"The Mid-20th Century Lawyer"

Remarks

By

Hon. R. E. Freer, Chairman
The Federal Trade Commission

Installation Banquet
Phi Alpha Delta Law Fraternity

At the Refectory of the University

The University of Richmond
Richmond, Virginia.

Friday, October 29, 1948.

This is a very happy occasion. It is a great pleasure to be here to witness this marriage of the two cultured and respected friends whom we honor tonight. Each for decades has played a stellar role in the play of dynamic forces giving shape to America's way of life. Such was the identity of direction, that it was written in the stars that one day the paths of the Law School of the University of Richmond and the Phi Alpha Delta Law Fraternity would join.

The prime goal of each is to promote better citizenship and better social institutions. High on this agenda is an interest in the progress of the legal profession. Being a member of that profession I will stick to my last. My topic is, "The mid-20th century lawyer."

I pass quickly over the many things concerning the lawyer that our friends and neighbors take for granted. For instance, the legally trained almost invariably are active and articulate participants in the economic and social life of town and country. Likely having served with distinction in one or both of the global conflicts, Mr. Average Lawyer, a civilian again, gives his time to charitable enterprises and religious affairs; and he exercises conscientiously his right to the ballot. He is part and parcel of a mature, vigilant and enlightened electorate. His debates, altercations and contentions, whether expressed in the courtroom, on the stump around the hustings or in the town meeting, help mold public opinion. Any school child knows that from one Esquire's clashes in the courtroom with his brother Esquire on the opposite side of a case, many of our basic truths have evolved, as translated by another brother lawyer - His Honor on the bench. Moreover, this mid-20th century pattern represents no departure from that of earlier centuries. For instance, the history of the 18th Century records that 26 of the 55 signing the Declaration of Independence were lawyers and that 31 lawyers made a substantial majority of the Constitutional Convention's total membership of 55.

Our friends and neighbors evince varying degrees of interest in lawyer-brothers of the practitioners and judges. I refer to the lawyers who sometimes head and help to staff the State and Federal governmental agencies created largely during the last three decades of expansion

in use of the administrative process. These commissions and boards have been created to protect rights and to interpose obstacles to wrong doing. Because a particular decision or adjudication involving close questions respecting the application of public policy may affect the aspirations or asserted rights of innumerable interested parties, these decisions, on occasion, may become the subjects of widespread public discussion. However, the administrative agency is designed to insure continuity and uniformity in the application of law through competency derived from specialized experience and concentrated study. As a legal institution it has so stood the test of war and peace that its place in our jurisprudence seems to be assured. In fact, continued utilization of administrative processes appears to be inevitable.

The legally trained are keenly aware of the ethical responsibility which the public trust imposes. Hence, the continuous sharpening and refinement in the selection process among candidates for a career in law has more than kept pace with the raising of standards in the other professions. Though advocates were a standing order in England prior to 1255, and barristers as early as 1291, they were the creation of custom, not statute. Early in the 15th Century, Parliament provided that none but "good and virtuous" men, "learned, and of good fame," should be examined, sworn and registered as attorneys, and that any such found in default thereafter "shall forswear the court." The substance of this British statute had its origin in French and Roman law but it came to the New World as part and parcel of the Common Law which served as the foundation of our American Law.

The number of lawyers in the States at the close of the Revolution has been variously estimated at from 300 to 700. By the middle 1880's the profession numbered 70,000 strong. Efforts of the profession itself, through the bar associations and the law schools, in gradually revising upward our standards have met with general public approval. In a very real sense the graduates of today's law schools have the requisite technical training to admit them to this finest profession in the land. Significant, too, has been the contribution of

the law fraternities in the undergraduate training of our legal rookies.

Every lawyer can contribute to maintain the high standards which the public has come to expect. All of us need an outlet broader than our day's work. Participation in the activities of local, State and National bar associations affords you such an experience. You will find friendly association and a medium for the exchange of ideas. Especially, the local association affords a channel in which to blow off steam. Such exchanges of ideas can go far toward divesting us of that characteristic which Mr. Justice Holmes attributed to judges and which Mr. Justice Douglas said lawyers incline to as well, by being "more likely to hate at sight any analysis to which they are not accustomed, and which disturbs repose of mind, than to fall in love with novelties."

In the bar associations you will find lawyers engaged in intelligent appraisal of proposals for procedural reform. There, in answer to social forces, sometimes is started the orderly movement of events which reshape some yet unconformed facet of the law to abstract justice.

Traditionally lawyers are rugged individualists. They are schooled to back their own decisions and to foster and depend on their own initiative. This may account for the fact that the percentage of participation in association activities is much lower in the law than for the other professions, medicine, for instance. Many of those not participating in organized activities, nevertheless, have acquiesced in, and contributed to, these advances.

One contemporary problem is as old as jurisprudence itself. Justice delayed is Justice denied; but summary judgment is no panacea. The 20th Century practitioner and his clients are the beneficiaries of substantial progress that has been made in the direction of speedy trial or hearing, on the one hand, and the full protection of the rights of litigants, on the other. Especially is this being achieved through increased emphasis on opportunity for pretrial conferences and settlements.

The availability of the former is encouraged also by the Administrative Procedure Act of 1946. The Act, I believe, is a landmark in the evolution of federal administrative law. As you know, it deals comprehensively with all phases of the administrative processes, including separation of prosecuting and deciding functions, evidence, rule making, appeal, and public information.

I had enviable opportunity to observe the impact of this legislation on the Federal Trade Commission where I have had the honor of serving for more than thirteen years and from which I shall resign before year's end in order to resume the practice of law.

The Commission, may I state in passing, is not a body determining disputes between litigants, but its primary duty is to preserve free and fair competition by preventing the use of predatory business practices in interstate commerce. Through the years following its creation in 1914 it had developed a procedure affording parties in formal cases full opportunity to be heard and had published its rules of practice, together with certain general policies by which it was guided. Hence, the Act brought no real revolutionary changes. It did, however, necessitate revisions, most of which referred to practices and procedures long in use but never reduced to writing. It caused us to analyze and evaluate most carefully such procedures and then express them in greater detail for the benefit both of counsel for respondents and applicants and for our own attorneys. Among others there were changes as to the form in which officers presiding at hearings were required to present their reports. Long prior to the Act the Commission had effected an administrative divorcement of its prosecuting and deciding functions. Necessary revisions in other respects were made as rapidly as possible, but some had to be postponed until effective date of the Act when legal authority thereunder was conferred.

There persists among lawyers of my age the same fond and fatherly interest which the elders of my law school days displayed toward me and my contemporaries as just prior to World War No. I, we were completing the academic phase of this indoctrination course we call the study of law. We more mature braves delight in reminding newcomers that unlike the ceremony of great dignity by which young American Indians of proved worth were accorded

the status of the Brave and forever after shared in the responsibility of tribal councils, no magic transformation occurs through survival of the trial by ordeal inherent in bar examinations. Presumably, older warriors already have reminded some of you that the young lawyer's prime function is to grow older and that like the law he is but a process and not the completed product. Additional testimony is that of an English barrister rich in maturity, achievement and clientele who observed that when young he lost cases he should have won and when older he won cases he should have lost; and summed it up by indicating that, thus, on the average, justice had been done.

The coals in the pipe of peace and friendship sometimes burn low in the tense atmosphere of court or hearing room. Although it has happened but rarely during oral arguments before the Federal Trade Commission, all judicial or quasi judicial officers at one time or another have viewed the awe-inspiring phenomenon that is an angry lawyer engaged in denouncing the social or economic objectives underlying a particular legislative enactment, or in challenging the more liberal rules of evidence that prevail in administrative proceedings. These grounds are being urged less and less frequently on appeal, as more lawyers become familiar with this field of the practice. Commenting on some practitioners whose participation in this field had been only occasional and who, therefore, had used the appellate court room for relief of resentment or tension rather than for factual and legal recitals, former appellate Judge Justin Miller said that:

> "Perhaps it would make them happy to know that we have heard many times, and from many experts, about 'star chamber procedure', the 'dictatorship of the bureaucracy,' and the passing of 'the rule of law'. If we could stipulate with counsel that we take judicial notice of all these arguments, it would save us an occasional earache and save such counsel much time for oral argument."

Peter, the Great, as a 17th Century visitor to London was amazed at the number of lawyers at Westminster Hall. Reports have it that he said there

were but two lawyers in all his dominions and that he had made up his mind to have one hanged when he got home. A past president of the Colorado Bar Association, no doubt, was relying on other and more recent evidence when he said, "The lawyer is the product of democracy. When dictators seize power, they liquidate the lawyers. They want no lawyers to be in the way by asserting the rights of citizens." Rightly called the "soldiers of our civil life" the contribution of the legally trained to the maintenance of democratic institutions has been enormous. This influence has been important abroad as well. Past president Lashley of the American Bar Association last year made a trip to France, Italy and Germany to tender the understanding and aid of American lawyers to their brothers overseas, upon whom Europe must depend for preservation of these ideals.

As to the shape of things to come, I believe that increased public confidence and respect will inure to our legal institutions, provided we steer our course on the beacon of our duty as officers of the court, avoiding the shoals of crass commercialism, a commercialism so aptly illustrated by a humorous comment made a year ago at the American Bar Association meeting in Cleveland by my British barrister friend, Member of Parliament and former Counselor of the British Embassy in Washington, Brigadier John Foster. He had for his topic the subject, "The Barrister in Parliament" and he stated that there were not many of them in Parliament, perhaps because, too often, too many people passing the Inns of Court on a warm day might have overhead one barrister in conference with another say, "What, settle the case and see the estate frittered away among the beneficiaries"?

Far from being a thing separate and apart, the bar as a matter of fact is a splendid index to public virtue. Corruption of its standards inevitably would infect the whole body politic. I shall conclude with a reference to our trust so well spelled out by former Chief Justice Hughes, when he described as follows democracy's stake in the bar:

> "With a sound, courageous, and independent bar, a foe of demagogy but a friend to rational improvement, vindicating its expert leadership by intelligent conception of the interests of the community, and by its zeal for the better administration of justice which is its especial care, democracy will not essay its tasks in vain."