

The President:

Senator Fearon's remarks call for one or two observations. First, he has kept the contract. Second, I am almost afraid to call upon the next gentleman who made a contract with me.

The next speaker has been active in State Bar Association matters as long as I can remember. He looks as young now as he did then. He took an active part in our State matters and then went to Washington and has recently been promoted to the head of the anti-trust division in the office of the Attorney General of the United States. He is a New York lawyer from Chautauqua, able and of delightful personality. It gives me great pleasure to present the Hon. Robert H. Jackson, of Chautauqua and Washington. (Applause.)

Hon. Robert H. Jackson:

Mr. Toastmaster, Guests and Members of the State Bar Association: If the sample which the Toastmaster has given you is a fair one of the way he can pick winners, I would advise him to stay away from Saratoga.

It is a comfort to speak again before my own Bar Association which has always been very tolerant of my heresies. I will test its patience again. Bar Association after-dinner speeches often voice the high and solemn esteem in which we hold ourselves. It was probably after a Bar dinner that the witty bard whose name our toastmaster honors wrote:

"Oh, how can a modest young man
Ere hope for the slightest progression
In a profession already so full
Of lawyers, *so full of profession.*"

As the New Dealer on your program I suppose I represent the "lesser breeds without the law." At least we are so represented at some Bar meetings. It seemed last fall that the American Bar Association identified itself pretty thoroughly with Maine and Vermont. Some people think we need a Bar Association to represent the rest of the United States. Now that the Union League Club offers itself as a political purgatory for penitent Democrats, there is a chance that the Bar will extend absolution to unrepentant ones and may even bring its liberalism nearer to date than the 1912 New Freedom model.

The legal profession may justly claim much credit for the making of our government. American Democracy may justly claim a large part in making the prestige of the legal profession. No other people have submitted so generally to lawyer leadership. We have held all of the judicial and many of the legislative and executive offices.

When lawyers exhibit toward government an air of ownership it is based on adverse possession. This profession is a pyramid with its base in general practice in every community and its apex in the Supreme Court. Judges are lawyers under the robe. Bench and Bar are schooled in a common philosophy and each member shapes his attitude by common patterns of thought.

The profession tonight can scarcely boast of its popularity. The President has implied some doubts about the helpfulness

of the lawyer's contribution to government. Governor Earle of Pennsylvania has talked about all of us the way we talk about each other during a lawsuit. The New York Times in reporting the election of Dr. Motta as President of the Swiss Federation said "He was a lawyer *before entering politics.*" There are those who would say the same of some New Dealers. But they would choose to say it by way of epitaph rather than of introduction.

Can one be a lawyer *after entering politics?* Is the professional attitude inconsistent with public welfare? Is there a fundamental conflict between the legal philosophy we apply in our Courts and the political principles of popular majority government which we champion on the stump? Is our profession a public servant or a public nuisance? Why not hurl our answers back at our critics—if we have an answer?

We rest under a handicap. We are unwanted children. Everyone agrees that there are too many of us. I have long advocated a New Deal law to pay the law schools for not producing lawyers. (Laughter.) The New Deal has performed a service to the Bar by keeping so many law professors busy in Washington. They could do less harm making new laws than at their usual task of making new lawyers. The County Lawyers' Association survey shows even the existing professional field overpopulated. Some think society will do well to plow under the worst of us. Others think the worst of us do less harm to society than the best of us. They point out that it takes good lawyers to kill great measures for public betterment and that the little fellows are relatively harmless because not so powerful.

Then, too, our sincerity is always under a cloud. People believe that a profession whose voice and hand are for sale may have a price on its heart also. Exceptional lawyers do have convictions of their own. But there is a cruel realism about the underworld which calls any lawyer, even its own, a "mouthpiece." Even the upper world notes that a lawyer's retainers and his convictions seldom conflict. The correspondence is too frequent to be a coincidence. People wonder

whether it is convictions that get retainers, or retainers that beget convictions. Some even suggest that the pay envelope campaign succeeds best among lawyers.

Lawyer prestige rests on judicial supremacy in government. Only by our monopoly of the high court can we hold society to those technical legal patterns which only counsellors at law can weave or unravel.

But lawyer control of the High Court rests only on public suffrage and tradition. The framers of our Constitution did not see fit to make provision that the membership of the Supreme Court must be only lawyers. They deliberately left it open to men of other learnings than the law. But from the very beginning we have kept it packed with lawyers, and now lawyers feel a vested interest in holding all seats on the Court for themselves.

Now suppose some "radical" administration (laughter) should propose to pack it with men of other vocations. There is no constitutional protection for our lawyer monopoly. We must rely solely on the record of a trust well fulfilled to perpetuate lawyer control. That is why we need to check up on ourselves. Does the record convince that legal knowledge, and that alone, is adequate to the settlement of the great public questions now settled with only lawyer votes? If, as the Court has said, it has only one duty in these cases—"to lay the article of the Constitution which is invoked beside the statute which is challenged and decide whether the latter squares with the former" are we the only men fit to do it? And if, as has been charged by some of its own members, the Court goes beyond this and "sits in judgment on the wisdom of legislative action," do we possess the only wisdom? Lawyers bring to the Court only one kind of thinking—at most.

The fundamental question is not one of personality of our representatives on the bench. A struggle between every progressive administration in our history against the Federal bench is not based on personalities alone but must be rooted in a conflict of philosophies.

Why does the legalism that guides Court and Bar so often find itself in conflict with the views of public leaders such as Jefferson, Jackson, Lincoln and Theodore Roosevelt, not to mention living leaders who have survived lawyer opposition?

Legal philosophy sets up a method of thinking that is not accepted by any other profession. Unreasoning devotion to precedent is so normal for the lawyer that Joseph Choate, in eulogy of James C. Carter, noted as almost an eccentricity of that genius "that he was not always willing to admit or to recognize the binding force of precedents, however numerous, which failed to run the gauntlet of his own reasoning powers. One of his favorite maxims was, that nothing was finally decided until it was decided right. * * *" And Choate referred to this trait as "vulnerable"!

Other men are known by their fruits, we judge our work only by logic. Congress looks forward to results, the Courts look backward to precedents, the President sees wrongs and remedies, the Courts look for limitations and express powers. The pattern requires the Court to go forward by looking backward. Legal philosophy requires us to consider modern labor relations in terms of precedents made by slave owners, and Social Security in the light of decisions by men, who if they heard the term, would have thought it meant return of fugitive slaves. Our motto is "No concessions to the times."

Our record is one of fidelity to "fundamentals." Since 1787 the medical profession has changed its treatment of disease from blood letting to blood transfusion. We make no such departures from the practice of the fathers.

We do not let the realities of life influence our legal decisions. When I was counsel to the Bureau of Internal Revenue an opinion was asked as to when a marriage would change a taxpayer's status. A young lawyer, destined, I am sure, for high judicial honors, prepared the answer. He set forth the rule of law that a fraction of a day will not be recognized. Then he added the rule as to service of process by which we exclude the day of service from the count. He arrived by this legal logic at the decision that a marriage is effective on the day

following the day of ceremony. (Laughter.) Though I could point to no flaw in the legal reasoning I did not sign that opinion, though I signed many worse ones. His process of reasoning was similar to that by which courts sometimes reach decisions that seem to me far from the realities of life.

The heaviest responsibility ever given by any nation to its bar is that of interpreting our Constitution. With it came the greatest opportunity to demonstrate the capacity of the lawyer to govern. Have we made constitutional law simple, clear and workable? Has government by litigation been prompt, certain and free of technical subtlety?

Our Constitution is a general outline of great powers and institutions. It is not a legal document. We know that because the original instrument contains only about 4250 words. Counsel would use ten times as many to express in legal jargon the single idea that if a corporation fails to pay its bonds the investor may resort to its property. Each word in our Constitution, setting up a whole system of government, had to carry a great load of meaning. It was never thought, when they spared words in the interest of simplicity, that we would reach a point where nothing is lawful unless the Constitution had a word for it. (Applause.) They set up a living National Government and left the future to fill in much of detail, according to its own experience, its judgment and its own patriotic purposes.

Then the lawyers whittled at it with the rules applicable to private contracts until today you commence study of constitutional law, not with the document but with a long course in interpretation of interpretations. This mass of constitutional law, not found in the Constitution, is not the achievement of one age—it is a tribute to the diligence of several generations of our profession.

The legal profession has transferred to constitutional law its whole technique for determining private rights. It tries to adjudge the rights of the masses, as it would a case of trespass or a suit on a note. Edmund Burke declared that you could not draw an indictment against a whole people, but modern courts are trying to draw injunctions against a whole people.

In dealing with a nation, whose genius is invention, we cannot outlaw every action that can not show a precedent. It would be as reckless for the President to steer public policy by precedent as to drive in the dark with only a tail light. If he can not use precedent to make policy and the courts apply them to strike down the policy, we have the basis of perpetual conflict awaiting only extremes of determination on each side to break down our system.

Lawyers have tied up many major policies of government in legal doubts. The process in the lower courts, where each of 150 Federal Judges claims for himself the right to nullify an act of Congress, produces conflicting "decisions" which confuse the public, and which have no finality. Nullification becomes almost a competition, while business and government await the disorderly and dilatory ritual of the law. Almost two years after devaluation our courts were debating its validity. Time means nothing to a lawyer.

No administration can halt its policies dealing with such problems as a banking emergency, unemployment, relief, or the currency to seek the judiciaries' views. The government can not learn the judge's views until after the law is passed and then only after a lapse of years as the view is slowly made available in private litigation. Moreover, the judicial contribution is always a negative. It may tell what can not be done to right a wrong or solve a problem, but it never tells what can be done.

Government by litigation has destroyed effective enforcement of public policy. Four lawsuits have usually served to sterilize each of those hopeful offspring of Congress designed to curb monopoly. We haven't always crudely killed them as unconstitutional, we have sometimes just sandbagged them with "interpretation."

The most subtle subverter of free government is a baffling complexity. Representative democracy is difficult at its best and demands understanding from its citizens. But we have added on top of 48 representative democracies, the most complex government of all, a federation of governments, in which

we have tried to balance representation between area and population, to balance grants of power against checks of authority, to entrench many rights of property beyond reach of the popular will, to balance nationalism against provincialism and to set up an equilibrium between progress and stability.

This intricate machine must function by compromise. Divergent social and political groups must be kept near enough together so that the differences will yield to arbitrament of ballot and court decision. We were once nearly wrecked by the rigid and unyielding legal philosophy which in the Dred Scott decision outlawed the Missouri Compromise, designed by Congress and executive to avoid a war between states. Contending social forces came to rest and equilibrium, at least temporarily, in such compromises as the N.R.A., the Guffey Coal bill, the Agricultural Adjustment Act, the minimum wage laws, the Labor Relations Act and Social Security Acts. We need as many constitutional powers and ways to compromise these struggles as possible. Lawyers have been closing the roads to political compromise of basic problems which are the country's route to economics and social peace. The detours may be rough!

In England the lawyers are kept to their own business of conducting private litigation and do not settle public policy by lawsuit. That country has gone through a labor party administration, and had the flexibility to come through without a transformation of its institutions. Could we do as much?

We lawyers have produced a paralyzing complexity of government that frustrates economic control. It is not a question of favoring conservative policy or liberal policy, property rights or human rights. Our problem is to make this great federation of states work. (Applause.)

When free government becomes too perplexing and futile the people turn to dictatorship. It is the simplest form of government. Out of the break-down of an attempt at free government which failed to function, arose Hitler, Lenin and Stalin, Napoleon and Cromwell.

Felix Morley has well said, "Fortunately for the United States, no period of our history has been so dark that a majority of Americans have turned in despair to embrace the argument that they are incompetent to run their own affairs. Should that day ever come, democracy will go under and dictatorship will take its place."

When we consider the confused muddle we have made of simple problems like child labor or minimum wages, we may wonder if that time is so far away. Another world war or another depression may well pose problems that will break the red tape of government by lawsuit.

The great good there is in our philosophy, the value of our precedents, the advantage of judicial review all may be endangered. Our disorderly and inconclusive squabbles in lower courts over questions we know the lower courts can not settle, our intolerable delay in settling questions on which executives must act, and then our disposing of vast problems of statecraft, such as defining "general welfare" "interstate commerce" or "due process" by legal specialists guided by precedents and boastfully regardless of reason or wisdom are not portents of health for us lawyers nor for our country.

Whatever our philosophy may do to impair our relations with the world outside, it binds us together in a great fellowship where New Deal is kin to old deal and radical at least understands reactionary. We appreciate each other's tricks and technique and skill. We play on opposing teams but we play the same game. Our common background of culture makes lawyers kinsmen and laymen strangers, and our fellowship is like that told by Kipling:

"The stranger within my gate,

He may be true or kind,

But he does not talk my talk—

I can not feel his mind.

I see the face and the eyes and the mouth,

But not the soul behind.

"The men of my own stock,
They may do ill or well,
But they tell the lies I am wonted to,
They are used to the lies I tell;
And we do not need interpreters
When we go to buy or sell.

"Then men of my own stock,
Bitter, bad they may be,
But, at least, they hear the things I hear,
And see the things I see;
And whatever I think of them and their likes
They think of the likes of me."

The President:

Gentlemen, I challenge only one statement which General Jackson has made, and that was when he said I was a poor picker and would not be safe at Saratoga. I claim, and I know you all agree with me, that after hearing the Chief Judge, Senator Fearon and General Jackson, you will all know that I am absolutely safe as a picker at Saratoga, Belmont, Hialeah, Epsom Downs, Trombley, Longchamps, or the Kentucky Derby. (Laughter.)