quiet title have been had by different fellows. That to me appears to be so unjust that I don't blame the public for complaining about the attorneys. I am not blaming the young attorneys, because their experience has been limited; but I do think the older heads ought to have sense enough to take a sensible view, and be willing to take into consideration that the lapse of time has cured some of these defects. It has reached a serious stage in Ada County, and I am of the opinion that unless we can come to a better understanding that we should change the law and have a title guaranty. I don't think that is the solution, but it is better than we are getting now. I can recite case after case where objections were made that I feel were entirely trivial and of no consequence.

That is what we are making an earnest effort to work out in Boise. We have held weekly meetings for about three months, and I think we are coming to a better understanding as to what attitude we should take on a lot of these matters.

The question has been raised about showing a complete summary of probate proceedings in the abstract. How far back should you go? If the proceeding is twenty years ago is it necessary to show it? Suppose it is just a distribution to the wife. Is it as important to show it as though it were something recent? Personally, I think the older the proceeding is the less exacting we should be. And the same applies to District Court procedure. I say that we in Boise should take a more liberal view than many of us are taking of titles. I think it is necessary to do that if the public is to get a square deal.

I know another case where an attorney—no reflection on the attorney—brought an action to quiet title, and it was necessary to make three men and their wives parties defendant. He made an affidavit for publication of summons, stating that he did not know the whereabouts of any of these parties. The first defendant had been a prominent attorney in Boise, and he was living in California; and the attorney could have phoned to half a dozen attorneys in Boise and in five minutes found out that man's address. If he had examined the probate records of Ada County he would have found that the man's wife was dead, and her last will had been admitted to probate in the probate court of Ada County. The second defendant was dead. His estate was then being probated in Ada County, and his widow lived just across the street from the court house. The other defendant lived at Mountain Home. I happened to be in the District Court room when this case came up. The Judge read over the complaint, and he said, "Mr. So-and so, I don't think your service is good; I don't think your complaint is good; but if you insist I will hear your testimony, and maybe grant you a decree." He did. That woman told me afterwards that she paid $150.00 for that action to quiet title, and she sold this house for less than a hundred after paying taxes on it for several years.

I think most of the attorneys in Boise would like to see these

things overcome. We do not hesitate on any other subject; we give our opinion, after looking it up; we are not afraid of anybody. But, when it comes to examining titles we all get panicky. I think we should eliminate that fear. Read our law books a little more; I think there are plenty of favorable decisions for a liberal construction by our own Supreme Court to back us up in a common sense rule in some of these things.

MR. GRIFFIN: As you have heard, this is a very vital question in Ada County,—perhaps it is in other sections of the state,—and we are trying to solve it there. If you have a similar problem in your own section I think it would be worth while to have some sort of a committee appointed and see if you can't iron this out. Then because it is increasing more each day that an Ada County or a Government attorney examines the titles from your locality, I think it is advisable that the whole Bar attempt to arrive ultimately at some basis for the examination of titles.

One of the things that has bothered me about the examination of titles is what I am doing when I examine one. Most of us, I think, write an opinion in which we limit our responsibility to what the abstract shows. In other words, we say, "based upon the foregoing abstract, we find title vested in so-and-so, subject to certain objections." But, actually, we don't examine abstracts of title that way at all. At least, they don't in Ada County. As an illustration: A good many years ago a husband could transfer the property without the joinder of the wife, but at the same time the statute provided that if there was a wife and if she died during ownership her interest in the community went to her descendents. You are examining an abstract and it doesn't show whether the man, grantor was married, or not married, his marital status doesn't appear; and so, on the face of the abstract, you don't know whether there was a wife, and you don't know whether, if there was a wife, she died, and you don't know whether, if there was a wife and if she died, she left descendents. Consequently, you don't examine the abstract when you raise the objection of the non-joinder of the wife, and the necessity for showing the marital status, but you go outside the abstract and begin to speculate as to what the true facts are. You are basing the opinion on title not upon the abstract, but upon what possibly might have been the actual facts. What is your duty in that respect? Are you supposed to go outside of the abstract and speculate through half a dozen inferences to arrive at a conclusion that there may be an objection, whether there is an actual objection on the face of the title or not? I think we should determine basically, in the first instance, whether we are going to speculate as to what the actual facts are, or whether we are going to pass title based upon what the abstract actually shows.

That is only one of the points that has occurred to us in Ada County, and a thought I hoped to bring to your attention for action by your Local Associations.

MR. WHITLA: As to what we examine when we examine an abstract, it seems to me if the abstract doesn't show facts from which

you could say that it shows good title, it should be referred back to the party with that statement.

There is another question I think very important; the question of a deed from the husband to the wife in contemplation of death. We have quite a number of those coming up frequently, and the question is how you can take care of the matter. Some of the best of our examiners have held that an action to quiet title is sufficient in matters of that kind. Others take the position that no action to quiet title will take care of such a matter, because nobody excepting the probate court can pass upon the question as to whether or not there is any inheritance tax due on the estate of which this property may be a part, and until there is some proceeding started in the probate court, and the probate court has acquired jurisdiction to base an order deciding whether or not there is an inheritance, is or can the question of inheritance tax be settled. It seems to me that that is perhaps right. Where the law has constituted the probate court to settle whether there is an inheritance tax due from the estate, only a probate proceeding can take care of that matter. You can't say that because the property involved is only worth $200.00, or $1,000.00, and it all goes to the wife, it is exempt, because that may be just some part of the property of the estate; and it may be that in the future some proceeding will be taken by the State to determine whether or not there is an inheritance, and in some cases it may eat up the entire property on which you are passing title.

There are quite a number of these things come up; and the lawyers don't agree among themselves. That being so, you can't say one fellow is wrong, and the other fellow is right. It is a controverted question in some sections just what to do with these various things.

MR. RALPH BRESHEARS: I would like to ask, Mr. McCutcheon, whether the Bonneville County Bar is now required, where substituted service is had, to set forth in the affidavit for publication the particulars in which due diligence has been exercised?

MR. McCUTCHEON: No. Locally, we base those, when the affidavit is drawn, under the statute without any showing of diligence. Just a little while ago I came across a case where property had been offered to the Beneficial Life Insurance Company of Salt Lake City for a loan, and Mr. Ashby D. Boyle, who represented them, would not accept the title because the affidavit, as he said, was defective. Our own Jesse Budge, who now practices in Salt Lake, takes that same position.

In regard to Mr. Whitla's remarks, I think he is right. Where we find a deed of gift to the wife we generally require an affidavit, especially if there is any indication that perhaps the husband may have died. But, if the death occurred more than five years ago my view of that has been that the statute of limitations has run against the State collecting any inheritance tax, and might be safely passed. But ordinarily if a situation of that kind is called to the attention of the state officers a proceeding will be commenced in the probate court having jurisdiction to determine that question of inheritance tax.

So far as what Mr. Griffin said is concerned, of course you can take two views of it. You can take the abstract and examine the abstract. But, I am sure most of us require information outside of the abstract. One of those cases which I referred to, in Judge Rice's opinion he said that if there was evidence extrinsic to the record, it should be referred to, and would have an effect upon the decree. So, I think instead of just examining the abstract, generally, we inquire into the facts; and I don't see how you can do otherwise, if it isn't all shown there. Perhaps sometimes you find a point incidentally in making some inquiry about a collateral matter, and you get information which is of value to you, and perhaps it assists you in passing the title, or perhaps it determines you to reject it. As I said in my remarks, I think that we ought to help business to go on. And that attitude of being fearful of what some subsequent examiner will say, no douht, has a great influence upon the preparation of opinions about titles.

Locally, we get along first rate. There are certain things about the eeparate examination of the wife but we usually waive them. In the suits to quiet title my great difficulty has been in finding that the publication of the summons has not heen made for a sufficient length of time. There are several changes in the statute, from year to year. Once we had to publish the summons for five or six weeks; then it was changed so that thirty days must intervene between the date of the first publication and the last; and that was changed finally to twenty-six days. Once in a while we will find a publication just short of the required time provided by the statute at the time the publication was made.

MR. TOM JONES: What would you do if you found that the husband alone had signed the deed of gift to the wife?

MR. McCUTCHEON: Well, we generally pass them, Tom.

MR. JONES: Do you require the wife to sign and join, under the statute? The statute provides both the husband and wife must sign and acknowledge.

MR. McCUTCHEON: We do, not, where it runs to the wife.

MR. AMBROSE: May I ask, Mr. McCutcheon, what would you do in a situation in which the owner of the property died outside of the state, and administration of his estate and the property he had was handled in the state of Montana, for example, and he owned at the time of his death land in the State of Idaho; a decree of distribution was made to a proper party, but nothing recorded in Idaho except the decree of distribution; and the major part of the property was in Montana.

MR. McCUTCHEON: We wouldn't accept that.

MR. WARE: If the wife alone deeds to the husband, as his separate property, do you hold that void, unless the husband joins with her?

MR. McCUTCHEON: You will find that there isn't anything in the law which allows the wife to alienate her interest in the community property.

MR. WARE: Just one other question along that line: The property is in Idaho, the husband in Maine, and the wife in California, and they join in different deeds to a grantee; do you consider that good?

MR. McCUTCHEON: I would say not, under that statute which requires the wife to sign and acknowledge the instrument by which the transfer is made.

MR. WARE: Assuming that the deeds themselves, you consider void, is there any possibility or probability that the instrument would be held estopping the wife from asserting any adverse interest in the property as against her grantee?

MR. McCUTCHEON: The courts have been very slow about applying estoppels to the wife. The Moscow case (Grice v. Woodworth, 10 Ida. 459) is one of the leading cases on that subject. I wouldn't dare say whether the court would apply the rule in the case illustrated, or not; but my impression would be that it would be a very unusual case if the doctrine of estoppel be applied.

MR. WARE: Then the question of inheritance tax, where there has been no probating. Under the inheritance law as it existed in 1929 the five-year statute is applicable as against the state. In the case of State v. Naylor (50 Idaho. 113) that went up from Latah County, in 1929, the statute only commences to run against the State Auditor from the time he has notice of the death of the deceased.

MR. McCUTCHEON: Yes.

MR. WARE: So there is a question as to whether the statute can ever run.

MR. McCUTCHEON: Apparently, unless you can charge him with notice of the death.

PRES. ANDERSON: Mr. Eberle has found out how much money the lawyers have made, and he wants to tell us about that. He said it won't take but a very few minutes.

MR. EBERLE: Mr. President, and fellow members of the Bar, I have no formai report, partly because of a misunderstanding, and I did not receive these figures from the Bureau of Income Tax until after coming to Idaho Falls. I want to give you these figures, and then my remarks will be extemporaneous. As a matter of history, those of you who have attended prior annual meetings know that some years ago the Commission appointed a survey committee, with tbe thought that if we could analyze the remuneration received by the several members of the Bar the information might be helpful in assisting the Commission in obtaining the cooperation of the members of the Bar in the work of the Idaho State Bar. The first year we attempted to obtain this information by questionnaire, and as many of you know, we received returns, I think, from only five percent of the members of the Idaho State Bar. The only recourse we had left was obtaining the information from the Income Tax Bureau of the State. Of course we appreciate that this is not necessarily accurate, in as much as allowance was made that the clerks in the office may have

some errors in computation. I am not going to compare these figures with the survey reports of prior years, because if you will check back over the reports you will get the figures. I want to give you the figures now, as shown by the State Income Tax Bureau on the returns made by the members of the Idaho State Bar last year of gross earnings for professional services: Five percent of the total membership showed earnings over $7,000.00; two percent showed earnings between $6,000.00 and $7,000.00; three percent between $5,000.00 and $6,000.00; four percent between $4,000.00 and $5,000.00; five percent between $3,000.00 and $4,000.00; six percent between $2,000.00 and $3,000.00; and seventy percent under $1500.00; and seventy-five percent under $2,000.00.

Now, I am not going to make the remarks which the committee has made heretofore, because they are contained in the prepared reports. All I want to ask—and I say this earnestly—is that you take this back to your local Association, take these figures. The thought was not that compensation was the paramount ideal of the profession; in obtaining this report the committee did not have in mind that the service of love and devotion to our profession was not paramount; but, rather, that when three-fourths of the entire membership of the Bar were receiving less than the lowest paid swamper of Henry Ford it was not a wholesome condition.

Many members of this Association have felt that the efforts of the Commission in attempting to obtain the cooperation of the members of the Bar toward reasonable remuneration for the several members of the Bar was a worthy object. We have always felt quite keenly that when seventy-five percent of the Bar obtained less than a living wage, it is not conducive of those things which we feel should be the objects of this Bar.

Remember that your Local Bar is the foundation upon which the entire superstructure of this integrated Bar of our must rest. You have all heard the story of the man who came into his club one day, and on seeing a man who was sitting off a little distance, turned to his friend and said, "I hate that man." His friend said, "How can you hate him? You don't know him." The first man replied, "I know it. If I knew him, I probably wouldn't hate him." That is the purpose of these Local Bars; we get to know each other better, and feel more kindly toward the brothers in our own profession. If we continue that year after year a greater and better understanding in this integrated Bar is going to be attained.

PRES. ANDERSON: The next order of business on the program is Analysis of Social Security and Unemployment Laws, by Senator Donald A. Callahan, of Wallace.

MR. CALLAHAN: Mr. President, and members of the Bar Association. I wondered why the committee wanted a discussion of this particular subject, which, in a great measure, has only an academic significance to the members of the Bar as citizens. Since hearing Mr. Eberle's report, I think I understand. The lawyers of Idaho should be very vitally concerned in this subject of social security.

It is rather difficult to present an analysis of our Social Security

and Unemployment laws from the legal standpoint. This type of legislation is so new in our American scheme and has within it such implications of social and economic consequences that any analysis must turn upon these considerations.

I do not believe it necessary or advisable to enter into a discussion of the mechanics of the laws themselves. You are familiar with the fact that the Social Security laws enacted by the Federal Congress have three major divisions, one calling for grants to the states for a specific relief such as that to the blind, the crippled, and others; the second, that of Old Age benefit provision; and third, that relating to unemployment compensation or insurance, as it is sometimes called. I shall not discuss the matter of grants because I think that the legal fraternity will have little to do with these in the practice of its profession.

The lawyer has a professional as well as an academic interest in Old Age Security for the time will come when he will be called upon to spend much time and effort in the preparation of claims under this plan. It will not be a remunerative branch of his practice. It will almost all come under the classification of charity but there is no question but that the lawyer will be called upon to prepare claims in the estates which he may represent and in the preparation of those claims he will find that an infinite amount of pains must be exercised even though the amounts realized will be extremely small.

There is no doubt either that the lawyer will be called upon very often to represent those who claim unemployment compensation and this will likewise be on the part of the legal fraternity largely a labor of love. Whatever may be accomplished by this new program of Social Security, there is no question but that in the years to come when both unemployment compensation and old age payments become really effective, the lawyer will find a considerable increase in his practice without a corresponding increase in his income.

I propose to look at these laws today from a more academic standpoint. The lawyer is usually a man of affairs. His interest in legislation is not entirely because that legislation provides the subject matter of his daily practice, but because as a public spirited citizen he is keenly interested in all legislation which affects the social and economic life of his community, his state and his nation. He is tremendously interested in this new movement for social security.

I have called it a new movement although strictly speaking it is not new. Social security has always been the aim of the human race. It is the motive force behind all human endeavor. It is the desire and hope of every human being and that desire and that hope have been expressed on practically every page of human history.

To secure social and economic security, wars have been fought between nations, revolutions have taken place and governments and dynasties have been overthrown. The whole history of the Anglo-Saxon race bears testimony to the desire of individuals for social security. For that security they pledged fealty to their lord; they gathered into communities, and we may safely say that the whole body

of the common law was evolved through an urge of the people of England for social security.

The modern application of this term, however, is somewhat different. By social security now we mean a provision of the state whereby its citizens will be protected in some measure at least from the hazards of life, from the uncertainties of business and economic conditions and even from the consequences of their own folly and incompetence. Unfortunately, the subject has entered to some extent into the realm of politics. We seem to have come to the conclusion recently that on this very important question there is a ground for political difference.

The American people believe now and always have believed in economic security. Individually they proved their faith in it by voluntarily providing themselves with seventy-five percent of all the life insurance which is in force in the world. More than 19,000 American employers have collaborated with more than seven million employees in purchasing more than ten billion dollars of group insurance in all its various forms. In addition to this we have had large groups of employers and employees establishing independent pension systems, voluntarily and under their own rules and recommendations. The field for the entry of governmentally managed social security was well prepared by the individual enterprises in that direction which had been successfully conducted for many years.

The Social Security law passed in 1935 was the outgrowth of the economic conditions prevailing in the country and, born under such conditions, it necessarily reflects ideals and proposes objectives that under more favorable economic conditions would not have been written into the law. It would have been wiser in Idaho, for instance, to have refrained from providing for specific rates of compensation for unemployment and specific periods during which such compensation should be paid. In my judgment it would have been much wiser to have levied the tax to provide the funds and provided for the creation of a non-partisan advisory board to study and observe the workings of the act, making specific recommendations to the Legislature as to waiting periods, rates of compensation and periods during which such compensation should be paid.

It is very clear that we know nothing about the rates which we shall be able to pay to unemployed persons in this state. We do not know how much money will be accumulated in the fund, and we know absolutely nothing about the periods of ordinary unemployment which this fund is supposed to meet. The danger of making the Act specific is that we can never go below that. If any change in the law is made as to the provisions of rates and periods, they will, under our political setup, be upward and not downward.

Again, it would be wise in my judgment to make our laws such as to encourage group provisions for unemployment. There are few individual employers in Idaho who have sufficient payrolls to provide individual unemployment systems of their own. There are, however, large groups that should be voluntarily organized and should take care of their own unemployment problems. When the Federal act

was passed, the pious hope was expressed that the legislation would lead to a more stabilized employment rather than to the creation of funds to meet unemployment situations. That theory should be encouraged in the laws of all the states and it can only be encouraged if full opportunity is given to group employers to organize themselves along a line which will permit them to take care of their own unemployment.

Another thing which should be done, in my opinion, as to unemployment, is to make the laws more inclusive. If unemployment compensation is good, if it is a means of providing a social security which would otherwise be lacking, why, then, in the name of common sense, do we exclude agricultural laborers and domestic help, and why in this day of ever increasing public employment do we exclude those who occupy those most hazardous positions in the public service.

There are many other features of this legislation which I might comment upon but time does not permit a thorough analysis of all its provisions. There is one, however, which I believe must eventually receive attention. The employers in Idaho having eight or more employees, and therefore, subject to the federal payroll tax, number less than one-fifth the total number who are subject to the Idaho tax. Accordingly, no federal tax is collected from the greater number of our employers to provide the funds with which to administer the act. Sooner or later this situation must be corrected. There are many administrative features which in the course of time will be changed as experience shows a better way. It would be useless and very boring to go into these features.

The other feature of our Social Security program, that of Old Age Benefits or annuities, required no action upon the part of our state legislature, but challenges the attention of every citizen for in this legislation we are being presented with one of the greater political and economic problems of the not distant future. To provide a means by which our aged people will have some measure of social security may well be one of the great duties of any social organization. To provide that means under a political government and to have the management of its affairs entrusted strictly to political bureaucratic control is very questionable. To create a reserve fund which will eventually amount to approximately fifty billion dollars is one of the most dangerous adventures ever undertaken by a human government. To levy upon the industry of the country and the wages of its employees the largest tax ever levied in our history to provide against contingencies of the future is a most serious undertaking and connotes a faith in our American system of government which few of us possess. We do not believe it is a very Christian thing for the people of this generation to provide a temptation for those that will come after them and yet that is precisely what we do when we create this tremendous fund and leave it to be administered by human agencies selected through the political movements of coming generations. We have but to consider some past experiences, such as the soldiers' bonus, to realize that in a national sense the idea of funds held in trust does not impress itself sufficiently to be a safeguard in our

Congress against the pressure of an organized group. We have had an example in our own state of provisions of our recent Public Assistance Act which were not agreeable to the recipients of such assistance, boldly set aside upon the opinion of an attorney general without even submission to a competent court. Those of us who live in Idaho and realize that it is only one of the many sovereign states and that similar conditions may be found in the others, are not at all optimistic about the future security of those who pay their payroll tax in the blind hope that human nature in a political government is so above temptation that the funds provided for security will not be diverted from their original purpose. From what I have said do not get the impression that I am opposed in any sense to the principle of social security. I am most heartily in favor of provisions to that end. I must, however, insist that the types of economic security be as sound as it is humanly possible to have them. I do not want the provisions for such security to undermine the character of our American people. I know that it is popular politically to expatiate upon the right of human beings to be fed and clothed and to have a place in the social organism. I am not one of those who believes that the world owes any man a living unless he is willing to use his own initiative and enterprise, his own industry and practice his own thrift to earn his right to a place of honor. Upon that principle we built this country and upon that principle it will either endure, or if that principle be lost sight of, it will go into decay. I believe that industry and labor together can work out in a cooperative manner far better provisions for social security than can ever be administered by faulty political governments. I believe that responsibility for that lies with industry and I believe that it has not in the past fully met that responsibility. I feel that industry and labor are becoming aroused to the necessity for their own provisions of a cooperation in this direction and I am convinced that any laws providing for social security should make it possible for industry and labor together to work out the means by which it will be provided.

In a word, I am skeptical of government as an administrator and I know that past experiences in this and other countries bear out that skepticism. We must, however, accept the situation as it has come to us and in conclusion I would urge upon the members of this Bar Association that they interest themselves in the future more than they have done in the past in the drafting of these laws which will affect them because they will affect all of our citizens. I urge upon this Association's members, who embrace the leading citizens of every community in Idaho, that they interest themselves in the selection of men to represent their counties in the legislature and, above all, I urge them that in this problem of social security, which after all is one of the greatest human problems that government ever faced, they refrain from taking a partisan political viewpoint, that they refrain from acting as predisposed toward the cause of either employers or employees, of either the nation, its financially confortable, those on the edge of economity insecurity or those who face dire necessity. I urge them rather that they take a lively interest in the social and economic questions presented in the social security program, examining them as they would brief a case in the courts, their client being the whole people of our state and nation and the point to be established that of the best manner of serving the interests of all classes of our society from the highest to the lowest.

PRES. ANDERSON: The next order of business is the report of the Canvassing Committee.

MR. HAWKINS: Your Canvassing Committee, find that eighty-six ballots were cast; nine were stricken for the reason that the members casting the ballots had failed to pay their dues, and were not in good standing; three for the reason, Mr. Secretary, that their names did not appear upon the list presented to us; and the balance of seventy-four legal ballots show that Walter H. Anderson has been reelected as your Commissioner from this District.

PRESIDENT ANDERSON: I want to thank the members of the Bar of the Southeastern Division for the confidence they have reposed in me by reelecting me, and I will strive in the future, as I have in the past, to do the best I can with the limited ability that I am endowed with, to do the things for the best interests of the lawyers generally, consistent with the public good.

Is there anything further to come before the convention this afternoon? We will adjourn until nine-thirty in the morning.

MORNING SESSION

Saturday, July 24, 1937

9:45 A. M.

PRES. ANDERSON: If the meeting will come to order, gentlemen, we will proceed. Mr. Morgan.

MR. A. L. MORGAN: There was up for discussion before the meeting of the delegates of the Local Organizations the question of raising the annual license fees from $5.00 to $7.50, and some discussion of it was had. They reported it back here, but no definite action was taken. Therefore, Mr. President, I move you that the matter of the raising of the Bar fees be referred to the Local Bar Associations, with instructions to discuss and vote upon the matter, and have their delegates to the next annual Bar Meeting instructed to act on that question.

MR. GRAHAM: I second the motion.

PRES. ANDERSON: Is there any discussion?

MR. JAMES: Would it be wise to incorporate in that motion a provision that the Local Bar Association make a report to your commission following their meeting. That would make a record of it.

MR. A. L. MORGAN: I think, Mr. President, that the motion covers that feature; that they do not report to the commission, but they do send their delegates here, instructed to act, and that their delegates the next time be prepared to report the action of their Local Bars to the new section that has been created.

MR. GRAHAM: Mr. President, that raises the question in regard to certain districts that haven't yet been organized. For instance, the old Fourth Judicial District, which Mr. James is in, has never been organized into a local.

PRES. ANDERSON: Neither has the Sixth. But I think, Mr. Graham, and the other members of the Bar, that those matters are going to be disposed of by attaching those districts to another if they will not organize. I as Commissioner went to two meetings in Blackfoot, and I think one time there were three, and the other time four members present. And I had had in mind of right away getting permission to hold one meeting and if they didn't organize then to attach them either to this district or to the Fifth. So they will be represented, very probably, if that action is taken right away in time to participate in this discussion.

MR. GRAHAM: I am rather inclined to believe, Mr. President, that the wishes of the members of the Bar in the Sixth District might be consulted, and also the wishes of the Bar of the Fifth, and if it is agreeable have the Board make an order including them within the boundaries of the Fifth.

PRES. ANDERSON: That was the way it was intended; to call a meeting at which they would either organize, or express their preference as to where they wanted to be attached.

MR. GRAHAM: Mr. James, would you fellows rather organize yourselves, or come into the Eleventh?

MR. JAMES: I really don't know. I think that if we don't organize in the Fourth District, the only thing for us to do is to go in with you boys. It is quite convenient for us to do that. So far, we haven't even made a start toward organizing. One of my reasons for making the suggestion a while ago, Mr. Chairman, was I had in mind when the motion was made that this referred to County Associations. I see it doesn't. But it occurred to me that many of those Associations wouldn't be represented here, at all, and unless their views were expressed in some communication we wouldn't know what they thought about it.

PRES. ANDERSON: They are District Organizations now.

MR. JAMES: I think in that case there is usually someone here.

PRES. ANDERSON: You have heard the motion, gentlemen. All in favor will make it known by saying aye. Opposed no. The ayes have it; and it is so ordered.

MR. A. L. MORGAN: With reference to how cases shall be submitted in the Supreme Court, as to whether or not there shall be any change with reference to the examination of the record, and oral argument. I note in the paper submitted by my brother yesterday that he suggested that the matter be fully discussed at this meeting—I think that has been pretty liberally done—and be referred back to the Local Organizations. Therefore Mr. President, I move you that the question of suggested procedure for oral argument in the Supreme Court be referred to the Local Bar Organizations, with instructions

to discuss the matter and send delegates to our next annual meeting prepared to act upon the matter.

MR. CHRISTENSEN: I second the motion.

PRES. ANDERSON: Is there any discussion? All in favor of the motion let it be known by saying aye. Opposed no. The ayes have it, and it is so ordered. Is there any other matter? If not, at this time we will call upon Judge Ailshie to discuss Judicial Ethics.

JUSTICE AILSHIE: Mr. President, and gentlemen of the Association; I am going to confine what I have to say to some few of the canons, as they have been adopted, and which I think worthy of our consideration. Therefore, in order to be reasonably brief, concise, and accurate, I am going to read from the latest edition of the Canons of Professional and Judicial Ethics, as they have been compiled, and with the opinions of the committee, were published during 1936; for I feel sure that very few of you have read them.

I will start out with one of the early rules of judicial ethics that was promulgated back in the Mosaic law. In the Book of Deuteronomy—of course, for the benefit of any who might not know where that is found, I would say it is in the Bible.—Deuteronomy, 1, 16-17, the admonition was given to the judges, "And I charged your judges at that time, saying, Hear the causes between your brethren, and judge righteously between every man and his brother, and the stranger that is with him.

"Ye shall not respect persons in judgment; but ye shall hear the small as well as the great; ye shall not be afraid of the face of man; for the judgment is God's; and the cause that is too hard for you, bring it to me, and I will hear it." And so in the first account we have among the Hebrews of the institution of a judicial system, we have this admonition given to them.

Let's come on a little further down. You remember the barons were discontented with the manner in which judicial matters were being conducted under the reign of King John, and so they extracted from him Magna Carta. I want to read chapter 45 of that charter to you. And I wonder if it wouldn't be a good idea to have that in force even these days and what manner of peace officers we would have if we required these qualifications. He covenanted in Magna Carta that he would do so and so, and among other things he said: "We will not make any justiciariis, constables, sheriffs or bailiffs but from those who understand the law of the realm and are well disposed to observe it." Of course, it is sometimes said—I will not say of judges, of course—but of police officers, constables and others, that they neither know the law, nor have any disposition to observe it!

Now, coming another step down. In 1922 the American Bar Association appointed a committee, instructed to compile and submit for adoption a code of judicial ethics. That committee was headed by Ex-President Taft, who was later Chief Justice, but at that time he was merely a law lecturer up at Yale; and a number of jurists and lawyers of eminence throughout the country were placed on that committee. They reported in 1923, and asked leave to further con-

sider the matter. In 1923 they submitted a code of judicial canons, consisting of 34 sections, which was adopted, and they have remained the code of judicial ethics ever since, with two amendments which took place, I believe, in 1933.

I am going to take up five or six of these canons that I want to call special attention to. In Canon No. 4, it is declared: "A judge's official conduct should be free from impropriety and the appearance of impropriety; he should avoid infractions of law; and his personal behavior, not only upon the Bench and in the performance of judicial duties, but also in his every day life, should be beyond reproach."

On that canon there have been three decisions made by the grievance committee of the American Bar Association in response to questions asked. The digest of those three reads as follows: I read this for the reason that it indicates the questions that have arisen. In Opinion 52 it is held in substance that, "It is improper for a judge to conduct a newspaper column of comment on current news items and matters of general interest." In Opinion 67, it was said: "It is improper for a judge to permit a broadcast of court proceedings." I think we will all agree with that very fully. And in Opinion 89 it is said: "It is improper for a judge to accept a loan from a lawyer on a second mortgage having no investment value." Of course, that ought to be enforced for two reasons, one judicial, and the other financial! I call attention to these for the reason that a man holding a judicial position cannot be too careful; and one does not realize the embarrassing situations that he can be headed into or backed into, until he is occupying that position. Some man might invite you out to dinner with him, and you find yourself in the company of persons who have litigation or prospective litigation, and you feel at once that you haven't any business there. Not that it is going to hurt you, but the appearance of it to the public and those who are interested adversely is very unfavorable. I might go ahead at great length in detailing embarrassing situations into which a man may get, and for which he must be constantly on the lookout; not so much what effect it is going to have on him in his judgment, perhaps none whatever, but he must consider just as much the appearance as the actual conduct.

I skip to number 10, on the subject of courtesy and civility. I want to read this, and make some comment on it: A judge "should be courteous to counsel, especially to those who are young and inexperienced, and also to all others appearing or concerned in the administration of justice in the court.

"He should also require, and, so far as his power extends, enforce on the part of clerks, court officers and counsel civility and courtesy to the court and to jurors, witnesses, litigants and others having business in the court."

My blood has been made to boil sometimes when I saw the manner in which witnesses were treated in the court room. I think that is one of the worst abuses that we have; to see some attorney bullying a witness. Some man, or woman, it may be either, comes into court, he is inexperienced in court, he is timid, he is embarrassed, he hasn't

a very large vocabulary, he hasn't a very happy way of expressing himself, but he is trying to tell a true story; possibly the attorney on the other side is objecting all the time that he is not answering directly to the question. The witness has in mind the thought that he wants to convey on the matter that is being dealt with, but the first thing he knows someone says, "Answer the question." And then I have seen the judge turn around and say, "Do you hear me? Listen to the question, and then answer it." And then when he has answered it, the judge said, "That isn't what they asked you." And the result is that the witness is so intimidated and embarrassed that he can't tell his story; it just simply disappears. I have seen that time and again in court. I am not one of those who makes comparisons of some foreign country's jurisprudence with our own, or at least prates on how much better off they are than we are. I have been in English courts of law and courts of equity, and so far as their administration of justice is concerned I don't think they have any advantage over us. But, they have one thing that they have certainly the best of us on, and that is the bringing out of the facts in a case and the treatment of the witness. When you see a witness in there he is the most independent fellow in the court room; he stands up; he has a desk in front of him where he can examine the exhibits and things of that nature; and he is asked to tell his story, and he tells it in his own way, and he is rarely interrupted. An English witness understands that he is at liberty to correct an attorney or the judge, and he exercises it. I remember hearing a judge, upon an objection to the introduction of some testimony, relating what had been said, and the witness looked up at him, and said, "No; your lordship is in error. I said so-and-so." The judge thanked him, corrected himself, and went on with the ruling. There wasn't anything disorderly, at all. That happens right along I am informed. The witness tells his story and he is not browbeaten. Here he may go out of the court room thinking that he hates the court and the lawyers, and sometimes he may hate the name of the court room and of justice.

I think the courts ought to enforce respect for witnesses and jurors. I think it is one of the causes of dissatisfaction and unfavorable comments on the courts. I have heard men's records pried into back to the day of their birth, when they were called as witnesses,—where were they born, and where they did this and that, who were their parents, and what did they do upon this, that or the other occasion, until a man hates to be called as a witness. And much of that is true in the examination of jurors.

I am a great believer in maintaining as much dignity as it is possible to maintain in the court room; I don't believe in levity; I don't believe in having a court room turned into a vaudeville. I think the less levity and the more serious vein the business of the court can be conducted in the more respect you can command in the administration of justice. I am a stickler for maintaining decorum and dignity in the court room. I believe it is best in the administration of justice, and it is the duty of the courts of the nation and the judiciary to do that.

I turn to Canon No. 17. I am not picking these because I do not give equal importance to the others, but they are sections that I specially have selected for this occasion. Number 17 is with respect to ex parte communications:

A judge "should not permit private interviews, arguments or communications designed to influence his judicial action, where interests to be affected thereby are not represented before him, except in cases where provision is made by law for ex parte application.

"While the conditions under which briefs of arguments are to be received are largely matters of local rule or practice, he should not permit the contents of such briefs presented to him to be concealed from opposing counsel. Ordinarily all communications of counsel to the judge intended or calculated to influence action should be made known to opposing counsel." I think that needs no comment. I think a copy of any communication, even though it is a letter or telegram, that affects business before the court, should be furnished to the opposing counsel.

Number 21. This deals with idiosyncrasies and inconsistencies. I read it because of some peculiarities about it.

"Justice should not be moulded by the individual idiosyncrasies of those who administer it. A judge should adopt the usual and expected method of doing justice, and not seek to be extreme or peculiar in his judgments, or spectacular or sensational in the conduct of the court. Though vested with discretion in the imposition of mild or severe sentences he should not compel persons brought before him to submit to some humiliating act or discipline of his own devising, without authority of law, because he thinks it will have a beneficial corrective influence.

"In imposing sentence he should endeavor to conform to a reasonable standard of punishment and should not seek popularity either by exceptional severity or undue leniency."

I will illustrate what I have in mind here, or at least a part of it. I wasn't present, but it was reported, in the early days when I was practicing in Idaho County, soon after the admission of the state, that a rather desperate fellow was called for sentence. There was a judge there who was pretty severe, and who liked to spend a great deal of time lecturing the fellows who were brought before him. This fellow knew that his sentence was likely to be life imprisonment. The judge asked him if he had anything to say why sentence shouldn't be pronounced, and he said "No; I think not." The judge started in with a scathing lecture, just taking the hide off him, before he pronounced judgment. The fellow turned to the judge, and said, "Now, you damned old s- of a b-, I am here for sentence, and not for a lecture. Give me your sentence, and keep your damned lecture." I always have been in sympathy with the prisoner in that case!

It is enough to take the sentence. Besides, the lecture often has the very reverse effect. You know that kind of talk doesn't help men who have gone wrong. Nine out of ten of those fellows are more regretful than anybody else of what has happened. If you talk to him

kindly he will appreciate it, and he will never forget it. The judge from the Bench can say something to him that will stick in his mind, and it will be useful to him. But, it won't help him, and it won't help anybody, to lecture him, and skin him alive. Give him his sentence, that is all right, but say something kindly to him.

Another thing that this canon strikes at is the imposition of spectacular penalties—excessive fines, and nine-hundred-year sentences, and those spectacular things. Those things do not get courts anywhere.

I pass to Canon No. 28. The next two are matters that particularly effect every judge and every lawyer. They come home to us.

"Partisan Politics. While entitled to entertain his personal views of political questions, and while not required to surrender his rights or opinions as a citizen, it is inevitable that suspicion of being warped by political bias will attach to a judge who becomes the active promoter of the interests of one political party as against another. He should avoid making political speeches, making or soliciting payment of assessments or contributions to party funds, the public endorsement of candidates for political office and participation in party conventions.

"He should neither accept nor retain a place on any party committee nor act as party leader, nor engage generally in partisan activities."

I believe very thoroughly in the requirements of that canon. A man on the Bench ought, as far as it is possible, to avoid letting litigants or parties appearing before him know what his party affiliation is. I do not mean by that that he has got to yield his political convictions. I would not do it, and I wouldn't expect anybody to do it, but I do think that when a man accepts a judicial position, to that extent he excludes himself from, and must necessarily be deemed to have surrendered voluntarily, the right to participate in political activities or to advocate the advancement of one political party over another. If he doesn't do so, or rather if he does take part in political discussions and controversies, how is the fellow who is against him, or who is advocating the other side, going to feel about it when some matter comes before him officially? And there is no judge who can preside over a court for any great length of time but is bound to be confronted with cases of at least a quasi political cast, that are in some measure of a political nature, especially in campaign years.

I wish to refer to that further in connection with the next one, which is Canon No. 30.

"Candidacy for Office. A candidate for judicial position should not make or suffer others to make for him, promises of conduct in office which appeal to the cupidity or prejudices of the appointing or electing power; he should not announce in advance his conclusions of law on disputed issues to secure class support, and he should do nothing while a candidate to create the impression that if chosen, he will administer his office with bias, partiality or improper discrimination."

In other words, he should not be a labor judge, or a capitalist

judge; he should not be a corporation judge, or an anti-corporation judge. But, he should simply be a judge. Canon 30 continues;

"While holding a judicial position he should not become an active candidate either at a party primary or at a general election for any office other than a judicial office. If a judge should decide to become a candidate for any office not judicial, he should resign in order that it cannot be said that he is using the power or prestige of his judicial position to promote his own candidacy or the success of his party."

In other words, if a man on the Bench wants to run for a political office, under this canon it would be his duty when he becomes a candidate for the office, or for the nomination, to resign his judicial position. That doesn't extend to becoming a candidate to succeed himself, or for some other judicial office. Of course, you can see the danger and difficulty of doing so. If a man, for instance, is running for the office of Governor, and he is still holding a judicial position, with cases pending before him, and others likely to arise, he is in a position that the public and litigants can say, "Now, if he is not elected, he is going to still be on the Bench. He is there, and he will still be there." That is going to have a powerful influence upon the electorate, especially those who are likely to have litigation or business before his court.

Just what one can do in campaigning is a problem, and especially under a law like we have. That is what every judge in Idaho must necessarily be interested in. You have to go out under a non-partisan primary law. The question has been asked many times—How is a man going to get his candidacy before the public? Well, I had to try it out the first election held under this law, and my experience in trying to campaign was a very peculiar one. If you go to a political meeting and ask to be introduced, of course you must necessarily be careful to caution the man who introduces you not to announce your political affiliation, or the very first thing he will tell is whether you are a Republican or a Democrat. Now, that is contrary to the spirit of the law. Not only that, but if you don't get to the opposite party in the same town it is going to do you more harm than good, provided the other side is the stronger. You go to a Republican meeting in a town and be introduced by a Republican and make a few remarks, and the other party will say, "Well, he is using the prestige of his position, and his sympathies are shown to be for the Republicans, we will let him get his votes from the Republicans." If you go to the other side you are confronted with the same thing.

There is another provision here, that I do not know whether I read before. This canon provides that he shall not solicit the support of attorneys practicing in his jurisdiction, or litigants having business before him. Now, if you limit yourself, if you cut out all the practicing attorneys in your district, and all the litigants, you have to go out and find a new set of acquaintances in your campaign.

This is of interest to you who are not judges, for the reason that some of you will be judges sometime; and you will be confronted with the same problems that we have been confronted with, and that I am

discussing here. It is not only necessary for a man to do that in his campaign, but he must carry it out during the course of his judicial career, if he is going to administer justice, not only without fault, but free from suspicion.

I will be glad to hear the reactions from the profession; you are the gentlemen I would like to have the reactions from.

Let me say this, that the Secretary of the American Bar Association has stacks of these books. Every law office ought to have one. It comprises the code of ethics—the professional ethics and the judicial ethics, together with the opinions that have been rendered by the committee of the American Bar Association from the time the code was adopted down to February of last year. I thank you.

MR. GRAHAM: Judge, can copies of those be secured by writing to the American Bar Association?

JUSTICE AILSHIE: Write to the Secretary of the American Bar Association, 1140 North Dearborn Street, Chicago. I think the canons of both the judiciary and the profession are in these late rules sent to all of you.

MR. G. W. SOULE: They are not annotated.

JUSTICE AILSHIE: No.

PRES. ANDERSON: The next matter coming up for discussion is Abuse of the Pardoning Power, and the Remedy Therefor, to be discussed by Hon. Frank L. Stephan, of Twin Falls; and discussion lead by Fredrick H. Snook, and Miss Mary Smith. We will hear from Mr. Stephan.

MR. STEPHAN: Mr. Chairman, and members of the Idaho State Bar, I may say that I was invited some time ago to prepare a paper on the subject that was assigned to me, and I have done so. I thought before coming over here that I might depart to some extent from the paper, but I don't believe that I will, because if I do it will very likely take more time than should be assigned me.

The doctrine of executive clemency which has been embodied in the Constitution of the United States and in all of our State Constitutions may be traced back through English and Anglo-Saxon History far beyond the time of Alfred the Great. How often the English Executives were called upon to extend relief by way of pardon I do not know but one of the most reliable English authorities has advised us that at one time England had defined no less than one hundred and sixty crimes punishable by instant death.

The Constitution of the United States gives to the President the right to pardon in all cases of crime against the Federal Government except in cases of impeachment. The President may grant a pardon before or after indictment, before or after trial, before or after the offense is reviewed by the Federal Courts and he may grant an absolute pardon or condition it.

Under the provisions of the Constitution of Idaho, the Governor, Secretary of State and the Attorney General constitute the Board of

Pardons, and they or a majority of them have the power to remit fines and forfeitures and to grant commutations and pardons after conviction and judgment, either absolutely or upon such conditions as they may impose, in all cases, whether felonies punishable by confinement in the State Penitentiary or misdemeanors punishable by confinement in jails or by imposition of fines, except treason or conviction on impeachment.

While the records of this State disclose that considerably more convictions are had in misdemeanor cases than in felonies and that in the course of a year considerably more persons are confined in jail than in the penitentiary, only occasionally is the Pardon Board called upon to consider an application of one serving a jail sentence, and of those applications only a few receive favorable consideration resulting in a pardon, it having been the practice of the Boards to grant pardons in misdemeanor cases only where the sheriffs or police officers and the prosecuting attorneys join in recommending the applicant for pardon.

In 1909 the Legislature of this State enacted the indeterminate sentence law, a humane and beneficent law, intended to serve and conserve both society and the erring individual. Our Penal Code now provides varied forms of punishment and a wide latitude of sentence within fixed limits. Under the provisions of that Code when any person is convicted of a felony, except treason or murder in the first degree, the Court imposing the sentence is required to fix a minimum sentence which in no case is less than six months. The maximum is fixed by law which may not be either raised nor lowered by the Court. Under the provisions of that law the Court may raise the minimum sentence to one-half the maximum. For example, the statute makes Grand Larceny punishable by imprisonment in the State Penitentiary for not less than one nor more than fourteen years and under the rules heretofore stated the Court may if he sees fit to do so, sentence one found guilty of that crime, to imprisonment in the Penitentiary for a term of not less than seven years and not more than fourteen years, but he may neither reduce nor increase the maximum term of fourteen years.

Where the indeterminate sentence laws have not been enacted it was never intended that the pardon power should be exercised in favor of a large proportion of those convicted of crime. It was intended only for exceptional cases: that is, where there had been a miscarriage of justice or where a strict enforcement of the law has resulted in unforeseen or unwarranted hardship or where the sentence was unduly severe and disproportionate to the crime committed.

However, the contrary is true where the indeterminate sentence law is in force. It is contemplated that in the operation of that law, the vast majority of cases shall be considered by the Board of Pardons. Consequently, with few exceptions all prisoners serving terms of imprisonment in the Penitentiary come before the Board of Pardons for determination of their terms of imprisonment.

The State Officers comprising the Board of Pardons also comprise the Parole Board which meets quarterly to consider applications

for parole. The Board may not parole one who is serving a term of life imprisonment, nor one who has not served the minimum term fixed by law nor one who has served a previous term of imprisonment in any Penitentiary nor may one be paroled except on the recommendation of the Warden of the Penitentiary. Nor is it the duty of the Board of Pardons of this state to release one who has served his minimum sentence. Undoubtedly in times past some votes have been cast by some members of the Pardon Board to release a prisoner when the minimum sentence had been served, but that contention or theory has been put at rest by a recent decision of the Supreme Court of this state. It now clearly appears, although the question seems never to have been serious, that one serving a term in the penitentiary is not entitled as a matter of right to demand his release merely because he has served the minimum sentence imposed by the Court under the indeterminate sentence law of this state.

The Board of Pardons may make its own rules and regulations but the rules for the Board of Paroles are quite definitely fixed by statute. The Board of Pardons has few rules. The meetings are quite informal. When considering applications for pardons it will consider petitions, letters, telegrams, oral or written communications of any kind on behalf of the applicant, or protests in similar form; it will hear pleas in his behalf on the part of friends, relatives and attorneys, or protests from those aggrieved by his crime or their friends or representatives.

We have no prisoners in the Penitentiary who are barred by law from making application for pardon. Any one of them may sooner or later come before the Pardon Board with his application for pardon. And when he comes he will no doubt be prepared to present arguments in his cause having at least a semblance of logic and reason. He may urge upon the Board that he is not guilty of the crime charged against him, or that he committed the crime because of circumstances which were mostly beyond his control; that before committing the crime he had lead a straightforward and useful life; that his conduct while confined in prison has been exemplary and repentant; that he has reformed; that he has seen the error of his ways; or that his health is broken and further imprisonment will mean almost immediate death; or that his family now, more than ever before, needs his care and support; or that he wants just one more chance to demonstrate that he can and will make good; or other similar arguments. I doubt if there are any excuses or purported reasons which those here assembled can imagine, that have not from time to time been tried upon the Pardon Board.

When the Board begins the consideration of any application for pardon or parole it should assume that the prisoner is guilty of the crime of which he has been convicted. It should indulge that presumption for the reason that the courts and juries are in a much better position when hearing the testimony of the witnesses in the trial of the case to determine the guilt or innocence of the prisoner, than is the Board. That presumption should be so thoroughly entertained by the Board that it should not in the absence of a very strong

showing review the transcripts of testimony of cases. However, in a few instances when a proper and sufficient strong showing has been made, it has reviewed the transcripts of testimony.

At the meetings of the Board of Pardons the Warden of the Penitentiary furnishes the Board with all reports in his files concerning the habits of life of the prisoner prior to imprisonment, and reports compiled during his imprisonment, disclosing his conduct as a prisoner. The Warden procures some of these reports from the trial courts and prosecuting attorneys who handle the cases at the time of the prisoner's conviction. The reports briefly summarize the facts surrounding the commission of the crime and generally indicate the seriousness of the offense. Other reports are procured by the Warden from Identification Bureaus and other penal institutions. The Board should regard these reports as indispensable. They are of particular significance where the prisoner has a prior criminal record. They are always of extreme importance to the Board when it attempts to determine how far it shall apply the rule of making the punishment fit the crime or when and how far it shall apply the rule of making the punishment fit the prisoner. It has been intimated at different times that the Board's resort to such data is unfair to the prisoner. It has been intimated and sometimes, more or less seriously argued that when the Board denies an application for pardon on the ground that the prisoner has a long record of prior convictions for each of which he has paid a penalty, it amounts to punishing a second time for the same offense. Manifestly, however, that is not the ground or the purpose for which such data is desired and used by the Board of Pardons. To begin with, a very small percentage of prisoners confined in the state penitentiary ever reform. It is a sad fact, but nevertheless true, that one who, over a long period of time, has committed and repeated crimes of burglary or grand larceny will again repeat and a moron who has been convicted of a series of base crimes is generally speaking beyond redemption. There are, of course, occasional reforms, but they are the exception and not the rule, and the duty or obligation should rest upon the shoulders of an applicant for pardon to prove that he has lifted himself above his former plane of life before asking for clemency, and the Board should be slow to turn back upon society those prisoners who are confirmed law violators. In a big percentage of cases, when they are released, they remain law-abiding citizens for only short periods of time and are again soon hailed into court for the commission of crime. The Pardon Board and Parole Boards should, of course, ever be mindful of the prisoner and his welfare, but on the other hand they should not be unmindful of their duty to society. The Sixteen Billion Dollar loss and expense caused annually in the United States by the criminal element of this country is an unanswerable argument that the crime problem is one of our most serious problems. And much of that loss and expense has undoubtedly resulted through the careless attitude of Pardon Boards, Parole Boards and Law Enforcement Officers, the tendency of groups and factions to accept as "whole gospel" the statements and representations of those asking for pardons, and the tendency of groups here and there to treat all prisoners who have

served a term of imprisonment in penitentiaries as reformed. It is the duty of the Boards in dealing with prisoners to carefully investigate their previous records. To the extent that those Boards represent the people or society, that duty should be performed and the information made available should be acted upon. To disregard such data or information is to disregard the public interest. To quickly turn back upon society those persons who are sure to repeat their favorite crimes with an attendant heavy expense to be incurred for their apprehension, trial and re-commitment is foolish and absurd.

It is, of course, apparent that all persons guilty of grand larceny should not be imprisoned for the same period of time even though all of them may have received the statutory penalty of from one to fourteen years. One prisoner may have stolen sixty-five dollars and another may have stolen one hundred thousand dollars. One prisoner may have stolen one hundred dollars from the person of another while the taking of a similar amount may have been, under other circumstances, partly under color of right. One prisoner may have stolen an automobile to effect his escape after committing highway robbery while in another instance an automobile may have been taken for the primary purpose of joy riding. Without regard to the personal equation of offenders it is evident that two thieves should not always receive the same punishment. The same is true of every other class of crime. The Board of Pardons may not deal with crime and the punishment of crime in an abstract manner. In every instance the Board must consider the personal equation. It must differentiate between extreme youth and maturity, between a former life of right living and one of crime, between an occasional offender and the habitual criminal, between the morally clean and the hopeless degenerate, and between the lazy parasite who take the course of least resistance and the desperate highway robber who commits his crime with an abandoned heart.

The Board must ever remember that in granting or denying pardons it is undertaking one of the serious responsibilities of government, that the Board itself is an agency attempting to measure out justice to erring humanity without a definite or fixed standard by which to measure criminality or the punishment the offender should receive. The Board must determine by the use of such standards as it may regard dependable what punishment is sufficient punishment. It must consider the welfare of the prisoner and the effect too much or too little punishment will have, not only upon the prisoner but upon society. If prisoners become embittered by serving sentences of inequality and severity then indeed the Body Politic will suffer in a disastrous way. On the other hand, too little punishment is unfortunate for both society and the prisoner. It misleads criminals, actual or potential, into believing that the people of the State are more interested in criminals than in their victims and at the same time it may tend to break down the respect law-abiding citizens should have for the law.

It has been my observation that more than ten people appear before the Pardon Board advocating the release of a prisoner to one

who appears protesting his release. Ordinarily by the time the prisoner has served his minimum term the details of the crime have been forgotten by the public and the people who concern themselves about his case think only of the "unfortunate" prisoner.

If a person is soft-hearted, emotional or impulsive he has no "business" on the Board of Pardons; there is a considerable element in our society who may on short notice be called upon to supply any deficiency of sentiment in the Pardon Board. We have those within Idaho, as in every state, who believe that any law or set of laws designed to inflict punishment is wrong; those who believe that the word of the prisoner should generally be accepted on how much punishment be should receive, that a prisoner should be given his freedom when he says he is reformed. It is unfortunate for society when our Board of Pardons and Parole Board become converted to those views. Ordinarily virtue should be rewarded—ordinarily vice should be punished and an application of those principles together with a proper proportioning of penalties, will develop a respect for the law among the evil disposed and a gratitude for its protection among the law-abiding.

I have no criticism of the legal machinery devised under the Constitution and laws of this state for the handling of prisoners and the granting of pardons and paroles. It is a good system. It is, of course, not perfect, but if the manner and method of handling prisoners in this state, as provided by our Constitution and Statutes, has not always worked well, the fault lies not in the system, hut with the members of the Boards charged with the responsibility of determining when pardons and paroles should be granted or refused. Whether the spirit of the law and the intention of the law makers are carried into effect or to become a farce depends upon the judgment and discretion of the members of those Boards.

MR. SNOOK: The only explanation I could give for being asked to discuss this matter was that perhaps the program committee had thought that after living fourteen or fifteen years of my life at the penitentiary—and I emphasize the preposition 'at'—I had perhaps seen many pardon boards function. That is true; I have seen five administrations in the State of Idaho, and five years of Federal administration at the Atlanta Federal Prison. For years I was impressed with what I considered the psychological factors lying behind the decisions that those boards would make. Of course, what the record said was a different thing. I not only attended the board meetings, but I ate with those individuals two times a day, and heard what they said off the record.

The Federal Prison Board at that time was composed of the Superintendent of Prisons, who resides in Washington, D. C., the Prison Physician, who resided in Atlanta, and the Warden, who resided at the prison. The Superintendent of Prisons was very much opposed to the prohibition law. There were over a thousand inmates in the federal prison at that time for violation of that particular law. Nearly every time that a prisoner would apply for parole, who had been convicted of a violation of the prohibition law, the Superintendent would

vote yes, because he was not in sympathy with the law in the first place. On the other hand, he was very much in sympathy with the narcotic law, and always voted no against narcotic offenders. The Prison Physician, was fundamentally interested in maintaining a low mortality table in the prison, and also was interested in ridding the prison of contagious diseases. And I might say that twenty-one per cent of the population was afflicted with syphilis, which amounted to between seven and eight hundred individuals—so if a person were near his death bed, or had probably reacted as a four-plus to the Wasserman test, and he applied for a parole, the chances were very much that the Prison Physician would vote yes, to get rid of him. The Warden at that time was very much opposed to the granting of parole in exchange for testimony of prisoners. Agents of the Department of Justice would visit the penitentiary, and of course were permitted to interview prisoners privately; and shortly thereafter a prisoner would be subpoenaed to appear in some particular court against some other individual, perhaps some associate of theirs before they were sentenced to the penitentiary. And at the next board meeting there would come a personal recommendation from the Assistant Attorney General, who was then Mable Walker Willebrandt, in charge of Federal prisons, to the effect that this individual should be paroled. I might say that almost invariably the Warden, under those conditions, would vote no.

The thing that I gathered from all this was that there should never be a pardon board consisting of one individual. The frailties of the human mind are such that no one individual can properly perform the duties of a pardon board. Those three individuals had definite prejudices, but I think they were representative of all pardon boards, and one served as a check on the other, and for that reason I believe that that board functioned as well as any other particular board.

It has become almost a universal fact that people in general regard pardon boards and parole boards as being susceptible of political influence and bribery. I might say that while in Atlanta Will Rogers wrote a letter to the parole board. We have a copy of it in our house. It was concerning some former cowboy friend who was confined in the penitentiary. And he started off by saying, "Gentlemen:' You will no doubt be surprised and keenly disappointed, but there is nothing in this envelope but the letter." The idea being, of course, that ordinarily when you ask to have some particular individual released, you accompany it with at least some money or some other remuneration.

The pardon board in this state is comprised, as you know of the Governor, the Secretary of State, and the Attorney General, the qualifications for Attorney General being much more rigid than for the other two offices. But, I might say that the only difference between the Governor and the Attorney General is that the latter must be a Member of the Idaho State Bar. We were told yesterday that seventy-five per cent of the members of the Idaho State Bar made less than the average Ford employee. Still I believe that he is perhaps more capable of reviewing the record and determining whether or not an individual is entitled to assistance from the parole board. I believe

if you will trace back over the administrations of this state, you will find that it has been the Attorney General who has been the key man of the pardon board. It has always been a political issue. If there was some reason, or some basis, I should say, for getting away from that political issue, we would have a much better pardon board. There is no doubt in my mind, and I don't believe there is in anyone elses mind who is familiar with the facts, that at the next election that will be one of the political issues, one of the most important political issues, both in the primaries and in the general election.

The Justices of this state, yes, and the Judges, theoretically, and perhaps to some extent actually, are more free from political influence than are any other public officials. If there were some method of dividing the state into sections, and, in cases of life imprisonment or the death penalty, the pardon board would adopt a rule whereby they would not interfere, except in cases where a majority of the District Judges in the particular section from which the individual was sentenced also concurred, it would be a much better system than we have now, and would relieve some of the political influence that governs some of the decisions of our pardon board. After an individual bas had a fair trial by a competent court, and the Supreme Court of this state has seen no reason to grant a new hearing, and there is no new evidence discovered thereafter, is it not presumptuous on the part of any individual—the pardoning board in this particular case—to say, in a manner that is not totally unlike the rumblings of the Delphic Oracle, that both of those courts have been wrong, and "we are now going to release this individual, in spite of the decisions of both of those courts"? I thank you.

PRES. ANDERSON: Miss Mary Smith is next on the program.

MISS SMITH: Mr. President, and members of the Idaho State Bar, after listening to the discussion yesterday regarding oral argument before the Supreme Court, and being well aware of the reputation of women for lengthy discussion, I decided last evening, while the male members of the Bar were wining and dining, that I would reduce my few simple suggestions to writing.

There are a great number of ideas advanced by interested people in an effort to eliminate the defects in our pardoning system, and there are many criticisms cast toward the pardoning boards.

I am not going to criticize. It is, my opinion that our various pardoning boards have been the victims of a system which is in a large measure beyond their control.

In criticizing the pardon board, how many of us take into consideration the fact that nine times out of ten tbe man who is seeking a pardon has been very thoroughly tried for his crime.. That his record is known by the court before which he appears in the first instance; that days and weeks are taken to determine if he is guilty. Then the people of the state place such a tremendous burden on three inexperienced men who are elected for a term of two years and who meet for a short period four times a year to consider cases tbat a prosecuting attorney, district court, jury, attorney general and Supreme

Court have devoted hours and hours of their time. How unfair it is to those three men to flood their office with requests for hundreds of pardons to be passed upon within such a short time, and with an almost complete lack of knowledge of the man with whom they have to deal.

It would be a physical impossibility for those men to investigate each case thoroughly. As in the case of Mahan, which has received such notoriety, the prison records show that he was one of the best prisoners they had. That he was willing and docile. Certainly such a recommendation from the warden and guards would have its effect. To three inexperienced men, his prison record would be unimpeachable. They have not had the time nor opportunity to verse themselves with the history and emotional make up of the man before them.

Before blasting tbe members of the pardon board, let us look into tbe system. No man can be better than the system which he serves.

No doubt we all have our pet theories pertaining to the reformation of criminals, the perfection of our penal institutions and pardon boards. However, I think we should start at the beginning; that we should be lenient with the first offenders; that the courts before which they first appear take the full responsibility for such a man and place him on probation to some responsible person who will conscientiously do his duty in checking up the first offender. I would advocate giving him an opportunity in the first instance rather than making him vindictive and an accomplished criminal by placing him in the penitentiary where he has the opportunity to associate with hardened criminals and receiving a post-graduate course in the art of crime, and, before serving his minimum sentence, marching before the pardon board and receiving his diploma as a Master of Crime.

We must get to the boy or man before he gets to the reformatory or prison. George E. Q. Johnson, prosecutor of Al Capone, and former Federal Judge, after making a survey, determined that seventy-two per cent of the boys and men discharged from reformatories and prisons of one of our states return to a life of crime. In other states this proportion ranges up to eighty-three per cent. Nearly three out of four boys or men who land behind bars continue their careers in crime after their releases. That is why I suggest that before we place our first offenders in our penal institutions to qualify for his M. C. place them on probation to some responsible officer or individual.

Each criminal is an individual problem. No doubt we will always have him with us. Eacb criminal has a complex emotional set up which, in our efforts for reformation and protection of society, should be taken into consideration, but which is a comparatively undeveloped field in our efforts to deal with crime. The individual members of our penal institutions do not receive as much consideration and help as a car part in a Ford factory.

Until we can devote more time to the criminal as an individual with body parts and passions, the longer we will have maladjusted individuals with us. Let us take more interest in the first offenders while there is still hope.

I would advocate the elimination of the pardon board and making

it a parole board. I would not give the criminal a complete dispensation but would place him on parole, responsible to parole officers or individuals, who must keep a complete check on the paroled man and his activities for a period of years, until he has proven himself able to fit into society.

I would suggest a parole board composed of men who have made the problems of humanity their life's work, who have the time and opportunity to examine the history and the individual criminal without political pressure and fear. Men whose every training in life has been for fairness and mercy.

The Supreme Court of the State is composed of men who have had the privilege of viewing every phase of life; place at their disposal the records of the criminal and the criminal himself for observation. It would increase the work of the members of the Court, but the benefit to the criminal and society would be well worth it. In my opinion no body of men could be more worthy to mete out justice and mercy. Some suggestions have been that the pardon board be selected on the same basis as a board of educaion. But I think it would be unfair to the members thus selected. Their life's training and work would, nine chances out of ten, be wholly foreign to the needs of our criminal element in relation to society.

As I said before, let us seek out the men who are qualified to mete out justice and mercy, who are not subject to political influences, who have had experience in that type of work, and who can study the history and emotions of their less fortunate fellow men.

PRES.ANDERSON: Anything further on this matter?

MR. EVANS: Mr. President, I wish to commend, very highly, the very excellent address made by Miss Mary Smith. It was very instructive in its nature, and has some suggestions that are well worthy of further thought by the members of the Idaho Bar.

I am not one of those, however, who believe in the excessive criticism that has been directed toward the pardoning boards. I believe that they have done good work, in a very creditable manner. I would like to receive some suggestions on this occasion as to the number of prisoners who have received leniency by our pardoning boards, who have made good. I don't believe that the system should be condemned because some individual has received leniency, and later proved undeserving of the leniency received. I think that an examination of the records of the pardoning board would show that an everwhelming majority of those who have received leniency from that board have justified the leniency received, and have thereafter led good and worthy lives. I don't believe that those people should be denied the opportunity of receiving consideration because some individual proves unworthy. I believe the fault very often is due to the fact that our courts impose unduly severe sentences, and that perhaps is due to the fact that they have not the time to investigate the conditions existing. They make no examination into the lives of the prisoner; they study only the fact whether or not he committed the crime which he is charged with. They do not investigate the circumstances that caused

the commission of the crime; and they hand out sentences that in very many instances are totally out of proportion to the crime committed. Our prosecuting attorneys also tend, in very many instances, owing to their association with persons engaged in the commission of crimes, to be callous, and unsympathetic, and the milk of human kindness has dried up in them; and to require that before a prisoner should receive consideration from the pardoning board he should have the endorsement of those officers, who are concerned only in the prosecution of criminals, and have made no investigation into the circumstances, and the man's condition, and the reason why he committed the crime, is placing an obstacle in the way of deserving applicants that would result in the imposition of unmerited severity upon those who are entitled to another chance with society.

I believe that our pardoning boards have done a good work, in a very fair manner; and that a good deal of the criticism that is directed against them is based on some personal, or some political motive that should be disregarded by the public as a whole.

MR. POOLE: I cannot agree with the remarks of the last speaker as to what trial judges do in the sentencing of men who are convicted of crime. Of course, my experience has been principally in this District. I have been prosecutor in one of the counties of the district for a good many years, and my observation has been that all of our judges, before passing sentence upon a man, have inquired into the past history of the man, they have invited the Sheriffs to tell what they know of the prisoner, they have invited the prosecutors to tell what they know, and they give others an opportunity to enlighten them as to the character and past life of the prisoner.

A few days ago our District Judge called me by telephone and asked me about a particular case. He said that the pardon board had asked him for information regarding that case, and the Judge told me what information he had in his possession; that his notes showed that this particular prisoner had been three times convicted of felonies prior to the time he was convicted in this district—once in Idaho. The question with me was why any pardoning board should be interested in that man. They had the same record before them that the District Judge had. In addition to the four convictions of felonies, he had five convictions of misdemeanors in other states. There were nine convictions, and yet the pardon board of Idaho was considering granting him another pardon. Now, if that is not an abuse of power, what constitutes an abuse of power?

I lay it to the system. We have a wrong system. Because the kings of old England granted clemency by virtue of their executive power is no reason why the granting of clemency now should be in the hands of an executive who is a partisan politician, or a man—as has been stated very clearly here today—who is entirely inexperienced in the administration of justice, and who often is not interested in the administration of justice. The first time that I remember hearing criticisms of the Idaho board of pardons was thirty-five years ago. In 1902 the actions of the pardon board of the State of Idaho were carried

into the campaign for governor of that year, and we have been listening to it ever since.

Now, it seems to me that when our courts are required to perform the duties relating to the administration of justice, and they do their duty as the courts in this state have done in the past, no other body in the state should have the power to undo what the judiciary of the state, set up by the people of the state to administer justice, has done. I think it is about time we changed our system, because you cannot charge it to any particular administration.

Now, it has been said that if you curtail the exercise of the pardoning power you will have our jails so full of prisoners that they will not be able to hold them. The remedy for that is one or the other of two things; build more jails, or stop prosecuting people who commit crimes. There is no common sense connected with our present system. Up in our county we extradited a man a few years ago from another state, spent a considerable sum of money to get him back into Idaho, in order that we might prosecute him. We prosecuted him and the court sent him to the penitentiary. He was there three months, and he was released and came back. Now he is in the penitentiary again, serving his third term. We spend hundreds and thousands of dollars of the people's money to bring men to trial, and convict them and send them to the penitentiary, and three men, entirely inexperienced, send them back in three or six months, and you have to go through the same process again in too many instances.

MR. A. L. MORGAN: I have neither criticism to offer nor a bouquet to hand to the board of pardons. It has been said here that one of the most serious problems that confronts the American people is the crime problem, and I think that is correct. I had hoped at some future time, when there would be more time to devote to it, that this question would come up, because sooner or later, so far as Idaho is concerned, the Idaho State Bar is going to have to solve that problem, if it is ever solved. The organization has certain things in mind now, which we are endeavoring to accomplish, and at some future day I hope to see this organization take up that question and settle it, and settle it correctly.

One of my young friends who was appointed to lead this discussion suggested that no pardon or parole should be granted unless it was concurred in by the District Judges of the particular district from which the criminal came. Dividing the state into pardon districts—if we may so express it. The other suggested—Miss Smith—that the matter should devolve upon the shoulders of the Supreme Court. Now, I hope that both of my young friends, before their hair has turned gray, will reach the conclusion that courts have certain functions to perform; and that merely because the people of Idaho have, wisely or otherwise, placed them on the Bench has not endowed them with any super-human power or granted them any education that they did not theretofore have. I want to say here that I am absolutely opposed to any statute in a criminal case placing any discretion in any trial court. The trouble is that the statutes of Idaho have in numerous instances clothed District Judges with the right to exercise

discretion, and in too many instances the All Wise Creator has failed to endow them with the power of exercising discretion.

Our system is wrong. There is no question about it. Under our present system of sentencing offenders we have just as many different kinds of justice meted out in those sentences as we have different District Judges. Up in a certain precinct in North Idaho, two young boys had gone out into the mountains, and while they were out they had slaughtered a calf that belonged to some member of the cattle men's association, and took it into camp, and ate what they could, and buried the hide and the rest of the carcass. That crime was discovered, and one of those boys, the oldest, was sentenced to the Idaho penitentiary for a minimum of four years, and whatever the maximum is. From another county in North Idaho another individual was sentenced, on almost identically the same state of facts, to six months and the maximum. Now, you can't reform people in that way, because those two men came together in the penitentiary, and one of them found that he was serving a four-year bottom, as they call it in the penitentiary, for the same crime that the other fellow was serving a six-month bottom. If you can reform that man, the fellow that had the longer time, under that situation, he is entirely differently constituted than I am.

The courts should attempt to administer the law, and when a man finds himself in the penitentiary the law, whether it be justice or not, has been administered, and the court has completed its function, and has done the only thing that it is trained to do. It is my belief that you will never solve the problem so long as you place the handling of the criminal element in the hands of people who know nothing whatever about how to administer it. I believe we ought to educate men in the matter of criminology to handle things of that kind, just as we educate doctors and lawyers and other professions. Then, instead of having one man sentenced with a four-year bottom, and another with a six-months bottom, I believe that the trial court should have no power, whatever, but to pronounce the individual guilty; and after that he would be in the hands of the pardoning power—a trained pardoning power. It is impossible to correct crime by administering fixed sentences. The individual who is convicted of an offense, if he have any sense of moral responsibility, may feel all of the punishment that is necessary in his particular case when the judgment of guilty is pronounced against him. Other individuals may spend the balance of their lives in the penitentiary, and would never reform.

Now, the theory that I suggest—and it is vague and shadowy at best—I would confine the individual in the penitentiary, and his conduct while there, and the question whether or not he had reformed, would be the thing that would determine when he got out of there. In other words, if he has made thorough atonement, and is thoroughly repentent, and he will likely make a good citizen, then is the time—whenever he reaches that point—that he ought to be given an opportunity. And, however insignificant the particular crime may have been, if he himself, judged by men who are skilled in that work, shows that he has made no reform, his sentence would then continue in

accord with his conduct. Now, something along that line may sometime aid us in solving our troubles with crimes and pardon boards.

MR. McCUTCHEON: Mr. President, I have served for several years on the executive council of the Boy Scouts, and in that connection my attention has been called to cases of juvenile delinquency. There was a book published about four years ago, entitled 'One Thousand Cases of Juvenile Delinquencies'; it represents the only study of its kind which has ever been made. It was made under the auspices of the Harvard Law School by men who had spent years of their lives with the subject, and were very familiar with it.

They took one thousand cases of juvenile delinquents who had passed through the Boston court from 1916 to 1926, and traced the history of eighty per cent of those juveniles over that period; some they couldn't find; but, of the eighty per cent some had gone insane, and that record was shown, and of those they found, one hundred per cent never reformed. It is a very discouraging record. And one of the surprising things is that the first serious offense of juvenile delinquencies is truancy from school.

We are approaching a subject here which commences years before the juvenile has grown up. We are talking about offenses, and going to the penitentiary. We must go further back, into the home, into the schools, and we must undertake to control those juveniles. If any of you are interested in the subject of clemency and reform you should certainly get this book. A resume of it is in the proceedings of the Grand Lodge of Masons of Idaho, of three years ago.

MR. CALLAHAN: Mr. President, this matter has been before the people of our state ever since prisons were established. There are certain things that stand out in my experience as a legislator of this state that I want to talk to you about. First of all, the attitude toward our reform institutions has been entirely erroneous. Our legislators don't understand the situation; and that is one of the things that is necessary in Idaho. In looking at this question of pardons, and the criminal situation generally, we are in the position of the man who couldn't see the forest for the trees. We see the individual case, and that is what the pardon board is presented with. We don't always look at the forest, which means the side of society and its betterment. We are expected, as legislators, to pass innumerable laws with felonies attached, and then expect we are going to have an ideal condition of society. One of the evils commences right there. We have too many felonies on the statute books in Idaho that shouldn't be there. Secondly, we must some time, if we are going to do anything with this problem at all, make provision for the segregation of first offenders. That is the crying need of our penal institutions. We must start, as the gentleman has suggested, with the reform institutions. We have the State Industrial School, under the jurisdiction of one body. From that institution, as we all know, comes a good deal of what afterwards develops into our worst criminal group.

There have been some suggestions made, and out of those suggestions should come something concrete. The first suggestion is for the Supreme Court itself to constitute a pardon board, which is, of course, out of the question from a practical standpoint. Secondly, the creation of a body that will study this question of criminology, and will be more or less a continuous one, uninfluenced by political considerations. Why can't we have a commission or board in the state, appointed by the Supreme Court of Idaho, with terms of not less than five years, and to be a more or less continuing body, to handle this situation, and make recommendations to the legislature, and be able to cope with these cases as they come up on their individual merits. It seems to me that a survey of the whole situation, from juvenile offenders, up through our penal institutions, as a whole, would be in order. And I suggest, for your consideration, that a special committee be appointed by this body to make some report at the next meeting of this association.

MR. TOM JONES: I would like to ask the Senator a question. Do you believe, as a legislator, that it is possible in the State of Idaho, to appoint a non-political committee, or have the legislature authorize the Supreme Court to appoint such a committee? Have you ever been able to get these things out of politics?

MR. CALLAHAN: The reason for that is that those appointments are made by an officer who is changed every two years. I am only asking for consideration by a special committee of this Bar. The only non-partisan body in the state, and it is non-partisan, is the court; and I believe by the appointment by that court of a non-partisan commission, with long terms, making it a continuous body, with terms expiring in alternate years, that is, a term expiring one each year, and to hold office for five years, that would take it away from the situation as it exists today. Aren't we sufficiently aroused, isn't the state of Idaho sufficiently aroused to want some kind of a solution of this question, that will remove it from political consideration?

MR. JONES: I think you are right. But, do you think the state administration would concede something of that kind?

MR. CALLAHAN: They should be glad to, because they will be free from the consequences.

JUDGE WINSTEAD: As I understand, the present law of Washington is to the effect that the trial judge merely gives the maximum sentence, instead of the minimum; then the parole board fixes the maximum sentence to be served by each prisoner who is sent to the penitentiary. They had our system, and found it very unsatisfactory; and they are now trying out this new system, which he tells me is much more satisfactory. I therefore suggest that in consideration of this matter, that consideration be given to the success or failure of the present Washington system.

MR. GRAHAM: I endorse the idea of Senator Callahan, to have a committee, but I fail to see that it is going to be effective.

I think the place to discuss it is back in the Locals. Give the Locals the interest and the power to do something, to recommend some-

thing; and then a year hence to take up the consideration of the subject after consideration by all the Locals.

Your theory is all right, Senator, but my experience on the Commission has been that those committees never function. You haven't any money to give them, and you can't get them together to discuss the matter; they resort to correspondence, and they write a few letters back and forth, and in due time their interest lags, and nothing is done.

MR. CALLAHAN: If Mr. Graham's method is the one by which the matter will receive the best consideration, I am certainly for it. All I am anxious to do is to have some method adopted by this body, so that next year we will have some definite recommendations as to a system of handling our criminals, that will be in line with what we have been talking about here today.

MR. E. B. SMITH: There has been a resolution turned in to the resolutions committee by a group who have given this matter considerable study. We have attempted to cover that in the proposed resolutions. I think that further discussion should be deferred until that resolution is presented.

PRES. ANDERSON: The next order of business is The Frazier-Lemke Act—Its Application in Idaho, by Hon. Dana E. Brinck, of the Federal Land Bank of Spokane. Judge Brinck.

JUDGE BRINCK: Mr. President, and members of the Bench and Bar of Idaho, I want to express first my appreciation to the program committee for giving me the privilege and honor of appearing on this program. Also I want to express to you all my appreciation for attending another meeting of the Idaho State Bar. You can't live in Idaho and mingle with its Bar for twenty-one years without feeling you share in the goodfellowship that was so evident here yesterday and last night. I have attended a good many Bar meetings the last few years in different states, and the feeling here is unusual.

I have been at considerable loss as to just what to discuss on this subject of the Frazier-Lemke bill, because there is so much collateral matter that is of interest. A study of the history of bankruptcy, and the evolution of bankruptcy, as it affects this act is of great interest. But, time does not permit a discussion of it. The act, as you know, was one of those measures adopted as an emergency measure, a temporary measure of Congress in 1933, originally. Nothing need to be said to an Idaho audience, an agricultural state, as to the causes leading to the enactment of that law. During a period of about two years preceding 1932 farm mortgage indebtedness had decreased from nine and a half billions, to eight and a half billions, chiefly through foreclosure, and this in spite of the fact that all the American banks and loaning agencies had been doing their best to avoid acquiring any more lands, and had adopted a policy of leniency. During the succeeding year the problem became more pressing, and the question was presented as to where would men go who were driven from their farms, and who would take their places.

In this discussion I shall be unable to observe the territorial limitation of the title assigned me—the Frazier-Lemke Act being a part of our National Bankruptcy Act, which, under the constitution, must be of geographically uniform application, leaves to peculiar treatment in a given state only the definition of property and of exemption, both of which are determined under the state law.

The act provides for a special bankruptcy proceeding to follow a debtor's proceeding previously instituted under Section 75 of the Bankruptcy Act, of which section the Frazier-Lemke Act is subsection (s), and, therefore, the whole of that section must be discussed together.

On March 3, 1933, Chapter VIII, of the Bankruptcy Act of 1898, was adopted. With subsequent additions it is composed of Sections 73 through 77B; and its enactment marked a distinct departure from the previous conception of bankruptcy legislation. Though enacted under the bankruptcy power of Congress it expressly stated that it was to provide for the relief of debtors, in addition to the jurisdiction exercised in proceedings to adjudge persons bankrupt. Instead of providing for bankruptcy it was calculated to avoid the necessity of bankruptcy. It was primarily intended for the benefit of debtors and was only incidentally, though definitely, intended for the benefit of creditors as well.

Up to that time bankruptcy had always been viewed as a proceeding for the protection of creditors with the benefit to the debtor only incidental, if present at all. While bankruptcy was known to the Roman law and was the subject of English legislation as early as 1542, it was not until 1705, under the English statutes, that the debtor received the benefit of a discharge from his debts.

When the discharge of a bankrupt was brought into the law, it was at first hedged about with many limitations. The first bankruptcy law of the United States, enacted in 1800 and existing only two years, required the consent in writing of two-thirds in number and amount of all the creditors before a discharge could be granted, and the succeeding acts prior to those of 1898 imposed similar though gradually less onerous conditions.

At best, a discharge, while permitting the debtor to begin over again, compelled him to start with nothing. The value of his business, as a going concern, was lost both to him and his creditors.

However, before the act of 1933, in appreciation of the fact that creditors would sometimes profit by permitting the debtor under specific terms to retain possession of his assets and maintain his business and attempt to work out of his difficulties, there had appeared by amendment in the law of 1867 and by the 1910 amendment in the law of 1898 a provision that without adjudication as a bankrupt a composition might be effected without acquiescence of all creditors. It was necessary, however, in all cases for the debtor to submit himself to the court of bankruptcy with the alternatives either of effecting such a composition or of being adjudged a bankrupt and having his estate administered accordingly. Such proceeding, expensive and cumbersome, was rarely, if at all, resorted to by farmers.

The act of March 3, 1933, and subsequent kindred legislation attempted to provide for all classes of debtors an opportunity for rehabilitation without the destruction of their businesses as going concerns. Procedure for effecting adjustments with creditors was provided in Section 74 applying to persons not corporations, and available, of course, to farmers; in Section 75 applying only to farmers, and in Section 77 providing for railroad reorganizations. The general plan was extended to corporations generally by Section 77B in June, 1934, and at about the same time corresponding relief was sought to be extended to municipal corporations by Sections 78, 79, and 80, which, however, have been held invalid by the United States Supreme Court as an invasion of the reserved powers of the states.

Section 75, with which we are here concerned, originally made at least three principal changes from the relief previously afforded under Section 12 of the Act of 1898 as applied to farmers. First, it provided a cheap and informal procedure for endeavoring to effect a composition by proceedings held in the county of the debtor's residence; second, it permitted such proceedings to be dismissed with adjudication of the petitioner as a bankrupt even though no composition was effected; and third, it gave exclusive jurisdiction to the bankruptcy court of proceedings against such a debtor although a state court had already acquired jurisdiction.

Section 75 provides for two distinct legal proceedings. The first is a debtor's proceeding for a composition agreement and is set forth in subsections (a) to (r). The second is a bankruptcy proceeding to follow the first proceeding if the farmer is unable to effect an agreement and desires to proceed further; it is set forth in subsection (s) and constitutes the Frazier-Lemke Act.

Subsections (a) to (r) of Section 75, as originally enacted, and which, with minor modifications, are still the law, did not, prior to the enactment of subsection (s), the Frazier-Lemke Act, prove to be of material benefit to anyone in any considerable number of cases because of the lack of compulsory features which were later embodied in the Frazier-Lemke Act. Subsections (a) to (r) provide for appointment by the Judge of the United States District Court of a Conciliation Commissioner in each county containing 500 farmers, whose relationship to the system is almost analogous to that of a referee in bankruptcy in the usual proceeding. They provide that a farmer may file in court or with such a commissioner his petition asking the privilege of composition or extension of his debts. The filing of such a petition immediately subjects all of the property of the debtor to the exclusive jurisdiction of the bankruptcy court and automatically acts as a stay to practically all proceedings affecting him or his property in any other court until his proposal has been disposed of. When inventory is filed, creditors are notified and a meeting held, and a composition or extension proposal submitted. The court can confirm such a proposal if it is consented to by a majority in number and amount of the creditors and if it includes an equitable and feasible method of liquidation for secured creditors and of financial rehabilitation for the farmer, is for the best interests of all creditors,

and if its offer and acceptance are in good faith. But if such consent could not be procured, or if such conditions did not obtain, there was, prior to the enactment of subsection (s), nothing left for the court to do except to dismiss the proceeding, leaving the creditors free to proceed the same as if no petition had been filed. It was for this reason that subsection (s) became necessary in order to actually effect the relief contemplated by Congress.

The original Frazier-Lemke Act, which was the first subsection (s), approved June 28, 1934, sought to accomplish this end by providing that a debtor who should fail to effect a composition or extension could thereupon amend his petition and ask to be adjudicated a bankrupt; whereupon, the referee, after having his property appraised and setting aside to him his exemptions, must order that the possession of the remainder remain in the debtor, subject to existing liens up to the appraised value of the property. The debtor was thereupon entitled, with the consent of the lien holders, to enter into an agreement to purchase the property at its appraised value, plus 1% interest, the principal being paid in small installments over the first five years, leaving 84% of the purchase price to be paid the sixth year. Should the lien holders not consent to such sale to the debtor and file written objections thereto, then the court was required to stay proceedings for five years, during which time the debtor must be given possession of his property under the control of the court, subject to the condition of paying a reasonable rental annually, the first payment to be made within six months, such rental to be distributed among secured and unsecured creditors, according to their interests. At any time within the five year period, the debtor might pay into court, at the election of the lien holder, either the appraised price of the property or the price then determined by a reappraisal made at the request of the lien holder, whereupon, the debtor would receive full possession and title of the property and a discharge from his debts. Failure of the farmer to fulfill the conditions subjected his property to immediate sale.

The fundamental feature of the original Frazier-Lemke Act was the compulsory scaling down of secured claims to the actual value of the security, which accomplishment, combined with the five year moratorium, was calculated to permit the rehabilitation of the debtor if, with the return of more normal conditions, he were able to reduce such scaled down indebtedness and to refinance the balance within five years.

The Supreme Court in the case of the Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555, held this law unconstitutional on the ground that the bankruptcy power of Congress was subject to the Fifth Amendment of the Constitution and that the act was repugnant to the Fifth Amendment in that it impaired five substantive property rights held by a mortgagee as follows:

1. The right to retain the lien until the indebtedness thereby secured is paid.
2. The right to realize upon the security by a judicial public sale.
3. The right to determine when such sale shall be held, subject only to the discretion of the court.

4. The right to protect its interest in the property by bidding at such sale whenever held, and thus to assure having the mortgaged property devoted primarily to the satisfaction of the debt, either through receipt of the proceeds of a fair competitive sale or by taking the property itself.
5. The right to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt.

The court did not hold the law unconstitutional because of any one of the stated objections but because of the total effect of all of the stated objections upon the rights of a mortgagee.

This decision was rendered on May 27, 1935, and on August 28 of that year, a new subsection (s), the present Frazier-Lemke Act, was approved. The new act was carefully drawn to comply with the rules stated in the Radford case, and besides eliminated several of the practical defects of the first act. It provided for the setting apart to the bankrupt of his unencumbered exemptions and of the equity in his encumbered exempt property, thus leaving under the control of the court the administration of the encumbrances upon his exemptions. Under the old law, it was not clear that encumbered exempt property, when set aside, was subject to the continued jurisdiction of the court. It dispensed with the ambiguous provisions of the original act as to a trustee and his functions and made the Conciliation Commissioner the referee. It permits in proper cases the postponement of the first rental payment to one year in lieu of the often impossible six months' period of the first act. The court may require additional payments to be made at stated periods, not inconsistent with the protection of the creditors and the debtor's ability to pay, with a view to his financial rehabilitation. At the end of three years, or prior thereto, the debtor may pay the appraised value of the property, including the amount of encumbrances up to the amount of the appraisal, less payments theretofore made, or the amount fixed upon a reappraisal made upon the request of any interested party, or fixed by the court upon evidence submitted; whereupon the debtor shall receive full possession and title to his property free and clear of encumbrances; except for a further proviso, which is the greatest departure from the theory of the original act, permitting a secured creditor to demand a public sale of the property upon which his lien rests.

When this act came before the Supreme Court in the case of Wright v. Vinton Branch of the Mountain Trust Bank, decided on March 29, 1937, it was pointed out by the Court that the decision in the Radford case did not question the power of Congress to offer to distressed farmers the aid of a means of rehabilitation under the bankruptcy clause; and that it was not denied that the new act adequately preserves three of the five rights of a mortgagee announced in the Radford case, viz., the right to retain the lien until the indebtedness thereby secured is paid, the right to realize upon the security by a judicial public sale, and the right to bid at such sale, thus assuring that the security would be devoted to the satisfaction of the debt, either through receipt of the proceeds of a fair competitive sale, or by taking the property itself. The right of the mortgagee to bid at the

sale is not expressly stated in the law, but a provision of the bill limiting that right had been stricken during the debates, and the court held that the explanations given in Congress make it plain that the mortgagee was intended to have this right.

However, it was contended, first, that the law still infringed the mortgagee's right to determine when a judicial public sale should be held; but the court decided that the three year stay was not an absolute right and that the court may terminate the stay and order a sale earlier. This construction is based, in part, upon a doubt as to the constitutionality of the act if otherwise construed; and it is further pointed out that the property may be sold if the debtor **at any time** fails to comply with the law or orders of court as to payment of rental, or interim payments on principal, or orders made otherwise in the course of its supervision and control, or at any time is unable to refinance himself within three years. These provisions are accordingly construed by the Supreme Court to mean that the court may terminate the stay if, after a reasonable time, it becomes evident that there is no reasonable hope that the debtor can rehabilitate himself within the three year period; and the court further considers as indicating the intention of Congress to make the stay terminable the statements made in the debates and the provision of the act that if, in the judgment of the court, the emergency ceases to exist in its locality, it may shorten the stay and proceed to liquidate the estate. It is, therefore, held that the power of the court in its discretion to shorten the three year period satisfies the right of the creditor, as stated in the Radford case, to determine when such sale shall be made, subject only to the discretion of the court.

As to the right to control the property during the period of default and to have the rents and profits collected by a receiver for the satisfaction of the debt, which was the second respect in which it was contended that the law was invalid, the Supreme Court says in effect in the Wright case, that the possession by the mortgagor under the supervision and control of the court is as effective as the appointment of a receiver for that purpose, and perhaps more so because of his familiarity with the property and his vital interest in preserving ownership; that the creditor is protected by the court's supervisory control of the property; that the power of the court to require the first payment at any time within one year and semi-annually thereafter is a reasonable provision; that application of rental upon taxes benefits the mortgagee; and also holds that the stay of proceedings for three years, plus the other incidental procedural delays, is not a denial of due process of law in view of the bankruptcy powers of Congress; and that the Act makes no unreasonable modification of the mortgagee's rights.

The act, as it now stands, therefore, permits the farm debtor to obtain a stay of all proceedings against him or his property on secured or unsecured claims during the period required for seeking agreement of creditors to a compromise or extension plan, looking toward his rehabilitation; and although such agreement is not reached, if a stay of proceedings appears reasonably to offer an opportunity for the

ultimate payment of his debts and the preservation of his property, the court may grant him the stay and the right of possession for not exceeding three years upon such terms and under such supervision as the court in its discretion may impose within the limits provided by the law.

Good faith of the debtor is required throughout, and good faith means not only honesty of purpose, but potential ability to effect a rehabilitation if the stay is granted.

It has been uniformly held that subsection (s) is available only to those debtors who have complied with the requirements of subsections (a) to (r) in offering to their creditors a composition and/or extension agreement, and, in this respect, the courts have held that no debtor has complied with the terms of the law unless he has submitted to his creditors a proposal which could be confirmed by the court if it were accepted by the requisite number of creditors; that is, each proposal must provide the following:

1. An equitable and feasible method for the liquidation of the secured creditors' claims;
2. An equitable and feasible method of financial rehabilitation for the farmer;
3. It must be for the best interests of all creditors; and
4. It must have been made in good faith.

If the plan falls short in any of these respects, the debtor's proceeding is dismissed, and the debtor is denied an adjudication under subsection (s) should he apply therefor. In other words, subsection (s) is open to only those farmers who have a real opportunity and prospect of working out and who are acting in good faith with their creditors, but who cannot reach a satisfactory agreement because of the attitude of their creditors.

In the Wright case the Supreme Court stated that the object of the law is the rehabilitation of the debtor. The courts have made it quite clear that the proceeding should not be maintained unless there is reasonable expectation that the end sought will be attained. The benefits of Section 75 (s) may not be utilized to bring about the continued possession of the property in hopeless circumstances where the only effect is a stay. In re Erickson, 8 Fed. Supp. 439, D. C. Mich. W. D. July 10, 1936. The provisions of the act were intended to benefit an honest debtor who desires to make a reasonable proposal to his creditors for an extension or composition and not merely to permit delay. In re Price, 16 Fed. Supp 836, D. C. La.

The United States Supreme Court in the Radford and Wright cases has passed only on the construction and validity of subsection (s), the Frazier-Lemke Act itself. Subsections (a) to (r), providing for conciliation proceedings, have not in many respects been before the Supreme Court and many points have been left undetermined except by decisions of the district courts and circuit courts of appeal, which, of course, are not always uniform. There are a number of interesting questions that can and will arise under the law which have not as yet been sufficiently passed upon by the Supreme Court so that an authoritative answer can be given.

Partly because until the decision in the Wright case there existed so much doubt as to the fate of this legislation, the courts have been slow to develop rules of procedure. In the administration of the law, much confusion has arisen from this cause and from lack of detail in the provisions of the law, the different unrecorded views of procedure possessed by the various judges, and the lack of legal knowledge, particularly of bankruptcy law and procedure, possessed by conciliation commissioners who are not lawyers. Both debtors and creditors have suffered from this.

It would seem that the courts, the bar, and the debtor and his creditors would be greatly benefited and the law would be more uniformly administered if the Supreme Court through the adoption of general orders, or the district judges through the promulgation of definite written rules would prescribe the procedure to be followed in the courts and before the conciliation commissioners; and if either the regular referees in bankruptcy, or attorneys, were appointed to serve as conciliation commissioners in all cases.

Notwithstanding its shortcomings as to procedure the Act has served well the purpose for which it was intended. There has been no mad rush to take advantage of it. In fact, the large agencies and institutions engaged in the business of making farm loans have in the main co-operated with their borrowers to keep them upon the land and have granted extensions in the worthy cases. Congress has made it possible for the Federal Land Banks to do likewise. Thus there has been no occasion for widespread resort to the remedy provided.

However there have been cases where the mortgagee has been unable to see any prospect of the particular farmer working out of his difficulties and the former has been able under the act to submit his case to judicial processes.

And of course there have been the isolated cases of a mortgagee willing to take advantage of the abnormal conditions and to acquire the land at less than its value. The Act has put an effective end to this. The fact that the mortgagor has had the remedy available as a last resort has no doubt brought about a more reasonable attitude on the part of such mortgagees, and has done much to restore the confidence and hope of the debtor.

PRES. ANDERSON: Does any member have anything to suggest in connection with this matter? We will pass to the next order of business.

The next matter coming up for consideration is the report of the resolutions committee.

MISS SMITH: Mr. President, and members of the State Bar. We, your committee on resolutions, consisting of Chase A. Clark, E. B. Smith and myself, beg leave to present the following resolutions for consideration and action by the Idaho State Bar:

RESOLUTION NO. 1

Be it resolved, that it is with profound regret that we are again called upon to record the passing of the following members of the Idaho State Bar:

A. B. Barclay, Jerome,
Fred C. Erb, Lewiston,
C. H. Edwards, Boise,
James H. Forney, Moscow,
L. B. Green, Mountain Home,
Harlan D. Heist, Shoshone,
Gustave Kroeger, Boise,
Lewis A. Lee, Idaho Falls,
Luther M. Lyon, Boise,
Paris Martin, Boise,
C. A. North, Twin Falls,
Charles O'Callaghan, Bonners Ferry,
John H. Padgham, Salmon,
D. W. Standrod, Jr., Pocatello,
Wm. A. Stone, Caldwell,
Edmund W. Wheelan, Sandpoint,
Edward E. Poulton, Moscow.

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

RESOLUTION NO. 2

Be it resolved, that the Idaho State Bar extend its sincerest of thanks to all of the members of the Ninth Judicial District Bar Association, to the City of Idaho Falls, and to the officials thereof, for the cordial reception and entertainment extended to the Idaho State Bar and the members thereof during its annual meeting held at Idaho Falls.

RESOLUTION NO. 3

Be it resolved, that we publicly record our appreciation to the Idaho State Bar Commission and its secretary, for their accomplishments in strengthening the Bar of this state.

RESOLUTION NO. 4

Resolved that resolutions to be submitted by the annual meeting of the Idaho State Bar shall be filed with the Secretary thereof at least 2 weeks before the annual session of the Idaho State Bar, and that a copy of each resolution be submitted by mail to members of the Bar at least 5 days before the scheduled meeting.

RESOLUTION NO. 5

Be it resolved, that we extend a vote of thanks to the program committee, consisting of Carey Nixon, A. H. Oversmith and Roy L. Black, for its excellent and untiring efforts in the preparation of the 1937 program of the Idaho State Bar.

MR. E. B. SMITH: I move that resolutions numbers one, two and three be adopted.

MR. G. W. SOULE: I second the motion.

PRES. ANDERSON: It has been regularly moved and seconded that resolutions one, two and three be adopted.

All in favor of adopting these first three resolutions let it be known by saying aye. Opposed no. They are adopted.

I think you better continue with the reading, and then come back to them.

MISS SMITH:

RESOLUTION NO. 6

Whereas, it has developed through studies undertaken by local bar associations that instances of hardship and cost of additional litigation to the public have resulted because of lack of uniformity of basic considerations to be regarded in the examination of abstracts of title to real property; further, that there appear to be instances of lack of uniformity in the practice pursued in examination of abstracts of title whereby lack of uniform understanding and interpretation of certain questions involved in the examination of abstracts of title have resulted, which, instances has caused multiplicity of labors of members of the bar, with added cost to the public in removing defects and objections to titles;

Be it resolved, that the Idaho State Bar hereby express its desire that studies be undertaken by local bar associations relating to the examination of abstracts of title to real property to the end that understandings be reached as to certain basic questions involved in the examination of abstracts of title to real property in various communities, the same to be promulgated as suggestions for consideration of members of the bar in examination of abstracts of titles, to the end that misunderstandings and additional costs of litigation be eliminated, and that uniformity of practice be attained.

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

MR. EBERLE: I second the motion.

PRES. ANDERSON: All in favor let it be known by saying aye. Opposed no. It is so ordered, and the resolution is adopted.

MISS SMITH:

RESOLUTION NO. 7

Be it resolved, that the Idaho State Bar, through its proper committees, cause to be prepared and presented to the next legislature of Idaho, proposed legislation having for its purpose the abolishment of the Industrial Accident Board, and the vesting of powers, heretofore and now exercised by said Board, in the District Courts of this state.

RESOLUTION NO. 8

Be it resolved, that the Board of Commissioners of the Idaho State Bar is hereby directed to devise means best suited to secure an adequate and comprehensive study of the questions involved in the exercise of the pardoning power in the State of Idaho, to the end that there shall be reported at the next meeting of this bar a concrete recommendation designed for an improvement of the pardoning system and its administration.

Mr. President, that is all the recommendations that we have at this time.

PRES. ANDERSON: Now, that leaves for consideration resolution number four, with respect to the filing of resolutions.

What is the pleasure of this body with respect to that resolution?

A VOICE: Mr. President, I move that "twenty-one days" be substituted for "two weeks," and as so amended that the resolution be adopted.

A VOICE: I second the motion.

PRES. ANDERSON: Any discussion?

MR. E. B. SMITH: Mr. President, I have attended quite a number of these annual sessions, and each time have I noticed that there are subjects which come up that it would be impossible to present resolutions upon if we are limited in that manner. Now, I know that there are certain subjects which could be turned into the secretary within the two weeks, or twenty-one days, as the case may be. But, right at the last minute, as this session is in progress there are things that come up, upon which it is necessary that resolutions be presented to the resolutions committee, and it is supposed to keep that in mind at all times during these sessions. Personally, I believe that resolution number four is completely out of order.

MR. JAMES: It seems to me that it would be a mistake to adopt a resolution of that kind. It will tie our hands in these sessions in many, many instances. I am wondering if it would not be better to so redraft that resolution as to urge all attorneys to so prepare and file their resolutions, as merely a suggestion.

MR. CALLAHAN: Mr. President, I don't think this resolution ties our hands at any future meeting of this body. I think if at the next meeting of this body a resolution were submitted, which grew out of the deliberations of the body itself, that the association could entertain it. At the same time, this expresses the sentiment and the desire and the policy of the association for the sake of more deliberate consideration of these resolutions.

MR. GRIFFIN: Mr. President, I move that the resolution be amended so as to read:

Resolved, that resolutions, except those arising out of the proceedings at the meeting, to be submitted by the annual meeting of the Idaho State Bar shall be filed with the Secretary thereof at least twenty-one days before the annual session of the Idaho State Bar, and that a copy of each resolution be submitted by mail to members of the Bar at least five days before the scheduled annual meeting.

A VOICE: I will second the motion as amended.

PRES. ANDERSON: All in favor of adopting the resolution, as amended, and as just stated by Mr. Griffin, make it known by saying aye. Opposed no. The ayes have it. The resolution, as amended, is adopted.

PRES. ANDERSON: The next resolution coming up is number five. All in favor of adopting the resolution make it known by saying aye. Opposed no. The ayes have it, and it is so ordered.

The next one is resolution number seven:

MR. GRAHAM: Mr. Chairman, I move that instead of adopting that resolution, the matter be referred to the Locals for consideration to report at the next annual meeting.

MR. S. T. LOWE: I move that the resolution be placed upon the table.

PRES. ANDERSON: Do I hear a second to either of those motions?

MR. BENOIT: I second the motion to table the resolution.

PRES. ANDERSON: It has been regularly moved and seconded that resolution number seven be tabled. All in favor of that motion make it known by saying aye. Opposed no. Your motion is lost.

What shall we do with resolution number seven?

MR. GRAHAM: I move that instead of adopting it, it be referred to the Locals for consideration.

MR. G. W. SOULE: I second the motion.

PRES. ANDERSON: All in favor say aye. Opposed no. It is so ordered. Resolution number eight: What is your pleasure with respect to that?

MR. TOM JONES: I move it be adopted.

A VOICE: I second the motion.

PRES. ANDERSON: All in favor of the adoption signify by saying aye. Opposed no. The ayes have it, and it is so ordered.

That is all the resolutions we have, except this one just submitted by Mr. Smith, which has not been read.

Resolution number nine, proposed by the Judiciary division, is:

Be it resolved, that the Legislative Committee of the State Bar be requested to draft an act to be presented to a future legislature providing for an annual meeting of the District Judges with the Justices of the Supreme Court at some appropriate date in January, the date to be fixed by the Chief Justice, for the purpose of discussing and acting upon proposals for legislation intended to improve and simplify the practice in the courts of the state; and providing that it shall be the duty of the Judges and Justices to attend and take part in these proceedings, and that their actual expenses be paid out of the State Treasury as their other expenses are now paid.

MR. BENOIT: I move the adoption of that resolution.

MR. G. W. SOULE: I second the motion.

PRES. ANDERSON: It has been moved and seconded that the resolution be adopted. Is there any discussion?

MR. E. B. SMITH: Our committee, in studying over this resolution, had in mind suggesting that perhaps an annual meeting would be out of order, and that perhaps the legislature should provide for a biennial meeting. Have you any suggestion as to that?

MR. A. L. MORGAN: As I understand, the purpose is to have the judges convene there at a time when the legislature is in session, and in that way try to get some judicial legislation. Is that the idea?

JUDGE WINSTEAD: On this question, this resolution was proposed and considered for this reason: The annual meeting of the Bar Association comes at a time when in the two-judge districts there is always one judge on vacation, and in the other districts many of the judges are away. I have attended two of those sessions, and at this session there wasn't over twenty-five percent of the judges of the state present. It is absolutely impossible to adopt resolutions, or do anything else, unless you have a majority of the judges present. If they have an annual meeting with the Supreme Court, and go over matters, this committee, at least, of the District Judges can always report to this section at this annual meeting of the Bar; and if there are any matters to be considered, they can be reported back to their annual meeting.

PRES. ANDERSON: Any further discussion?

MR. CALLAHAN: The question was made as to a biennial meeting, and it was suggested that the meeting be held while the legislature was in session. I have some observations to make. If you are going to have a biennial meeting, I suggest that you have the meeting the year when the legislature is not in session, so that the legislature will not get the idea that you are meeting to frame up something. Legislatures are sometimes suspicious. If a biennial meeting is to be held, let it be held the year the legislature is not in session, or else at some place except in Boise, so the suspicions of the legislature will not be aroused.

PRES. ANDERSON: All in favor of adopting this resolution let it be known by saying aye. Opposed no. The ayes have it, and it is so ordered.

A VOICE: I would like to offer a motion, as I did in the Local Bar Section, that the Public Utilities Commission and the Industrial Accident Board be requested by this State Bar Association to refrain from setting cases for argument or trial during the week in which the Idaho Bar meets.

A VOICE: I second the motion.

PRES. ANDERSON: Any discussion? All in favor of the motion let it be known by saying aye. Opposed no. The ayes have it, and it is so ordered.

Is there any other matter. If not, I will ask Mr. Holden and Mr. Tom Jones to conduct Mr. A. L. Morgan, the newly elected President of the Idaho State Bar, to the stand. (Mr. A. L. Morgan was then escorted to the stand.)

PRES. MORGAN: The introduction of a new president takes the place of a motion to adjourn. This meeting is at an end.

PROCEEDINGS

THIRD ANNUAL MEETING *of the* JUDICIAL SECTION

of the

IDAHO STATE BAR

IDAHO FALLS, IDAHO
JULY 22, 1937, at 2:00 P. M.

There were present at the Judicial Section meeting:

Hon. D. H. Sutphen, District Judge, Chairman,

Hon. William M. Morgan, Chief Justice, Supreme Court,

Hon. James F. Ailshie, Justice, Supreme Court,

Hon. Alfred Budge, Justice, Supreme Court,

Hon. Edwin M. Holden, Justice, Supreme Court,

Hon. Isaac McDougall, District Judge,

Hon. James W. Porter, District Judge,

Hon. Guy Stevens, District Judge,

Hon. C. J. Taylor, District Judge,

Hon. Charles E. Winstead, District Judge,

Hon. F. J. Cowan, Ex-District Judge.

THURSDAY, July 22, 1937,

2:00 P. M.

JUDGE SUTPHEN: Gentlemen, Judge Koelsch was chairman of this section, but was unable to be here, and he asked me to help prepare the program. I find that they have me listed here as chairman. Since that is the case we will proceed. We should take up the discussion of the uniform District Court rules. I have made a report and prepared copies of the rules submitted at the last meeting of the Judicial Section, and I mailed a copy to each of the District Judges. I have a few answers from Judges who are not able to attend, and I will read a few of these letters, so that you may get some of the suggestions.

From Judge Miles S. Johnson, of the Tenth District, at Lewiston:

"The major portion of the business in my district is transacted at Lewiston where Court is kept in session except for the times I am away from home, and we have never found any necessity for rules governing procedure. In fact, the attorneys are very much better satisfied without rules than they would be with them. I am rather inclined to the view that where the Bar is harmonious, at least in districts like mine, it is much more satisfactory for counsel as well as the Court to have no rules. I was at one time compelled to establish a rule that all pleadings should be double spaced as it is extremely trying on the eyes to read pleadings that are typed single space.

"I have no criticism of the rules you forwarded me in places where there is a necessity for rules."

From Judge Bert A. Reed, Coeur d'Alene:

"I have gone over the rules carefully and the only one to which I have any serious objection is the proposed rule No. 15 for "Serving objections to findings."

"My experience has been very unsatisfactory in that regard as it is practically impossible to get counsel to agree, and, further, counsel for the losing party would undoubtedly feel that he is prejudicing his case on appeal if he appeals. Further, it resolves itself into the final duty of the Court to prepare and file his own findings.

"I will also call your attention to rule No. 10. In case a party wishes or desires to amend his pleadings to correspond with his evidence adduced at the trial or amendments made at bar which, however, do not change the issues, but would entail delaying the case."

JUDGE SUTPHEN: In regard to rule No. 15 I believe Judge Morgan has something to say later on the program.

A letter from Judge Hodge states:

"I have hastily glanced over the proposed rules, many of which have in substance been adopted in this district. At first glance I do not notice anything particularly objectionable."

Judge Sutton from Weiser writes:

"During the past two weeks I have been trying cases at Caldwell, and while there discussed the proposed rules with Judge Rice.

"It is my personal opinion several of the rules are of no importance and will serve no useful purpose. However, I have no objection to them and if they are adopted will do my best to enforce them.

"If the matter of making rules for the District Courts is to be handled as it was last year, nothing will be accomplished, in my opinion. You will recall the Judges met in the so called Judicial Section and went through the motions of adopting rules. These were then submitted to the open meeting of the Bar Association where many of the adopted rules were amended or eliminated. As I view it the District Courts either have the right to make rules or they have not. If they have the right and make the rules, the Bar has not any right or authority to amend or repeal or make new rules. I do not mean to say the Bar should not be heard, but I do say there must be an end to the proceeding somewhere."

That represents the present attitude of some of the District Judges.

I feel this way about it, that before definitely adopting these rules in the various Districts we should be assured of the general cooperation of the various District Courts in the State. I was wondering if we have a full enough representation of the various Districts to make a decision at this time.

JUDGE WINSTEAD: Mr. Chairman, in view of the fact that only four Districts in the State are represented, I move that the consideration of the rules be deferred until the next session.

JUDGE PORTER: I second the motion, Mr. Chairman.

JUDGE SUTPHEN: All in favor of the motion signify by saying aye. Opposed the same. The Ayes have it, and it will be so ordered.

Gentlemen, I hope that each of you will retain the copies that have heretofore been sent to you. You will find a discussion by the members of the Bar beginning at page 25 of the proceedings of the Idaho State Bar meeting for the year 1936. Some of the criticisms made by various attorneys to some of the proposed rules are there. If we will all be prepared at the next meeting with definite ideas as to what we want to do, and try to get a larger representation, we will be prepared to take definite action in regard to this matter.

Judge Ailshie, you are scheduled to enlighten the jury here in regard to legal ethics. Before you do so, I will give you the privilege of exercising four peremptory challenges, if you want to exercise those challenges.

JUSTICE AILSHIE: Mr. Chairman, I was just looking over the jury when I came in, and the first thought that struck me was this is a bum jury; and then when I observed two of the members of the jury I concluded it was not only a bum jury but it was a hand picked one. In view of that I am going to lodge a challenge to the panel.

It is my judgment that the practice of the profession is intimately connected with and bound up in the subject of judicial ethics, if we are going to observe them; that if we are going to get anything out

of this, and to profit by it, we ought to defer this subject until such time as we can have a larger attendance. I think it would be more profitable than it will be for us to discuss it here. For example, two of the members of the Supreme Court and all the District Judges will be up for re-election next election; one of the things that I want to discuss, which is worthy of the consideration of the profession, and not just the candidates for judgeship, is judicial ethics in conducting a campaign. Now, we have a double barreled campaign here in Idaho under our election system, and unless a man makes a center fire the first time he has to take a second shot at is. If you conduct a campaign under the code of professional ethics in the canons of the American Bar Association which we have adopted, it tends to hamper a man very much. Just how far he should go, and just what he should do is a matter of a great deal of importance to the sixteen District Judges in this State and every Judge of the Supreme Court and every man who is going to aspire to any of those places. So that you affect a large number of people. Now, the question arises too of the difference between judicial ethics with respect to the man who is in office and the man who is out of office, and just a common practitioner at the Bar, who is trying to rout you out of office.

What I had in mind was that during this meeting we could have this discussion in the open session of the Association. I am interested in the reaction of the profession. For instance, there is one of the canons the substance of which is that a candidate for the Bench should not solicit the support of any practicing attorney. Well, you have cut off a good part of your source of contact and your acquaintanceship when you do that. There are many phases of that question that are worthy of consideration. The same is true with reference to people who have either present litigation, or have had litigation in the past, or who have prospective litigation that may come before you. And there is a question that has arisen, and gone to the grievance committee, respecting men who are engaged in big business. And, who is not in big business, but all of those who are in little business.

I am filled up on the subject, for the reason that I have discussed it, and I have served on the Committee, and during my service on the Committee we annotated the canons of judicial and professional ethics, and published the annotations, together with the opinions down to the year 1936. There are so many questions in this that when they came before the Committee in 1932 the American Bar Association passed a resolution authorizing a grievance committee to take up a great variety of questions touching existing questions, conjectural questions, and questions that were apt to arise.

JUSTICE MORGAN: I am heartily in favor of bringing this on for discussion before the entire Bar, for the reasons Justice Ailshie has pointed out.

Justice Givens asked me to express his regrets to this meeting, and also the Bar generally on tomorrow, because of his inability to be here.

JUDGE SUTPHEN: Gentlemen, if there is no objection we will

do as Judge Ailshie suggests and have his talk before the Bar rather than at this meeting.

I thought we might get an expression from the various Judges as to their interpretation of the law and ethics in regard to participating in and attending pre-election parties, and getting introduced thereat, when they are strictly partisan parties. The Democratic party and the Republican party will call meetings at the various school houses in the District, and the question came up in my mind as to whether it was just proper for a candidate for the Bench to attend the meetings of either party, and if it was permissable for the Judges to do so.

The next matter we have on the program is Judge Winstead, whom we have scheduled for a talk on Publicity Control. We will be glad to hear from you now, Judge.

JUDGE WINSTEAD: Mr. Chairman and Gentlemen:

The subject assigned to me for discussion is Publicity Control. This, I take it, has to do with the question of what control, if any, a court may have over the publicity attending trials in general and particularly criminal trials where the offense charged involves a wide public interest.

The need for such discussion and a consideration of this subject has developed as an aftermath of the trial of Bruno Hauptmann in New Jersey, certain criminal trials in the movie-mad atmospbere of California, and in other sections of the country where publicity-mad judges and notoriety-seeking members of the bar have made a travesty of justice. Fortunately, the courts of Idaho bave for the most part been remarkably free from such criticism.

Every judge who respects his oath of office and who has a proper appreciation of the duties and responsibilities of his position, abhors the idea that a criminal trial and particularly a trial on a capital offense where a human life is at stake, should he so conducted as to furnish a show for the public. A court of justice is not a place for amusement, nor should it ever be permitted to become a substitute for a circus, a vaudeville, a movie, or a radio broadcast studio. It should be a dignified tribunal conducted with all decorum and the proprieties which befit the occasion. Under our system of jurisprudence the lowest and most despicable offender is entitled to and should receive a fair and impartial trial.

A consideration of this subject naturally first raises the question of its possible conflict with the Federal Constitution.

The Constitution of the United States as originally drafted and adopted did not attempt a systematic enumeration of fundamental rights, and the absence of this was made a ground of persistent opposition to the ratification of the Constitution. To meet this situation, eight amendments were proposed and adopted, which since have been known as the American Bill of Rights.

The First Amendment to the Constitution provides in part that Congress shall make no law abridging the freedom of speech or of

the press. It will be noted that this provision undertakes to give no rights; but it did recognize the rights mentioned as something known, understood, and existing, and it forbids any law of Congress that shall abridge them. We are thus referred for an understanding of the protection of the pre-existing law; and this must have been the common law, or the existing statutes of the states. As the statutes of the several states of the period had little to say upon the subject, it is necessary to consider the common law and to interpret the provision in connection with the common law of the period.

In his work on "Constitutional Law," Judge Thomas M. Cooley, long recognized as one of our really great authorities upon the Federal Constitution and its limitations, has this to say with regard to the purpose of this provision:

> "But in a constitutional point of view its chief importance is, that it enables the citizen to bring any person in authority, any public corporation or agency, or even the government in all its departments, to the bar of public opinion, and to compel him or them to submit to an examination and criticism of conduct, measures, and purposes in the face of the world, with a view to the correction or prevention of evils; and also to subject those who seek public positions to a like scrutiny for a like purpose. These advantages had been fully realized and enjoyed by the people during the revolutionary epoch; the press had been the chief means of disseminating free principles among the people, and in preparing the country to resist oppression; and its powers for good in this direction had appeared so great as to cast its other benefits into the shade. It is a just conclusion, therefore, that this freedom of public discussion was meant to be fully preserved; and that the prohibition of laws impairing it was aimed, not merely at a censorship of the press, but more particularly at any restrictive laws or administration of law, whereby such free and general discussions of public interests and affairs as had become customary in America should be so abridged as to deprive it of its advantages as an aid to the people in exercising intelligently their privileges as citizens, and in protecting their liberties."

In his further discussion of this provision, Judge Cooley says:

> "Full and fair reports of what takes place publicly . . . . in the courts high and low, are . . . . absolutely privileged. The citizen has a right to be present at such proceedings, but the reasons which throw them open to spectators justify publication for the benefit of those who cannot or do not attend. It is only by publicity of proceedings that those to whom the liberty and civil and political rights of their fellows are submitted can be kept under a due sense of responsibility, and within the limits of the rules that should govern their conduct. But the report must be confined to the proceedings themselves, and must not indulge in defamatory observations, headings, or comments. The privilege, however, has never been extended to ex parte proceedings or examinations the reason being that they tend to mislead the public, rather than to enlighten it. One may publish these, but at the peril of being responsible if any untrue statement made in the publication proves injurious to the standing, reputation or business of individuals."

In the years which followed the adoption of this amendment to the Federal Constitution, there was a gradual but perceptible change in the character of our newspapers. The pamphlet style of the

Revolutionary period with its editorials, its essays on public questions, its poetry and general literary makeup, gradually changed to the present news form. In the early days each paper of consequence reflected the opinions of some stalwart editor. The editors were personalities, like Waterson of the Courier-Journal, and others too numerous to mention. Then improvements in communication, changes in transportation, and new machinery and equipment brought the newspaper of today. News syndicates and canned editorials eliminated personalities. Sensationalism and propaganda in turn cast their blight upon the press and these in turn have at times appeared to the layman even to be corrupting the courts.

With sensationalism rampant in the public press, it was natural that certain of the newspapers should attempt to make spectacles of public trials where public interest had been aroused. In the Hauptmann case this led to extremes. The sensational press had competition with the movie and the radio.. Not being content with a statement of the actual news of the trial, feature writers turned to all of the side issues of the case in the effort to work up human interest stories. The judge was tired out from posing for pictures, the rival lawyers lost sleep in presenting their case to the radio audience before they presented it in court; and then after it was all over, members of the jury gave out interviews and became vaudeville attractions.

It is patent that such procedure not only tends to defeat justice but to discredit the courts and to prevent a fair and impartial consideration of the case. Such "freedom of speech" and "freedom of the press" as here indulged in tend not to promote liberty and democracy, but to destroy it.

Realizing the necessity of some action, the American Bar Association, in its Section of Criminal Law, through its Executive Committee, some time in 1935 appointed a special committee to consider and report as to ways and means of curbing excessive publicity in connection with criminal trials and this committee reported in January, 1936.

Relative to this matter the American Bar Association Journal in its issue of February, 1936, at page 79, says:

> "Although this report originated in various phases of the press and radio activity in connection with the Hauptman trial, the Executive Committee considered the matter in its broader aspects, as to the prevention of publicity interfering with fair trial and orderly determination in connection with other judicial and quasi-judicial proceedings, including civil as well as criminal trials. The incidents of the Hauptmann trial were not regarded as solitary. The Executive Committee voted that the Association create a special committee of its members, to act in cooperation with committees from press and radio organizations, to see if sound and practicable standards can be formulated as to such publicity, for enforcement through rules of court and the action of press and radio associations, as well as by the lawyers. The recommendations as to the conduct of criminal trials will be the starting point for the work of the joint committee."

The recommendations of the special committee, in part, are:

"In the foregoing report we have tried to make a fair presentation of salient facts. We have been moved less by spirit of censure than by hope of remedial action. The excesses we have described differ from practices in many other cases mainly in degree.

"The trial of a criminal case is a business that has for its sole purpose the administration of justice, and it should be carried on without distracting influences.

"Passing from the general to the specific we recommend:

"That attendance in the courtroom during the progress of a criminal trial be limited to the seating capacity of the room.

"That the process of subpoena or any other process of the court should never be used to secure preferential admission of any person or spectator; that such abuse of process be punished as contempt.

"That approaches to the courtroom be kept clear, to the end that free access to the courtroom be maintained.

"That no use of cameras or photographic appliances be permitted in the courtroom, either during the session of the court or otherwise.

"That no sound registering devices for publicity be permitted to operate in the courtroom at any time.

"That the surreptitious procurement of pictures or sound records be considered contempt of court and be punished as such.

"That the courtroom and the courthouse be kept free from news distributing devices and equipment.

"That newspaper accounts of criminal proceedings be limited to accounts of occurrences in court without argument of the case to the public.

"That no popular referendum be taken during the pendency of the litigation as to the guilt or innocence of the accused.

"That broadcasting of arguments, giving out of argumentative press bulletins, and every other form of argument or discussion addressed to the public, by lawyers in the case during the progress of the litigation be definitely forbidden.

"That bulletins by the defendant issued to the public during the progress of the trial be definitely forbidden.

"That public criticism of the court or the jury by lawyers in the case during the progress of the litigation be not tolerated.

"That featuring in vaudeville of jurors or other court officers, either during or after the trial, be forbidden.

"That the giving of paid interviews or the writing of paid articles by jurors, either during or after the trial, be forbidden.

"That the atmosphere of the courtroom and adjacent premises be maintained as one of dignity and calm."

Later the American Newspaper Publishers' Association and the American Society of Newspaper Editors appointed special committees of their profession for the purpose of co-operating with a special committee of the American Bar Association, of which Newton Baker is chairman. The result of this co-operative effort on the matter of proper trial publicity, so far as I am advised, has not yet been made public.

The Editor and Publisher, recognized publication of newspaper publishers, early in 1936 ran an editorial entitled "Hippodrome Justice," wherein it was said:

> ". . . As a rule, we think, reporters on regular court runs get along well enough with judges and lawyers, conserving the rules of good journalism. The trouble seems to start when alleged 'experts,' 'white seals,' feature writers, novelists, and sundry other amateurs are dragged in to pep up the story. This is entirely in the hands of editors who, however, are also victims of the competitive element in modern newspaper work. The Hauptman outrage, however, should indicate that there is a limit to such 'enterprise.'
>
> "It seems to us that the problem is and must be, in the hands of the presiding judge. There can be no legislation to govern it without the danger of an abuse which might easily be worse than the one complained of. The press has full right to enter a court room and report what is said and done there, and public welfare demands that courts accommodate news writers and facilitate thorough news ventilation. Reaction to the 'star chamber' is always easy, and would be quickly resorted to by unscrupulous, vain and ignorant judges, under laws limiting reportorial enterprise and freedom.
>
> "The Baker Committee might well set up a standard of ideal practice which would include a demand on the presiding judge that a judicial atmosphere be conserved in the court room, that lawyers desist from propaganda activity in any form, and that editors be urged to demand of their reporters strict compliance with the orderly rules of the court if and when they do not impede adequate reporting. The reform so urgently sought by the right-thinking public may be realized, we believe, through honorable and sensible cooperation of press and bar. The press in general favors it."

In the general discussion of the subject, the Milwaukee Journal covered most of the suggestions of other papers by outlining a three-point reform: First, a stricter regard for the dignity of the court on the part of the presiding judge; second, a strict enforcement of the ethics of the legal profession which specifically forbid comment to newspapers by lawyers concerning trials in which they are engaged; and third, refusal on the part of papers to carry stories by writers who weigh and express an opinion on the evidence in a trial while it is in progress.

The suggestions contained in the recommendations of the special committee of the American Bar Association and in the editorial comment above quoted are in my opinion timely and should receive the attention of both the bench and bar of Idaho.

JUDGE SUTPHEN: Judge, I thank you very much. That was splendid, and I know that we will all read that again in the proceedings of this meeting. I think it is a subject we all want to bear in mind in case we have an important criminal trial.

Gentlemen, Judge Morgan has the matter of Findings of Fact and Conclusions of Law, which he will discuss.

JUSTICE MORGAN: Mr. Chairman, in the first place, it is lamentable that we have so few Judges attending this meeting. I am prompted to make the suggestion that Judge Winstead made to me

in a whisper a little while ago that the law should make it the duty of all Judges to attend these meetings; and it wouldn't be amiss if their expenses, when doing so, were taken care of from the public treasury. A great deal of good can come from meetings of this kind of the Judges.

The subject which I am going to discuss is one of importance, and one about which there should be a uniformity of practice; and unless we can get together and discuss it we have very little chance of agreeing upon it. Findings of fact of the trial judge who has had the advantage of listening to the witnesses on the witness stand, if they are based upon sufficient evidence in dispute, will be considered binding upon the Supreme Court. Your opportunities being much greater than ours of the Supreme Court, we are anxious to be bound by them. It is a matter which does not invite argument, and there would be a unanimity of opinion about this, if these findings could emanate from an unbiased source. I happen to know it is the practice—and I am not criticising anybody, because I think the practice is pretty general—that the attorney for the party litigant who has won his suit is called upon to prepare the findings for the signature of the trial Judge. In some instances probably the trial Judge reads them, and possibly in some instances he does not. Now, you could not find a more biased and prejudiced and badly warped source than that. The attorney who is not biased and prejudiced in favor of his client against his adversary is not very likely to be called upon to draft findings. Probably the other fellow will draft them. He is either interested enough in his law suit to become a partisan, or he isn't likely to win. Now, that is all right with me. I have no objection to a trial Judge assigning the duty of preparing the findings to the attorney who wins the case. But, I would like to have the trial Judge certify that that is what occurred, rather than to leave it to the speculation of the Supreme Court as to whether the trial Judge prepared those findings or not. There is no one on the Supreme Bench but who desires to be bound absolutely by the findings of the trial Judge. But, if the attorney for the respondent makes those findings, and the Trial Judge merely supplies the signature, it ought not to be binding upon the appellate court, because it does not arise from an unbiased source.

I should like a general discussion of that. I should like to find out how general it is for the Judges to make their own findings, and how general it is for them to be made by the prevailing party.

The other question is one which is submitted entirely to the gentlemen of the District Bench, and I don't know whether the other members of the Supreme Court feel the same way about it, or not, but when a conclusion of law is reached if the Judge will kindly cite the authority upon which it is based, it would be of great assistance to the appellate court. I know that frequently when you make your conclusions of law you must have been persuaded by one or more cases. Now, that may find its way into counsel's brief, and maybe it does not. It is a good deal owing to what the attorney thinks of the applicability of the case, probably. But, if I could read a case

which has prevailed upon you, Mr. Chairman, to make a conclusion of law, I believe I could come more nearly seeing that case through your eyes than I would be able to do if I did not have that case pointed out for me. It would be very little trouble to add the citation of authorities which prompted the trial Judge to make the conclusion of law, immediately following that conclusion of law, and I would be very grateful for it. I do not suggest that you adopt a rule requiring it, but I do suggest that it would be very welcome, so far as I am personally concerned, if I could have it done. Because, naturally, the Supreme Court desires at some time during the investigation of the case to see that law suit through the trial Judge's eyes.

JUDGE SUTPHEN: In our practice, while we call upon the attorney for the prevailing party to prepare findings and conclusions of law, we also give to the opposing counsel the right to make objections thereto within a specified period of time, generally five to ten days. The opposing counsel then comes in and files objections to the particular paragraphs of the findings and conclusions that he has objections to. If there is then any question in the mind of the Court about it he calls for argument by counsel. After hearing the matter, the Court probably doesn't find it necessary to rewrite the entire findings, but there may be a paragraph that he finds it necessary to amend. That is our practice. If counsel for the opposite party makes no objections within the period allowed for objections, it has been my custom not to give them a very careful reading, but as a rule I simply sign them up, unless something comes to my attention that strikes me as being clearly out of place. I think it is the general custom in the other Districts.

Now, of course, in regard to the conclusions, they are generally based upon briefs that have been submitted, and those generally mention the authorities submitted. Those briefs will be available to the Supreme Court as well as the District Court, and perhaps the subject will be briefed more extensively when it appears before the Supreme Court. I know it would be quite a job to list all the authorities that we might rely upon in support of any particular conclusion.

JUDGE WINSTEAD: The practice in the Third District is that the authorities on which we base our conclusions are contained in that system which has been so criticised, known as the memorandum opinion. As to the findings, in our District, and the same is true in the Fourth District, they are prepared by the prevailing party, and then the other side is given five days to make objections, and if the court is satisfied with the findings which have been prepared they are adopted. But, often they are amended and corrected and changed.

JUSTICE MORGAN: I know that is true in the Third District. But, I know when I was in the practice there were Districts where giving of notice was not required. With respect to the memorandum decision, it is a good thing, no doubt, but the difficulty is the legislature doesn't recognize it as any part of a law suit.

JUDGE WINSTEAD: Where the memorandum decision goes up it is unnecessary to annotate the conclusions of law.

JUSTICE MORGAN: Where there are numerous decisions, if there should be one that you consider especially worthy it would be a nice thing to have that pointed out in some fashion or other.

JUDGE PORTER: We give five days after the proposed findings are submitted to opposing counsel. I appreciate the objection raised by Judge Morgan, and it has occurred to me that the better practice is for the trial Judge to point out pretty definitely in his memorandum decision the ultimate facts that he finds in order to guide counsel in the preparation of their findings.

JUDGE SUTPHEN: Well, that is generally done in our memorandum decisions. But, as I understand, the legislature has not recognized the memorandum decision as any part of the case.

JUSTICE MORGAN: I wish that in case a memorandum decision has been rendered it could be incorporated in the judgment roll. It would be highly desirable. It is true it finds its way into the transcript.

JUDGE McDOUGALL: Why isn't the memorandum a part of the minutes? Suppose you call it a minute, instead of a memorandum?

JUSTICE MORGAN: Well, aren't the minutes, Judge, more in the nature of the proceedings of the trial? If it could be made, in any way, a part of the judicial proceedings I should certainly be very glad to be governed by it, and wherever it contradicted the findings, in view of the fact that the findings are not always made by the Judge, I would prefer to have him say he believed such and such testimony, than to get it from the findings.

JUDGE STEVENS: Judge Morgan, even though it is no part of the judgment roll, if you find it in the transcript of course there would be nothing to stop you from considering it.

JUSTICE MORGAN: I suppose not. It is the findings of the court and his conclusions of law.

JUDGE STEVENS: I cannot speak for other Judges, but I read them over carefully and counsel has an opportunity to object to any finding. I know of no District where that practice does not prevail. In writing my memorandums I require that the findings be prepared by the attorney for the successful party, and copies served upon opposing counsel at least five days before being presented to me for signature. I think Rule 10 of our rules in the Sixth District requires that. I really wish we had some way of citing those cases for your benefit, so that you might get our viewpoint.

JUDGE WINSTEAD: They are incorporated in the memorandum.

JUSTICE MORGAN: Yes, but you don't invariably submit a memorandum.

JUDGE WINSTEAD: I do.

JUSTICE HOLDEN: Doesn't the successful party always cite those cases which are in the memorandum decision in his brief on

appeal. I would presume that the cases cited by the trial Judge in his memorandum were applicable, and I see no reason why the successful party wouldn't carry those cases in his brief on appeal.

JUSTICE MORGAN: Unfortunately, you have all manner and type of lawyers. I can name you lawyers as to whom there is no way of forecasting what they will put in a brief.

JUDGE WINSTEAD: I think there are times when cases are presented when it is up to the Judge to make an investigation as to the authorities.

JUSTICE MORGAN: I may not be accurate about it, but speaking of the custom in the Eighth District, I have heard the complaint made that findings are not served upon adverse counsel, and, at times, the losing party will slip up and get findings and conclusions signed. I don't know what the truth of that may be.

JUSTICE AILSHIE: I have had experience in that District, and I have had findings served on me that had already been signed, and the first I had ever heard of the findings was when I got a copy of the findings that had been signed.

JUSTICE MORGAN: That should not be done.

JUDGE SUTPHEN: I notice we have the subject Shorter and Clearer Instructions to Juries. I expect all of us wish we could shorten them. I haven't any solution to the problem. Every time I have made an attempt to shorten up my instructions, and try to make them clearer, and think that I have an ideal set of instructions, counsel comes in with about three times as many requested instructions as I contemplated, and by the time I get through it sounds worse to me than it did before.

I had this experience: We had quite a number of stock instructions that came down to me from my predecessor, and I took it on myself to eliminate some of the repetitions and shorten up the instructions to about half their former contents. However, I found that this is what happened: Counsel got wise to it, and took my old stock instructions and presented them as requests. I have counsel right now who, every time I attempt to use my present shortened forms of instructions, get out their old instructions, and they have everything in their requested instructions that I left out. So that I didn't have much success on that. If anyone has any suggestions on this subject of how we can simplify our instructions I would be very glad to hear from him.

I think that anybody who sits back in the court room and listens to the reading of the instructions in the average damage case would have a very poor idea of what the law was; and I can't see how a jury can have a very clear idea of the law of the case, after hearing the instructions read in the average damage case. By the time they have heard the various instructions on the law of negligence, and contributory negligence, and last clear chance, and all of the various other legal points that have been raised, their minds cannot help but be confused. In the average damage case—and I suppose the other Judges have had the same experience I have—I find that fifty or

sixty instructions is about the rule, and I do not believe the jury can absorb it—I know I cannot—on the first reading. I read them three or four times before I understand what it's all about.

I am very much dissatisfied, to tell you the truth, about the matter of our instructions we are giving to juries. I am not only dissatisfied with my own, but I am dissatisfied with other instructions that I have read in other cases in which I have seen transcripts. I haven't any suggestion in mind, but I do think that eventually we should get away from our practice of giving instructions, and that we should eventually change the law, and have a practice very similar to our equity cases where the jury finds certain questions of fact, and they are not required to read long briefs—you might say—on legal subjects which are beyond them and which they cannot possibly understand without more study than it is possible by just hearing the instructions read.

The next proposition that we have listed is Suggested Reforms in Practice and Procedure. I wonder if anyone has any suggested reforms that we should submit to the Bar or to the legislature. I appreciate that we have this job to do on the first day of July of each year, to submit them to the Chief Justice. Occasionally I do that, but more often I forget to do it. Unless one keeps track of every case he is liable to find at the time of making the report that he has forgotten many of the points that he might have had in mind otherwise.

JUSTICE MORGAN: So far as I know, you are not out anything by forgetting, because the suggestions are always incorporated in the proposed amendments of the Supreme Court and delivered to the Governor, and up to the present I have never been able to trace one of those suggestions beyond the Governor. It never gets to the legislature, apparently. So, I imagine we may as well forget it, or else deliver a copy to the judiciary committee of each house.

JUDGE SUTPHEN: Well, I think it is our duty as Judges to bear that in mind, and to make our suggestions that we may have, from time to time, and that we should mail those in to the Chief Justice on the first day of July.

JUSTICE MORGAN: I wish we had a practice in this State whereby judicial procedure were a matter of court rule, uniform court rule throughout the state, rather than a matter of legislation.

JUDGE STEVENS: I was just telling Judge Winstead about trying a case involving the foreclosure of an attorney's lien. The attorney's lien attached back in 1930, and the work was not completed until 1933. In the meantime the property had been mortgaged, and the question was whether the mortgage lien was superior to the attorney's lien. There is no statute with respect to the filing or the foreclosure of an attorney's lien. It seems to me an attorney's lien should be recorded. The mortgagee had no notice of attorney's lien; he had no actual notice; and the filing of the attorney's lien did not constitute constructive notice because it is not required by the statute that such a lien should be recorded; and he made the loan

without any notice of the attorney's lien. There should be some proceeding to protect persons who are loaning money on property, or buying property. There is no method now by which it could be done, that I know of.

JUSTICE MORGAN: That is right. There should be some method of protecting the attorney, as well as the public.

JUDGE SUTPHEN: Going back to the matter that you suggested a moment ago—that is, the power of the Court to regulate procedure. I think we had a discussion on that at the last meeting of the Bar, as to the power of the Court to modify and to enact rules of practice and procedure. I gained the impression that that right was fundamental with the Courts but that we in this State had just allowed the legislature to take over that responsibility, and the result is now that it would be difficult for us to take it away from the legislature, unless we had a legislative enactment which would reinvest it in the Courts.

JUDGE COWAN: That could be done by a constitutional amendment.

JUDGE SUTPHEN: It wouldn't take a constitutional amendment, would it, Judge?

JUDGE COWAN: Well, it might, under the practice that has grown up in this country from the beginning. Courts should be authorized by the constitution to prescribe rules of procedure, and legislatures, composed of two-thirds to nine-tenths laymen, should not be permitted to change the rules of procedure. There are so many amendments or changes in the statutory procedure at the behest of some man who has neglected something sometime or other, by missing a requirement of the statute, that has knocked him out of court, and he thinks that ought to be changed. Those changes should be made by professional men, men who understand the business, and who can make the changes, where one change would necessitate the changing of something else, to make it harmonious. I think the constitution should be amended so that the matter of procedure should be controlled by the courts, where it was originally intended to be, and where it ought to be; and then a law should be passed requiring the Justices of the Supreme Court and the Judges of the District Courts, together with perhaps a few selected practitioners, to meet once a year for the purpose of perfecting the procedure.

JUSTICE MORGAN: In addition to that, let me suggest that the Board of Pardons be required to meet with the Judges, and see if they cannot get together on some kind of a uniform system of punishment for crime.

JUSTICE AILSHIE: A year ago I suggested in a paper to this association, and cited a good many authorities to support it, that the courts have the power to make rules for the conduct of the business of the courts. And further suggested that it has been done elsewhere, under similar constitutional provisions, and could be done here if the legislature would pass an act authorizing the Supreme Court, either through its Justices, or in cooperation with the Judges of the

District Court, to adopt uniform rules throughout the state, and to have supervision and control in matters of practice and procedure. And I think I quoted a statute, probably from Colorado, or the state of Washington, in that paper. This, in my judgment, is the way to handle this thing, to have uniform rules, to have the benefit of advice and counsel, not only of the Justices already there, but of a representative body of the trial Judges, to promulgate those rules and regulations.

JUDGE SUTPHEN: That contemplates the Supreme Court would probably announce to the Bar that they contemplated certain changes, and then there would be a hearing before the Supreme Court on the changes? I think that the rule, as suggested at your talk last year, provided for the turning over of the rule making power to the Supreme Court to make rules of procedure and practice, and modify any existing legislation.

JUSTICE AILSHIE: As I recall, I quoted in that paper the Washington statute, which is the same as the Colorado statute, and referred to the decisions of the courts of those respective states upon the statute which authorizes the Supreme Court to promulgate rules of practice and procedure to prevail over the state. I examined the authorities very carefully before preparing the paper.

JUDGE COWAN: Wouldn't the difficulty with that situation at the present time be this: That the legislature would consider an act of that kind an abandonment of authority on their part? And wouldn't you be liable to meet up with the further trouble that a subsequent legislature might come in and try to retract the authority that they had already given? You would be in a continual state of difficulty over that, if one legislature did not look at it in the same light as another legislature looked at it. If the matter were fixed by constitutional provision, then there could be no question about it; there never would occur any quarrel between the legislature and the independent judiciary branch.

JUDGE SUTPHEN: Logically, all matters of procedure and practice should be under the control of the Court, and finally the Supreme Court should determine those questions, and any amendments, of course, should be made after hearing is had.

JUDGE COWAN: A yearly meeting of the Justices of the Supreme Court and District Judges, for the purpose of making changes, could keep fairly well abreast of the matter.

JUDGE SUTPHEN: I should think that in a case of that kind there probably should be a committee appointed whose duty it should be to make the suggested changes that should be submitted to the Supreme Court, and then a hearing provided in which counsel generally could file objections, and after consideration then have the matter finally determined by the Court, for the more important matters of practice and procedure.

JUSTICE AILSHIE: The Supreme Court has been operating in Washington, and apparently they have had none of the difficulties which Judge Cowan anticipates there. They are operating under that

form of statute, and the Supreme Court of the state has promulgated the rules of practice and procedure for all the courts of the state.

JUSTICE MORGAN: It would be much easier to get an amendment of the statute, which requires a majority of each house of the legislature, than it would be to get a constitutional amendment submitted.

JUDGE COWAN: The only practical way that could be done would be by a constitutional convention. Whenever a constitutional convention is called that matter ought to be taken up and incorporated in the constitution.

JUSTICE MORGAN: Dovetailed into this question is the suggestion that we ought to take some steps to get a more representative body of the Judges to attend these meetings.

JUDGE WINSTEAD: Along that line, Judge, it seems to me that our section the last couple of years has been a flop. I think this is the wrong time of the year to have this Judicial Section meet. Some of the Judges are on vacation, and we can't expect those men to give up their vacations. It seems to me the proper time for these meetings is in January, at Boise, with the Supreme Court, and that the Judges of the District Court should be required to attend, and be allowed their mileage. And then, whatever is agreed upon that January session, a committee can be appointed to present the findings of this section to the State Bar at their summer meeting. In that way it assures the attendance of at least a majority of the Judges of the state. We haven't half of the Judges of the state here, and we can't act on anything.

JUDGE TAYLOR: Mr. Chairman, it seems to me that perhaps that suggestion of Judge Winstead's could be carried out by modification of the statute referred to a few minutes ago, which requires the District Judges to report to the Supreme Court, and the Supreme Court to the Governor, such defects in the laws as come to their attention. If that could be handled to the legislature in the form of an act amending that section of the statute, and providing that these meetings be held in January, at Boise, I believe the legislature would be quite receptive to an amendment of that kind.

JUSTICE MORGAN: If the Judges of this state will get behind these recommendations as nearly unanimously as we can, I am sure we can get the Governor to incorporate it in his message to the legislature, and we ought to be able to get them adopted without very much trouble. We have always mailed the recommendations of yourselves, and our own, to the Governor, and not waited upon him personally, and the result is they have been overlooked, or lost, or maybe he never saw them at all.

JUDGE WINSTEAD: I think a whole lot more could be accomplished at such a meeting. There is no use taking the time in these meetings, unless we accomplish something; and we cannot accomplish anything unless the boys are here. We have a better representation here now, however, than we had last year, I believe.

JUDGE TAYLOR: I move adoption of the following resolution:

Be it resolved that the legislative committee of the Idaho State Bar be requested to draft an act to be presented to a future legislature providing for an annual meeting of the District Judges with the Justices of the Supreme Court, at some appropriate date in January, the date to be fixed by the Chief Justice, for the purpose of discussing and acting upon proposals for legislation intended to improve and simplify the practice in the courts of the state; and providing that it shall be the duty of the Judges and Justices to attend and take part in these proceedings, and that their actual expenses be paid out of the State Treasury as their other expenses are now paid.

JUDGE SUTPHEN: Those in favor of the adoption of the resolution signify by saying aye. Those opposed, no. The ayes have it, and the resolution is adopted.

Gentlemen, have you any other matters for discussion, or any other actions that you want to take?

JUDGE TAYLOR: Mr. Chairman, Doctor Warner is here from the State Hospital South.

JUDGE SUTPHEN: Doctor, we are pleased to have you here. We will be very happy to hear from you.

DOCTOR WARNER: Mr. Chairman, and gentlemen. I want to express my appreciation for what you are trying to do in dealing with those unfortunates whom alcohol has gotten the best of, and whom you send to us. I desire to say that we are doing what we can, not to just keep these men for troubling their communities, but we are doing all we can to cure them of the curse. We are trying to deal with those men in a way that we can return them to you, and to your communities and to their homes and families with the capacity to really meet the temptations that come to them and live as good citizens, and we desire to cooperate with you in every way possible. We hope to be able in a short time, and we are trying now, to look after these men to some extent after they return to their communities; paroling them out to individuals, and we will be giving them some supervision during that time that we may help them adjust themselves and find it is possible to live normal lives.

I court your counsel in dealing with these men. You may please call upon us for any service we can render, and we court your fellowship and cooperation.

JUDGE SUTPHEN: Thank you, Doctor.

Doctor, what time do you find generally is necessary for the cure of these cases?

DOCTOR WARNER: Personally I have not had experience enough to answer that intelligently. I have read some on the subject, but not enough to pass judgment. My personal opinion is that those men can be compelled to stay there too long, as well as too short a time. If they are compelled to stay there too long they are apt to have a feeling that it is not for the purpose of a cure, but as a penal matter, and their reaction is apt to be unsatisfactory. If we have some way whereby we can keep them until we feel they are

competent to return to society, and then give them supervision after they return, we think that that perhaps is better than to try to keep them all the same length of time. The length of time is dependent to some extent on the circumstances in each case. Some require a great deal longer. Then there is a great deal of difference in home conditions, and an individual who has adjusted himself so that he can live in comparative ease with us may not be able to return to certain situations under which he lived before. I should say that the condition at home has a great deal to do with the length of time he ought to stay; and, personally, I think we have some responsibility in finding a place where he can straighten up. Frequently the home community is the wrong place for him. Some times we might be able to parole them to some other neighborhood where they would be free from these temptations. But, as to the length of time, I think that should be determined from each case. And I think they ought to be under supervision after they come out.

JUDGE SUTPHEN: As I recall the law it provides for confinement in your institution not exceeding two years, and that it may be any time in between. But, your institution has the power to parole them at any time that you may see fit.

DOCTOR WARNER: Some of you send them in with definite sentences; some of you say they are subject to the usual rules in insanity cases; and others of you say nothing about it.

JUDGE SUTPHEN: The law specifies that you must fix a definite period.

JUDGE WINSTEAD: The trouble in the past has been lack of supervision after they have been paroled. I feel if we would follow up the general situation by a supervised parole that the time that has been spent down there might have accomplished something.

DOCTOR WARNER: I have the same feeling about that, Mr. Chairman, in reference to these cases and the cases of ordinary insanity, that we make a great mistake by not giving those people supervision when they come out. I myself am trying to do something on that now.

JUDGE SUTPHEN: Thank you very much, Doctor.

Gentlemen, were there any other matters that you want to discuss at this meeting? If not, we will stand adjourned.

ATTENDANCE REGISTER

Otto E. McCutcheon	Idaho Falls
George L. Ambrose	Mackay
P. J. Evans	Preston
L. E. Glennon	Pocatello
Ben B. Johnson	Preston
O. A. Johanneson	Idaho Falls
E. A. Owen	Idaho Falls
Donald A. Callahan	Wallace
D. H. Sutphen	Gooding
J. W. Porter	Twin Falls
C. W. Poole	Rexburg
Pendleton Howard	Moscow
Frank Griffin	Kellogg
F. C. Keane	Wallace
Wm. M. Morgan	Boise
Laurel E. Elam	Boise
Grant Soule	Dubois
P. M. Condie	Preston
Chas. C. Shaw	Pocatello
Clyde Bowen	Pocatello
Hugh Redford	Rupert
A. H. Neilson	Burley
J. L. Eberle	Boise
E. B. Smith	Boise
Carey Nixon	Boise
Chas. E. Winstead	Boise
W. H. Davison	Boise
A. L. Morgan	Moscow
Frank E. Meek	Caldwell
Harry Benoit	Twin Falls
John T. Kenward	Payette
Thos. Y. Gwilliam	Emmett
Murray Estes	Moscow
Paul W. Hyatt	Lewiston
Marcus J. Ware	Lewiston
D. E. Rathbun	Idaho Falls
S. H. Atchley	Driggs
Fred W. Wilkie	Idaho Falls
A. H. Wilkie	Idaho Falls
W. Lloyd Adams	Rexburg
Ezra R. Whitla	Coeur d'Alene
Wm. S. Hawkins	Coeur d'Alene
John W. Graham	Twin Falls
D. K. McLean	Soda Springs
J. P. Thoman	Twin Falls
Mary Smith	Rexburg
Roy L. Black	Pocatello
Sam S. Griffin	Boise
Kenneth S. MacKenzie	Idaho Falls

A. A. Merrill	Idaho Falls
L. H. Merrill	Idaho Falls
Carl C. Christensen	Pocatello
E. V. Boughton	Coeur d'Alene
Fred H. Snook	Salmon
Faber F. Tway	Idaho Falls
Edward Babcock	Twin Falls
Robert M. Kerr, Jr.	Rexburg
Edward V. Davis	Idaho Falls
A. H. Christensen	Boise
S. T. Lowe	Burley
Paul T. Peterson	Idaho Falls
T. D. Jones	Pocatello
Alfred Budge	Pocatello
R. J. Dygert	Soda Springs
Arthur W. Holden	Idaho Falls
T. W. Smith	Rexburg
C. W. Thomas	Burley
Geo. H. Scatterday	Caldwell
Walter H. Anderson	Pocatello
J. F. Martin	Boise
Paul S. Boyd	Buhl
A. F. James	Gooding
H. Mark Earl	Idaho Falls
H. Wm. Furchner	Blackfoot
John R. Black	Montpelier
C. Wallsen Lyon	Salmon
Stewart S. Maxey	Caldwell
Frank M. Rettig	Jerome
Dwight Disney	Idaho Falls
Alvin Denman	Idaho Falls
Ezra Parkinson Monson	Blackfoot
J. H. Andersen	Blackfoot
E. M. Wright	Idaho Falls
C. T. Cotant	American Falls
W. C. Loofbourrow	American Falls
Ralph R. Breshears	Boise
John A. Cannon	Pocatello
Gus Carr Anderson	Pocatello
Wm. S. Holden	Idaho Falls
James F. Ailshie	Boise
E. J. Soelberg	Idaho Falls
Isaac McDougall	Pocatello
Dana E. Brinck	Spokane, Wash.
Frank L. Stephan	Twin Falls
B. A. McDevitt	Pocatello
O. R. Baum	Pocatello
Finis Bentley	Pocatello
Dale Clemons	Boise
J. H. Blandford	Twin Falls
P. B. Carter	Boise

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