

S P E E C H

Phillips Brooks House Association

April 5, 1935

For the kind remarks of Mr. Frankfurter I am, of course, most grateful. The only reason I have for not launching into a fervent discourse on why I hold him in semi-idolatry is because it would look out of place to start the proceedings on the basis of a mutual admiration society. However, I am sure that I know the explanation for the unusual warmth of the introduction, or at least I suspect it. The thought occurs to me that very likely Mr. Frankfurter has found out that only yesterday I bought his case book on Administrative Law for \$7.50 in cash and this is the receipt. Mr. Frankfurter is intelligent enough to show his gratitude to the only human who ever purchased his book who didn't have to.

Since the custom made scientific by Cicero still holds its vogue of attempting to render one's audience benevolent at the start --- I shall begin with a story --- a story to indicate that life in Washington for all its intensity has a lighter side. The story is a true one and from another angle might appear semi-tragic to be entitled "The New Deal - Another Great Leveler".

The mail man recently produced from our fan mail a communication signed by Mc-Ginty-- not "iron man" McGinty, but possibly "ladies' man" McGinty. I attest the following to be a true copy from our files.

"I will thank you to mail to me the necessary forms upon which to make application (if required after reading following) for the privilege of permitting a group of ladies to create a stock company under laws of Texas.

"It is to be a small organization of their own so that they may in an orderly and lawful manner, assemble their funds to employ an oil well drilling contractor, to make some small "stripper wells" in a nearby old oil field.

"They expect to issue one share of stock to each lady that pays \$5.00 into the treasury. It will require a total of \$16,000.00 to pay for the making of ten wells on the Lease, so their capital stock will be for that amount.

"A comfortable observation platform will be erected near the site of operations so that as many as a dozen ladies at a time may be on hand to observe the operations as the wells are made. A reliable lawyer will guide them in the conduct of their corporation.

"All necessary information in connection with this matter will be appreciated.

(Signed) Chas. F. McGinty"

I was asked to give a title to my remarks and tentatively suggested, for want of a better one, "A Lawyer's View of One Phase of the New Deal". That was intended as an anchor to windward and had not reached the stage of finality when I left Washington for a short vacation. Reading the Boston papers last Monday I found that the pressure on my secretary while I was away for an answer

to Mr. Ames' letter had been irresistible and so my tentative title became a binding one. Now I have an aversion for titles because they impose such restrictions of logic and relevance. What you say may be valid, authentic, entertaining, witty, profound, or flattering, but the audience has constantly in mind your title. I thus come here fearing most of all that your judgment will be (*bene cantas sed extra coram*)- that I have sung well but outside the chorus.

Before I launch into the particularities of the field I now work in I should like to make a few general observations. Not so many years ago I attended similar gatherings under the auspices of Phillips Brooks House and if I bore you, my culpability is unpardonable, because I and the other students were bored almost to extinction by the stirring tales of the insertion of a tricky default provision in the South America 6's of 1924 (incidentally the victim of the trick has turned out to be a cancellationist or at least a revisionist). Prominent New York lawyers came to us in those gay 20's. They were the heroes of halcyon time who, thought never in a court room, with the touch of Midas made one dollar of value multiply geometrically, their relative standing being measured by the size of the army they employed. I recall vividly on at least two occasions that most of us avoided the tedium and the risk of a snore by our desire to look wise while the mysteries of outsnaring the other fellow were being unfolded. For this reason I shall not attempt to expound the new science of interpretation which the Securities Act of 1933 and the Securities Exchange of 1934 have

produced. There is no place here for a technical discussion of the details of our daily work. I hope rather to give here a brief message of reflections about the law in general from an experience that has embraced several distinct viewpoints culminating in one phase, and I might add one of the most important phases of the New Deal.

In September, 1929, while I was here on the faculty I had the privilege of hearing a most illustrious graduate of this school, the late Joseph P. Cotton of the Class of 1900, former New York lawyer, and, at the time of his death, Under Secretary of State. He gave the address in this very room during the ceremonies attending the opening of the new Langdell Hall. In this talk the speaker reviewed the history of the school and its important effect on the recent history of American law. In keeping with the established tradition Mr. Cotton paid deserving tribute to Dean Pound's great contribution to contemporary jurisprudence in his insistence on the view that one should look at the whole field of the law, in particular to find how far the law so set up and enforced constitutes the accepted rule of conduct of the people-- a living justice in the land."

And then he dealt with the significance of this new Langdell monument with its breath-taking proportions. He called it an experiment of great promise and closed with a fervent prayer that in the stereotyped life that surrounded us, the law school might prove to be a strong and pervasive force for temperate, considerate individual opinion.

Reading the speech anew fortifies one's conviction that Mr. Cotton was more than a great lawyer. The fundamental tone is semi-tragic, even in those days of frenzied color of pre-October '29. What impressed me then impresses me now in rereading it-- no pompous glorification of our lady the common law but rather a reluctant admission that with all the fine sounding flattery the common law system was woefully weak. Let me give his exact thought:

"A SCHOOL OF LAW RESEARCH

"The other great danger of the experiment (referring to the ambitions of Harvard Law School for research) is that the research is to be carried out in so large measure by men with common law training. The danger is not that they will use the common law method-- the application of reason to causes as they arise. The danger is that law teachers are steeped in common law and respecters of its authority. They have grown up in an atmosphere where it has been customary to solve problems by looking back to the orderly processes of the English common law. That tradition has always been extraordinarily potent among English-speaking lawyers. It does not come from argument or reasoning, but the ingrained habit of daily discipline and of attachment to accepted doctrines of youth. Men who sat under Ames and Thayer could never believe that mastery of the common law was mastery of a perfection of human logic, but the doctrines of the common law did come

to us as things to be accepted, and they were accepted by us. Yet--and here I speak only for myself-- my subsequent experience has not enabled me to hold for the science of the common law a reasonably orthodox respect. There is some danger that the teacher in any school of law research who is at the same time teaching the common law will instinctively go through a process of selection and interpretation of such portions of the common law as seem to him personally to have a peculiar value. That is, he will be weighing the common law, and rejecting part of it on the basis of his own personal experience, but in that process he will still feel the authority of the common law traditions of his youth and of his daily work. Perhaps I exaggerate the danger in the work of preparing to change the American common law reasonably to fit the conditions of modern life. Obviously the learning of the common law will throw great light. What I am emphasizing at the moment is that it also casts deep shadows."

The common law of torts, based on conceptions of the conduct of an abstract prudent man (interpreted through the personalities of jurors), seems a poor guide for conduct or responsibility in a motor-driven age. The common law of contracts has a real place in mercantile law, but it seems a joke in a standardized age to expect it to govern the status of the tenement dweller vis-a-vis his landlord, or the relation of the ordinary investor who buys securities blindfold from his banker, or the status of the factory hand in industry. Who of us thinks criminal procedure in the United States is a wisely planned system? Any intelligent attempt to remake the law so that it shall reasonably apply to modern life in a machine age must, it seems, begin by scrapping the foundation principles in many fields of the common law and by the conscious avoidance of those common law principles which have been greatly affected by individualistic doctrines of economics.

Perhaps I stress the danger too greatly. Certain it is that in no other law school has the danger been so soon ascertained, so much understood, as in the Harvard Law School.

I would like to add my humble testimony to a thesis that can never be popular. The automobile brought more litigation than any phenomenon of modern life. The common law up to date furnishes no workable solution for this vexing problem. I speak out of a concentrated experience that I think is broad enough to make generalization a safe process. The search for

fault in our automobile trials is a most elusive one. The disproportion between the capacity of the human eye to see, the ear to hear and the memory to retain, and the intelligence to reproduce, and on the other hand the swiftness of the few events that make the causative factors of a modern collision, upon reflection indicate the futility of the common law method of trial. When added to this inherent difficulty we have the delays from the accident to the trial, so characteristic of modern jury methods, justice in a real sense cannot prevail. Add to that the unfairness of contributory negligence, particularly when applied to pedestrians, the inherent difficulty in standardizing our tests of the prudent man, and in the field of Tort at least, Mr. Cotton's disrespect can be appreciated. It has been wittily remarked that there are always three collisions - the one in which the parties are hurt, the one that is tried to a jury and the one that appears in the printed record for appellate review - all of them different.

Of the commercial field one has but to regard the tremendous growth in arbitration to appreciate how impotent the legal technique has been to meet the needs of our specialized way of living. The persistence of the old-fashioned jury method, particularly in large cities, accounts in a large way for this commercial ostracism of the law. My experience on the bench convinces me that the jury method for complicated commercial problems is an unscientific one. The outcome of the trial, too much of which our rules of evidence make into a

battle of wits, may depend upon a hundred and one irrelevancies, most of the time upon the competing personalities of the advocates. I discussed this matter with Mr. Justice Brandeis and was surprised to find his faith undimmed in the jury process for civil causes. He said that many of the criticisms are referable to evils of the system and not to the system itself. His own wide experience made him feel safer before men whose prejudices tended to upset one another than before a single justice behind whose mask might lurk unsuspecting slants of strong emotion. The law governing the status of landlord and tenant, and perforce I speak particularly of the law of this Commonwealth, though I am certain the same observations could in general be made of the law of other jurisdictions, contains a mass of intellectual rubbish and the explanation is an obvious one. The landlord made law of the beginnings of our system has retained its "tough consistency" despite the centuries of ameliorating statutes which have adopted new analogies, new legal concepts. The underlying conception of the estate in the land gives a ridiculous tone to the modern problem of a skyscraper. The feudal lore of Lord Cole's time, I submit, ought to be of little importance in adjusting rent disputes of a modern urban society. In this branch we pay too high a price for our devotion to precedent. In Massachusetts there are super-logical judges. We have certainly turned our backs on the common law in the modern protection afforded the investor - caveat venditor - must hereafter be the watchword. The Acts we administer are scintillating examples to prove the inadequacy

of the common law. The individualistic hard-boiled immorality of the ancient law logically applied could see no reason for adjusting the odds between Harry L. Doherty, Samuel Insull and the widows and orphans. The technique of the old law we must use, - we can't escape it, but a new and different spiritual influence obtains in the modern legislation. The law has caught up with morals. When one speaks about the common law casting deep shadows I know exactly what is meant in the field of administration. When a new problem confronts me invariably I search for an analogy in the cases I have studied out of the technique of the common law. I feel helpless without some recourse to what my legal educators taught me. This is a natural and understandable course of conduct, but when applied to the administration of a complicated set of rules for regulating a complex modern business, the common law technique soon becomes a handicap. That human desire to make of the law a perfect fitting mosaic spells failure when applied to the rule-making power of a modern administrative agency. In the young men of the better law schools, I find this defect a constant one. The business of administration, of getting things done, of making compromises, of developing the art of judgment--all these qualities are seriously lacking in the mind produced by the case system. Let me not leave the impression that I would scrap the common law, rather would I have it purged in the light of a new learning, a different culture, and a novel sociology. I

would lessen the emphasis perhaps on the technique of decision but lest you assume from this that I am a traitor to my profession, I hesitate to add a note of praise. It is the common law which will continue to furnish to our system of justice many of its principles. The great expounders of our legal system divined that facts alone are dead inert things of no value unless vitalized by fundamental principles. Much of the jurisprudence of realism that has been written in the last decade is self-deluding. It is not of much value to reduce the field of the law to a series of interests or claims of human beings that have conflicted and have been given varying recognition. Unless we realize that after the claims have been identified and cataloged we are still left with our original problem as to the fundamental principles upon which will rest the decision of what claims we will protect and encourage and what claims we will deny. Idealism thus remains a necessary factor in law making, law interpreting and particularly in law teaching. Its place in the practice of the law has never been disputed though in experience its absence has often been a cause for great dismay. In our work at Washington naturally the mores of the Bar can be inspected advantageously, not only in retrospect as one contemplates the factors which brought the Commission to life, but also currently as the lawyers of America perform in the field of corporate finance. In the process of familiarizing themselves with the intricacies of this new and important department of the law innumerable lawyers have had correspondence and interviews with the Commission and its staff, most of them voluntarily.

Generalizations in this respect are dangerous but on the whole the lack of idealism of the American Bar or rather their kind of idealism, I cannot respect. It is not my intention to impute criminality to large numbers in the profession (though in some instances this charge could be sustained with ease). But rather do I condemn because of the notorious lack of social consciousness which I behold daily. Lawyers, it is true, are timid, cautious and in many instances such qualities are their strongest virtues. But their great lack is their failure to stimulate idealism in their clients. I venture to state that no shocking abuse of economic force has occurred in so-called big business without the advising hand of a "reputable" lawyer. The great extravagances of the past, the abuses of stock options, bonuses, unreasonable salaries, tax evasions--all of them went unchallenged by the lawyer leaders who because they profess must bear a large share of the blame.

In the Fordham Law Review for January, Mr. William D. Guthrie of New York seeks to defend the good name of the American Bar from what he terms the unjustifiable criticism of Mr. Justice Harlan Stone in the November number of the current volume of the Harvard Law Review. I recommend a consideration of these two articles, confident that slight study will demonstrate that Mr. Guthrie's answer is quite inadequate. The kernel of the defense is contained in the following paragraph:

"No one, unfortunately, can read Mr. Justice Stone's address without the impression that he has come to believe that the profession in the United States has of recent years greatly deteriorated, and fallen morally and intellectually to a low and deplorable state. He repeatedly speaks of lawyers as doing 'so little' in public service, when the fact, everywhere evident, ought in fairness and justice to have been recognized that they have been doing and are doing as much as, if not more than, any other class or group in the country, as shown by their activities, services, and prominence in every branch of public or charitable and welfare service, national or state, whether in the present period of emergency, the New Deal, or otherwise, and frequently, too, at the sacrifice of that kind of professional success that is measured only by dollar incomes. As matter of fact, the large law offices, which he compares to factories, are comparatively few, and they include a small fraction of the profession; they are to be found only in the larger cities; most of them practice according to the best and highest standards of professional ethics and 'scrupulous fidelity,' and very few of these offices can fairly or properly be stigmatized as a 'new type of factory,' and their members ought not to be disparaged as proprietors or general managers of factories, or as mass producers."

It is, of course, difficult to demonstrate mathematically the affirmative or the negative of a proposition dealing

with the ethical condition of a group of lawyers. Very early in the controversy the combatants are reduced to the state of saying "You're another". But I honestly think that the national leaders of the Bar have shown a woeful lack of sympathy for the perils of the people in society even though copious tears are shed for institutions and abstractions. By and large, the honor of the American Bar in the New Deal has not been saved by our leaders - there is, in many instances, an understandable selfishness which lies behind the refusal of prominent lawyers to become part of their time. The bald fact is that in most cases the services has been rendered by the youth of the Bar, and a grand inspiring thought it is to contemplate that so many young men are learning the difficult act of government. Oh, I wish we had enough money to take most of you to Washington for your first view of the law in action - not that practice is necessarily a sordid affair.

I much prefer the ringing truth of Mr. Justice Stone -

"THE PUBLIC INFLUENCE OF THE BAR

"We cannot brush aside this lay dissatisfaction with lawyers with the comforting assurance that it is nothing more than the chronic distrust of the lawyer class which the literature of every age has portrayed. It is, I fear, the expression of a belief too general and too firmly held for us to shut our eyes to it. One might cite many examples

but it suffices that in the struggle, unique in our history, to determine whether the giant economic forces which our industrial and financial world have created shall be brought under some larger measure of control and, if so, what legal devices can and should be selected to accomplish that end, it is a matter of public comment that the practicing lawyer has been but a minor participant. It is unnecessary, and it would be unbecoming for me to express any opinion upon the merits of that controversy or the methods of its solution. It is enough for present purposes that in one of the most critical periods of our history, when a major public problem is the choice of remedies for our economic ills and the mutual adjustment and reconciliation of those remedies with legal doctrine, the practicing Bar of the nation has not attained its accustomed place of recognized leadership. Unless in this time of self-searching we are to abandon the lawyer's habit of facing the realities of the world in which we live and rest content to dwell on the happier recollections of another day, we cannot avoid asking ourselves how our past, and the ideals which claim our attachment, are to be reconciled with the disquieting circumstances of our present; or whether the donor of this beneficent gift for the public good was mistaken in his judgment that we may look to the

legal profession more than to other groups in our society for future public leadership.

". I have no thought that men are made moral by the mere formulation of rules of conduct, no matter how solemnly bar associations may pronounce them, or that they may be made good by mere exhortation. But men serve causes because of their devotion to them. The zeal of the student for proficiency in the law, like that of his elder brother at the Bar, comes from a higher source than selfishness. It is devotion to his conception of a useful and worthy institution. But that conception is a distorted one if it envisages only the cultivation of skill without thought of how and to what end it is to be used, and the question what the law schools have done and can do to make that conception truer is one to be pondered and to be answered. It is not beyond the power of institutions which have so successfully mastered the art of penetrating all the intricacies of legal doctrine to impart a truer understanding of the functions of those who are to be its servants. That understanding will come, not from platitudinous exhortation, but from knowledge of the consequences of the failure of a profession to bear its social responsibilities, and what it is doing and may do to meet them. . . ."

But here I am talking for twenty minutes and still off my subject. There is no point in reviewing the history of the legislation creating the Commission. Perhaps I had better start by announcing my faith in it. Regardless of what happens to the New Deal agencies the alphabets that seem to be always in the soup in Republican editorials, I believe the Commission will live and grow, because its existence is due to a clamor that has been growing for years, because even to the most straight-laced states righter the problem of society arising out of the securities business required Federal supervision. The Securities Act is after all nothing but a Federal Blue Sky law. After eight months' experience, my only wonder is that the date of enactment should be so long delayed. In the difficult mixed question of law and policy underlying problems of Federal jurisdiction, I suppose roughly the fundamental test has become one of capacity of the states to cope with a given social evil. On this score the '33 Act finds overwhelming vindication. Assuming the most capable state enforcing agencies of unquestionable integrity, larger scale interstate frauds will nevertheless flourish. The measure of success which has greeted our first efforts tempts me to predict with confidence the ultimate effective control over this form of swindling. Its total abolition I recognize as an impossibility, but I am not conscious of any visionary symptoms when I

state that the huge scale crooked promotions will soon be largely a matter of history. I do not wish to appear too premature in an appraisal of the results of this new system, particularly in the light of the refusal of state and Federal juries to convict some notorious malefactors in the face of overwhelming evidence of guilt. But the powers of the Commission for the spotlight of publicity, for preventive measures, for integrating the activities of state agencies, for utilizing the numerous unofficial groups engaged in anti-fraud work, the opportunities for control of the facilities of interstate commerce plus the actual experience of the Commission in closing the shops of those pirates at great financial loss to the fraudulent promoter all combine to explain my apparently boastful appraisal of the Commission's anti-fraud activities. Business, finance, the bar and political leaders may differ as to specific provisions of the Securities Act but they cannot deny the need for it.

One must also consider the Securities Act of 1933 in its effect on securities which are not usually classified as fraudulent. It is from the group representative of the so-called big business that most of the articulate criticism of the Act and its administration has come. But the record of the need of disclosure is unanswerable. The most common complaint of the large investor advisory services prior to the Act was the difficulty, frequently the impossibility of securing adequate

information from the officers and directors of publicly owned corporations. It is not hard to reconstruct the Napoleonic temperament of many of these officials, but it is difficult to understand. Only last week a stockholder of intelligence and standing in the community had the temerity to inquire at a stockholders' meeting about the salaries of certain of the officers of a famed corporation which had filed a petition in bankruptcy. His request was denied--was deemed irrelevant by the presiding officer, a president of one of our great universities. He was told he would get it in time, but not in that pink slip manna. It is puzzling to contemplate that the common law concept of the relationship of a director or an officer to the corporation should by ballyhoo and gall evolve into the status of master and serf with the owner as the serf. Very often a spirited criticism against so-called regimentation is merely a cover for a reluctance to disclose an extortionate salary in a losing year. In one recent case a registration statement was prepared but the issue was disposed of privately without filing when our Commission refused to permit an uncollectible officer's note to be carried as a cash item.

In this field of big business finance, the out and out frauds were not so common, the unfairness, the overreaching, the slippery dealing were all too frequent. The civil liability is the sanction which guarantees the successful attainments of the statutory ends. Much has been written about amending the Act

in this regard, too much I dare say because out of it all has grown a fear of direful consequence for even mistakes in grammar. Actually the common law liability was more severe but more difficult of enforcement. When the Act has become the subject of court review and when its status is as secure as that of the Companies Act and when the chance of amending has gone aft a gle, no business man will be any more disturbed by these liability sections than by the larceny statute of his state.

There is, however, one intangible source of value the Act has, which cannot be underestimated. By our rules and regulations and forms we are in a position to set the pace for corporate disclosure, and ultimately for corporate ethics in relation to stockholders, competitors and the public. The grumbling is understandable but gradually through the gentle, painless process of education the Commission will make complete disclosure a commonplace and the investor then can have no one to blame but himself.

The Securities Exchange Act of 1934 is a more technical statute. Its importance today is rather minimized by the depressed condition of the organized exchanges. It is, however, a necessary adjunct to the '33 Act and in general has been accepted as an inevitable step in governmental intervention. Here too, the Act is no sudden decree to meet an emergency. It is true that the Pecora investigation gave it impetus and I might add many of its details, but for years there had been a constant

demand that the Federal Government use its powers to control this complicated phenomenon in the public interest. Time will not permit my discussing the details of this extraordinary piece of legislation.

The two statutes differ sharply in the amount of power which has been delegated to the Commission. The Securities Act of 1933 was intended to be Commission-proof and comparatively little was left to the judgment of the Commission through rules and regulations. The Securities Exchange Act of 1934 on the contrary represents one of the most interesting instances of generous delegation. The reasons are obvious. The later Act deals with a more technical field where changes in trading methods might easily nullify Commission control. It would be impossible for a Congress no matter how gifted it might be to spell out in advance a provision of law for even the more important problems which demanded regulation. In the 1934 Act the phrase "as the Commission by rules and regulations may provide" occurs almost a hundred times. This should not shock you because without such delegation the law would be entirely inadequate to meet the evils Congress sought to remedy. As a matter of fact our task would be easier and the work of the Commission more valuable if there had been greater elasticity in the first Act.

Despite the witticism of the syndicated columnists there is still great attention and respect paid to the risks of constitutional review of administrative statutes. When all of

you have come to the great throne of T. R. Powell and he has dismissed you, some to the torture of a second try, you will realize that in a great conspiracy against truth you have been led to believe that there was such a thing as constitutional law--Oh yes, there are unconstitutional statutes but it is not law that made them get that way. It is people. We already have time as our ally and a number of other facts such as the acquiescence of our principal opponent, the New York Stock Exchange, incidentally there are a few helpful cases in the books, and of course, I shouldn't leave out the most important of all, we have a good Commission-- all of these combine to make our constitutional horoscope very favorable.

If you gentlemen were stockbrokers, dealers or accountants, or prospective issuers or underwriters, I would be greatly tempted to indulge in a litany of reassurances, even though I appreciate the risks of repeated reiteration. Because you are lawyers, or quasi-lawyers, and for that reason highly skeptical of oral testimony, not under oath, particularly if not made on the personal knowledge of the declarant, I reluctantly pass that part of my remarks which seavor of a campaign. The Commission and its staff know well that the only test is performance not promise; that unless the Commission's efforts command the respect of right thinking men, its public relations' side, however, showy, will not meet the approval of business and the professions. To take this job I left the pleasant and

interesting atmosphere of a court and while my present pace is swifter and the hours much longer and the precedents more unsubstantial, I am very happy in the knowledge that the Commissioners bring to their task unusual ability, tact and fairness. We would like to have the time for formal pleadings, that would clarify the issues for arguments, and briefs that would aid us in our decisions. But administration can't afford to have a very old calendar. These ceremonies, we have had to dispense with, in order that the law be made an efficient instrumentality. But the essentials of judicial procedure the Commission strives to attain. A fair hearing to those who might be affected, an intelligent understanding of the problem and a decision solely on the merits--These I am sure are present and they are the guarantees that the Commission will long endure.