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## Justice and the Legal Profession

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## \*JUSTICE AND THE LEGAL PROFESSION

Certainly it is a pleasure to be with you, to-day. Not alone the community, but Dickinson, has a back-ground full of traditions that fill the heart with warmth and satisfaction. Yours is a generous heritage. And as you go forth from these classic halls be assured that the recommendation given you by your college is an eminently respectable one. Dickinson has furnished to the country many eminent men, and as the years roll on you will appreciate, fuller than you do now probably, the great debt America owes to your alma mater.

There was probably some moving reason that induced you to undertake the study of the law. It may be that you were influenced by some great forensic battle you saw or read about in the legal forum. Perhaps some other equally enticing inducement controlled your mental action. If your action was influenced by a desire for or expectation of great monetary reward, you are likely to be disappointed; for there is a respectable saying that successful lawyers work hard, live well and die poor.

If you intend to turn your mind inward, as many do, and regard the profession as the step towards your own exploitation and advancement, you will be likewise disappointed. For the law is a jealous mistress and permits no rivals, such as political preferment. If the latter is an incident and is a duty performed that all of us owe to the

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\*An address delivered before the students of the Dickinson School of Law, April 22, 1933.

commonwealth, then, if it be in line with your professional work, the honor alone is your compensation.

If you seek to discover the place of the law in the social order and link your professional work to the larger end of the social good, keeping in mind always the higher thought that yours is a public profession, whose traditions are noble, whose ends are the administration of concrete justice, whose ethics are inexorable, then your professional life, whatever your ultimate status, will be a reward in itself and commend you and your family to the most favorable consideration of the community of which you are a part.

Remember always that your moral conduct will be regarded more highly by the public than your professional ability; that deviation from your code of ethics is dishonorable; and that the community in which you live must first respect you before they honor you. Honor in the legal profession is grudgingly granted; it is not accidental or fleeting and is acquired and held because of long and weary years of almost monastic training and constant study and a strict regard for the moral standards of the community of which you are a part.

Your training here, of necessity, is merely a skeleton one. It is given in such a form as to lay the foundation for admission to the bar. Once admitted your work on broader lines begins. Much of it will have no connection with the particular professional duty of the moment. You will, I hope, begin then the study of the history of the law, the reasons for its existence and its philosophy. If you do not, then your work will be parrot-like; you will be merely reciting what others tell you is the law, instead of developing and applying your thoughts to the experience of the ages. Then you will be better able to test and ascertain the justice of your cause. Justice, concrete and absolute, should be always the aim and hope of the lawyer.

Many of you may not be what the world denominates successful advocates and yet you may find your place as eminent counselors. Time alone will be the determining factor. But whatever you are, wherever your lot is cast,

do your duty honestly and without fear of results or expectation of favor.

You must have a properly educated and balanced civic conscience, an ultimate and complete knowledge of the ethical duties of the lawyer towards the public and towards his client. If you are lacking in this primary and most essential trait, your professional life will be a failure. Keep always in mind the fact that your predecessors in the profession look to you to maintain unsullied the high and noble traditions of the centuries. For you are the judges, the legislators, the diplomats, the presidents—aye, our leaders of to-morrow.

When you come to consider law as a science, unless you are strong minded and well trained, you will find yourself in an impenetrable forest of apparently conflicting ideas and notions. It is well to keep uppermost in your mind the fundamental idea that laws are made for and by men and for their government and not men for laws. And here begins what we call the paradoxes of legal science. As an eminent professor of Columbia recently said: "Society moulds and makes the individual; but individuals are and mould society. Law is a going whole we are born into; but law is a changing something we help remodel. Law decides cases; but cases make law. Law deflects society; but society is reflected in the law. How can such propositions, patently all true, all so commonplace that we do not think them through, exist together? How and where do the gears of the seemingly insights mesh? The problem before us is description. It is to see, in action, to follow in their inter-action, the divergent branches of the paradox; to see them in action as a going whole".

And while the law is a collection of paradoxes, and thrives upon them, if one may so use the expression, yet its certainty in application lies in the fact that all law is adjective in that it strives to be the hand maiden of justice, and is but the force, when put in motion, that is presumed to ascertain and apply justice to the individual. May I illustrate it? Take an automobile. The ultimate purpose

is its use, whether for passenger or freight. Many different materials are required in its building, innumerable parts are made, a design or pattern is carefully followed, numerous mechanics are employed in the actual building of it, other agencies such as steam or electricity and other machinery, are required, which bring into play so many various and different actions that the human mind can hardly conceive of them. Then the bowels of the earth are searched for oil, which is refined into two different ways for fuel, and water is added. The machine is complete. The iron, which was converted into steel, the wood used for its wheels or body, were centuries in the making—nature contributed. The mind of man collected all these things and put them together. But without the driver at the wheel, to properly direct its motions, it is without force. When the human mind starts the machine and it moves towards its ultimate object—then all of the various materials, the work of the ages, the minds of hundreds of other men on the manufacture of its parts, are given force and effect. The object is attained. So with the law—the end is justice.

Yet, if defects exist or parts are lacking, as the machine refuses to function or does so imperfectly—so with the law. Justice, the objective end, is lacking.

When the legal machine works perfectly, when the gears mesh, when the machine responds, all the rules of law, centuries maybe in the making, are applied, the mind of the driver directing its movement is the Infinite, the philosopher's First Great Cause, the God of Mankind—and Justice, its ultimate goal, is attained.

For that reason, if I may now bring your minds back to the present, material problems, we frequently ask ourselves in this present age, in view of the complexities of our problems, whether the civilization of the centuries, which has made the many rules of law, striving together to work out ultimate justice, shall endure and whether we are strong enough to face the future confident that the basic concepts of justice, upon which we have and are building

that civilization, will stand the strain and advance to the ultimate triumph of truth. For justice, we know, must be and is truth personified.

Then, to, into this maelstrom of conflicting thought has come the constant and recurring charge that the law is not adequately adjusting itself to these changes of economic thought and social conditions, and, where there is adequate adjustment, in many cases, the adjective field is too restricted to give either complete, effective or early relief. And for these existent shortcomings, the legal profession is held responsible. One would acquire the impression that we are a class distinct and apart from the social atmosphere in which we live, without knowledge of its extent and unaffected by it.

It may become your duty to answer this charge. It is undoubtedly true as you have ascertained that the adjective or procedural field of the law needs overhauling, and needs it badly. But the charge made, as applied to the legal profession, is unfounded. Time and again, in every manner in which the bar can speak, the bar has called the attention of the legislative departments of the nation and states to the woeful condition of legal procedure. It has urgently pleaded for relief from complicated systems of pleading, from delays, and from rules of procedure governing appeals. And most of its pleas have been in vain. A single printed page giving the appellate courts the power to make procedural rules and change them, as and when necessary, will place the responsibility on the bar for reform in the field of adjective law. Until this is done, there will be no real relief. Why the legislative branch of our governments refuses to give to our courts the rule making power, as the English Parliament has done, is beyond the ken of man. The legislatures have not hesitated to give to administrative boards, such as public service commissions, the right to make procedural rules and even to hear cases without resort to the common rules of evidence—but to the courts, never! Urge, then, as one of the reforms in the law, that the rule making power, which includes the

entire procedural field, be lodged in the hands of the courts, where it belongs, and within a relatively short period of time the people will hear no more about the law's delay in civil matters. When we come to the substantive portion of the law—the body of the law, so-called, a different condition prevails. Those who hold the legal profession responsible for the shortcomings of the body of the law, as distinguished from its procedure, have little regard for or knowledge of the science or technique of the law. The substantive law is confined to the common and the statute law. The necessity for substantive law, either common or statute law, awaits the existence of a right before the creation of the concept. We know that if the existence of a right is not challenged, then no reason exists for any rule. But these well meaning critics of our profession conceive the idea that we may, if we will, without legislative sanction, breathe into the common law economic thought or take judicial notice of a social condition, and that when the profession fails to do what the legislative branch has not done, there is a lack of comprehension on our part. If one would project into the law an economic principle or some new thought, new or undefined, without sufficient force to become a general and accepted theory governing some particular transaction or business, it should be done by legislation and not by court action. Then the thought becomes part of the substantive law and the only question remaining is whether such economic thought, translated into positive law, conforms with constitutional provisions.

In the adoption of a new idea, the trouble lies in determining what is the prevailing economic thought or social condition. Courts, indeed, take judicial cognizance, so distinguished from judicial notice, of some prevailing condition, generally recognized, which is reflected from the facts. It is in this manner that custom creeps into and becomes part of the body of the common law. On the other hand, to assert that courts may go without the record of the particular case and by reference to some expression of an economist or any declaration of layman or lawyer of what

is or should be a legal rule and make it one—and I admit that this has happened, is to advocate a rule which would violate the very foundation of the judicial process. Let us not forget that the courts apply legal rules only to concrete facts.

Social facts or social conditions cannot so easily become part of the body of the common law. The common law is of slow, almost imperceptible, growth—too slow to assimilate proposed drastic action that so often we have been importuned to adopt. A rule of law is based upon logic, history, custom and utility, as well as the accepted standards of right conduct, which, says Mr. Justice Cordozo, "singly or in combination shape the progress of the law". And to quote him further, he remarks: "One of the fundamental social interests is that the law shall be uniform and impartial. Therefore, in the main, there shall be adherence to precedent".

We, who are advocates in the legal forums, hesitate to suggest, much less to urge, any completely new idea. It is only when precedent is out of gear, when it is plainly wrong and completely at variance with fundamental truth, as applied to the subject matter in controversy, that we desire to propose a new rule of decision.

The courts, too, have an inherent hesitancy, born of wisdom, of constructing new paths along well defined avenues of thought. Certainly they have tried to make the crooked road straight, to cut down the hills, to level up the depressions. That is their function. But let it be noted that they have been as careful as the courts of yonder years to ascertain that the slopes and banks of public welfare on either side of the road are properly constructed and sufficiently strong to stand the strain.

True every generation contributes some thought of material value to the sum total of human intelligence, and it may be that history will accord to this age more substantial contributions than other periods of time; but to suggest that society take into consideration each and every social whim, every ill conceived formula, and weigh it for in-

clusion into the substance of the common law, is to ask the judiciary to exchange the fleeting conceit of the times for the experience of ages, and, by it ipse dixit, to create conceptions that may weigh down and destroy the whole fabric of the body of the law.

These well meaning advocates of social reform, many of them charged with a self imposed duty, with superficial knowledge or none at all, of the subject, would substitute sentimental emotionalism for the realm of reason; the courts of Momus for the tribunals of justice. It is time to speak.

That defects exist in the body of the law, as well as in its adjective principles, is undoubtedly true, and this condition will continue until the end of time. Our object and purpose is to reduce them to a minimum. For law is an expression of the law giver, whether the autocrat or a free and independent people. It is the result, the supposed sum total of human experience and intelligence at the time of adoption.

Nor can it be said that, apart from our purely professional duties, during this present so-called upheaval in social thought, we have been lagging. In every avenue of human endeavor the bar has been laboring. Every state and local bar association is attempting a solution of its problems. Through the Conference of Commissioners on Uniform State Laws, the profession has formulated and recommended the passage of statutes by the States making uniform in form and construction, the law pertaining to the various branches of commercial transactions—some of which have been adopted by every State of our Union. The newly organized American Legislators Association, the work of lawyers interested in legislation, is seeking to inculcate proper perceptions and to generate uniform methods in that realm of action. The American Judicature Society is attacking the problem of simplification of the judicial structure. The American Law Institute is gradually bringing order out of seeming chaos in the unwritten law and the result of its work is even now being felt in the

judicial realm. Every section and committee of the American Bar Association is charged with the performance of some duty, the favorable termination of which duty, it is hoped, will contribute to the cause of justice. In short, we are not alone restating the law—we are recodifying it, if I may so express it. The accomplishment of these undertakings, coordinative in purpose and conceived to meet the demand of the times, have the support and encouragement of the American Bar Association. Each of them is building for the present and preparing for the future. Collectively, they are the work of a unified bar, conscious now of its established influence and its force in the body politic. Thus have we turned seeming forlorn hope into constructive action! May we not indulge the expectation that succeeding generations will proclaim this era the golden age of American jurisprudence?

We brought to our shores the substantive law and the adjective principles embodied in the common law of England, crude in many respects and unsuited in others for the development of a mighty nation. This system, added to and subtracted from, has been molded by the American courts to suit the necessities of an heterogeneous people. So far it has been welded to meet not alone the demands of an agricultural people, for which it was intended, but it has been enlarged and extended, in a constructive manner, to suit the requirements of a great industrial people, into which we have grown. Nursed and cradled in the age of the cradle, its principles have been made applicable to an age of electricity. Under its protecting shield we have travelled from the time of the stage coach to that of the aeroplane. That system, builded now into a body of American law, has been the greatest contributing, aye, the controlling factor in the maintenance of peace and the political solidification of our people.

Notwithstanding the recurring attacks from well meaning as well as disgruntled groups, time after time, and sometimes from convulsive actions within their own ranks, our courts, as far as the judicial process will permit, have

held fast to the fundamental concepts of justice in accord with the precepts of the natural law. Mistakes they have made and plenty of them; but they have fallen to rise, to conceive nobler objectives. They have been ambitious only in the cause of right.

They have, by their foresight and learning, breathed into our constitutional structure the life of legal beauty, nurtured it and sustained it, so that it has grown with the nation, gathering strength and wisdom, until it has become the admired political creature of the civilized world. And above all things, our judiciary, as a body, has sought the truth and, as occasion demanded, fearlessly declared it—the noblest gift of God.

This, then, in brief, has been our record; and upon this muniment of things accomplished, we have builded our destiny. Call us reactionary, if one will, but it has been a reaction based upon constructive conservatism. Accuse us of lack of appreciation of the social atmosphere, as the unthinking do, yet it is and we hope always will be a want born of a desire to be certain of our philosophy. We have opened wide the throttle to so-called progressive thought only when we knew that adequate terminal facilities had been provided, and we have observed well the guiding signals the centuries have erected along our path for the safety of our people.

Certainly the American bench and bar of this generation needs no commendation. Sufficient, indeed, is it to say that amid the vicissitudes and fortunes of our political life for a century and a half, members of the bar have been the leaders of constructive thought and action in the nation. To you, then, who are about to consecrate your lives to the service of the profession there should come an individual sense of responsibility that law shall be just and that it shall be administered honestly, fairly and quickly. Emerging, as we trust we are, from the turmoil and unrest, the troubles and the tribulations, of the last third of a century, we look to you, the lawyers of yonder years, to protect that structure which has been builded now into a

system of law, dedicated to the cause of justice, which, in the aggregate, will secure the admiration and meet the approbation of our posterity. What you should strive for in your professional life is the creation of an enlightened, cordial and encouraging sentiment among our people, who have knowledge of our past, who are conscious, as we are, of our shortcomings, and who are sympathetic with our aims and ideals to perpetuate a system that has been the basis of our American civilization.

Martinsburg, W. Va.

CLARENCE E. MARTIN.