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George T. McDermott

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THE LAWYER OF TOMORROW

By Hon. George T. McDermott

THE invitation to speak to you tonight proved too much for my feeble power of resistance, for the fame of this annual dinner has reached even the hinterland from which I come. It is a signal honor to break bread with the members of the bar of this great state; a bar which has given to the nation so many great lawyers and jurists, including at the present time a Justice of the Supreme Court and the Attorney General of the nation; a bar which gave to that empire between the Mississippi and the Mountains, its greatest jurist, the late Walter H. Sanborn; a bar from which came Judge Booth, another of the outstanding judges of the Middle West, who has particularly endeared himself to Kansas lawyers; and "young John Sanborn," as his fellows call him, whose career already promises much for the future. When to that honor is added the privilege of speaking from the same rostrum as those eminent men who have graced this board in previous years, my cup runneth over. But it is not all beer and skittles, for I think I now know something of the catch in the throat which a bush leaguer must have when he first walks to the plate in the majors.

That natural consternation is intensified by the realization that I have no gripping message to deliver. I am not one of those who have lost confidence in law and lawyers; I do not believe that everything is going to pot. On the contrary, I think our laws, imperfect though they may be, are the best rules yet devised for the game of life. I think most men are honest and want to do the right thing. I think that, as a whole, lawyers are entirely worthy of the confidence reposed in them, and are true to their trusts. While there are spots which are disturbing, I have an abiding faith that the genius of the American people will re-assert itself, and that we will go on to even a higher plane. Such a feeling of confidence and optimism is a comfortable one, but it does not afford a good background for an address.

I have therefore concluded to speak particularly to the students of this great Law School—you who will be the lawyers of tomorrow. And all I hope to do is to leave with you some suggestions that you may think about at your leisure. I would not have you accept what I may say as true, if I could; and I could not, if I would. Your fine education has given you, first of all, a receptive but inquiring mind. If the years have taught me anything, which may be open to dispute, it is that men do not learn by being told; they learn by testing ideas in the crucible of their own minds with the flame of their own experience. And this is as it should be.

†Address delivered at the Annual Banquet, Law School, University of Minnesota, April 30, 1932.

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Your professional career will carry with it two separate and distinct responsibilities. The first, and the most absorbing, is the responsibility to yourself and your family. You want, and properly want, to go as far in your chosen profession as you can. No one can be of much help to you in that struggle. You must stand on your own feet and fight your own battle. But one thing can be said with entire assurance, and that is, there is no dollar mark engraved on the cup that is awarded the victor. Eminence in the legal profession may, and often does, bring moderate wealth in its wake; but it is but a by-product of success; the victor's cup is awarded to him who, by his unswerving honesty, his adherence to lofty ideals, his staunch courage, and his legal learning, has gained and held the confidence of his neighbors and the respect of his fellows.

The other responsibility that will come with your degree is a public one, a responsibility which you will share with other members of the profession. This public responsibility is sometimes divided into what may be termed a responsibility to your profession, to the end that the administration of justice may be improved; and a responsibility to the nation to which you owe your allegiance; this responsibility rests upon every citizen, but a lawyer's training peculiarly equips him for its discharge, and his responsibility is thereby increased. Professional and civic responsibility shade into each other, for, after all, a proper administration of justice is the chief aim of government.

The lawyers of yesterday have done their bit. The lawyers of today, working generally through bar associations, are doing theirs. Together, they are able to report substantial progress. Largely through the ever widening influence of the faculties of the law schools, the standards of admission to the bar have been so elevated that some intellectual attainment and a reasonably thorough training in the fundamentals are now required of those who enter the profession. The methods of study are now undergoing critical analysis, in an effort to turn out a still better product. Attention is being given, more and more, to the moral training and discipline which is the sine qua non of real success at the bar. Codes of ethics have been evolved, and progress is being made in requiring their observance. Although there is still much to be desired, a determined effort is being made to rid the profession of those moral lepers who pollute the fountain of justice at its very source, by the use of perjured evidence. With such, there should be no temporizing; there is but one remedy—throw them out of the profession with little ceremony, and without benefit of clergy.

The bar is today grappling with another problem, a problem brought about by the circumstance that facility of communication, on the rails, over wires, and through the ether of space, has welded the states into a compact nation. A hundred years ago, no serious inconvenience resulted because the laws of the different states were of varying patterns. But in more recent times, the crazy quilt of statutes and decisions of varying color and design has proven to be a substantial obstacle to the interplay of business. And so for many years the Conference of Commissioners on Uniform Laws has labored to harmonize statutory law in many fields. If that body had accomplished nothing else, the enactment of the Uniform Negotiable Instru-
ments Law would have justified its existence. For about ten years, the lawyers and judges and teachers have been working, shoulder to shoulder, in the more difficult field of non-statutory law, in an effort to bring some sort of order out of the wilderness of court decisions. It is too early to predict, with confidence, what success may attend upon the efforts of the members of the American Law Institute. But whether they succeed or fail, we know at least that they have tried.

Other matters are having the present attention of the profession. Lawyers have always been officers of the court in name; the present effort is to make them officers of the court in fact. The trial of a case in court ought to be a simple quest for the truth; the lawyers ought to be the aides of the court in the inquiry. The legislatures of many of our states have so circumscribed the power of the judge that the court room is little more than an arena where lawyers engage in forensic combat, and where the object is a victory rather than the ascertainment of the facts. Public and private agencies devoted to a better administration of the law have taken note of this situation, and the trend of the times is for the better.

The tendency to commercialize the profession is meeting with stubborn resistance. The practice of the profession as a side line to corporate commercial activities is being checked. I do not know how it may be with you, but in our circuit I think the race between the ambulance chaser and the adjuster is about run. The bench and bar are getting tired of the revolting spectacle of an officer of the court tendering his services with proclamations of his own virtues. It has not been wiped out, but it cannot last long after the profession is thoroughly aroused to the wrongs done to the unfortunate people who are the particular prey of the solicitor.

But this is enough of the present and its problems. You are interested in the problems that are just over the hill. And problems there are; I do not know their answer, but I do know that the answer, if one exists, will only be found if those who follow us seek to find it. It is fitting, as well as inevitable, that there is room for improvement; for, as was long ago said, change and decay are the law of life. The moment that we stop improving, decay sets in. Our physical selves are the product of centuries of evolution; our moral and spiritual selves are the results of a constant yearning to better ourselves. The restlessness of youth prompts a desire to change for change's sake, which oftentimes is not wise. The complacency of age suggests that well enough be let alone. Perhaps there may be a happy mean between youth and age; perhaps it is an unyielding adherence to certain fundamental principles of justice, coupled with a determination to better the machinery by which they are applied.

I have already adverted to one of the major problems that so far has not been satisfactorily solved, and that is the matter of control over the lawyer after he is admitted. More injury comes to the profession, and more damage to the public, from the machinations of a handful of unscrupulous lawyers, than comes by the admission of those intellectually unfit to practice. There are a few lawyers untrue to their trusts; a few who collect and do not pay; a few who flirt with the penitentiary by the use of perjured evidence. There ought to be some accessible body to which any aggrieved person could readily apply, for redress for wrongs done, and
with disciplinary control over the wrongdoer. Such a body should take note of pettifoggery, solicitation, and other unethical practices, and should first instruct, then warn, and then strike. Whether the suggestion of the integrated bar will solve the problem, I do not know; it is at least an effort in that direction; perhaps it will come by committees appointed by the courts; or perhaps by law societies such as have given such standing to the English bar. But whatever the method used, firm control must be exercised over those who practice the profession.

Another major problem is the inefficiency of the machinery of the courts. Lawsuits generally turn on what happened; what was said or done on a given occasion, or what correspondence passed between the parties. Once in a while a suit turns on what the law is. In the ordinary case, it takes a year or more to find out. That's too long, and there's no reason for it. The result is, to take a man into court, where justice will be administered, is a threat; it ought to be a promise. Another result is that all over the country, and in all sorts of organizations of business men, arbitration tribunals are being set up to do the work that courts are organized and paid to do. These are not the informal arbitrations of disputes which have existed as long as men have bartered their wares; they are trial tribunals, adjudicating rights according to legal principles, and frequently with the right of appeal. In ten years, the legislatures of twelve states have put back of their awards all of the power of government, together with the machinery for enforcement. Their awards are judgments. Why have business men, at their own expense, established these tribunals? There may be a variety of reasons, but one controlling and sufficient reason is that it takes the courts too long to find out who owns the farm. That there is no necessity for the interminable delays that occur in the ordinary litigation is demonstrated, I think, by the fact that arbitration tribunals decide controversies, without sacrificing the fundamentals of adequate notice and a fair hearing, within a few weeks' time; and by the fact that the English courts, as a rule, act with amazing celerity.

There has been a disposition to charge the delays to procedural rules. I doubt if the fault is there. Any fair procedure must afford adequate notice of the claim made, and an opportunity to deny, avoid, or counterclaim. Issues must be framed, and enough time allowed thereafter to assemble the proofs. Our rules make allowance for the unusual case, and the time limits prescribed for answer or reply are maximums, and not minimums, as many counsel for the defense seem to think. It may be that procedural rules may be improved; suggestions have been made that appeals might be perfected, as is done in some countries, by carrying the court files from the office of one clerk to that of another; another suggestion is that a preliminary, informal conference between court and counsel would be an aid in getting at the kernel of the controversy quickly. These suggestions are worthy of study, but that is not my point. My point is that while procedural rules may not prevent delay, they certainly do not cause it. Given two opposing lawyers who want a speedy adjudication of a controversy, and a court willing to cooperate, as most of them are, almost any lawsuit can be finally determined in a very brief period of time under our present rules. The delays are not caused by the rules; the delays are
caused by the lawyers, and at times, the courts. When a case comes into a law office, the lawyer investigates the facts and the law, and in a few days' time knows what the case turns on and the chances of success; ordinarily he is as ready to try the case in a week's time as he ever will be. But he does not try it; instead, he dictates a memorandum so he will not forget it during the ensuing year, and goes back to work on a case that came into the office year before last. Occasionally a lawyer delays a case deliberately, his oath to the contrary notwithstanding; more often, it is from force of habit. But it is a bad habit, one that is bringing reproach to the profession and driving justiciable controversies from the offices of lawyers and from the chambers of courts. And some judges must bear their share of the blame. Judges exist who hold matters under advisement for inexcusable periods; their theory must be that if they postpone decision until their minds are no longer confused by the argument, and until they have forgotten whether it is a suit on a promissory note or an action to compel a father to support the child, they will stand at least a fifty-fifty chance of being right. It is a hard choice between the judge who decides before he hears—who shoots from the hip—and one who never decides. The law is not and never will be an exact science, and as a whole, I believe society is better off with 75 per cent justice today, than with 80 per cent justice a year from next fall.

The time-honored institution of trial by jury is under fire from many quarters. I think it will survive. Although the necessity for it may not be as acute as it was in centuries that are gone, it still is the best insurance against oppression that has been devised. And aside from its value in that respect, a jury of ordinarily intelligent men, drawn from all walks of life, can sift the true from the false, and determine the reasonableness of men's actions, better than any one man. While I think the jury system is sound, its administration may be improved. The power of the presiding judge to analyze and classify and fairly comment upon the evidence of both sides was an inseparable attribute of trial by jury at common law; the strongest strictures against the system exist where the judge has been stripped of that power. It should be restored. More attention may well be paid to the personnel of the jury, and to their instruction in the high responsibilities of the position. Courts can do much by dealing firmly with the pettifogger who attempts to distract the jury's attention from their task of ascertaining the truth. Where experts battle on technical questions, assistance might well be given the jurors by a disinterested expert called and examined by the court, the fees for such services being taxed as costs. And, of course, there are questions of fact of such complexity that juries cannot handle them. The statutes or rules of practice which define such questions and prescribe their method of determination may not be as flexible as they should. Other suggestions will occur to you; but I believe that it will behoove you to think well before you abolish the system that has survived the centuries since Runnymede and has, as a whole, served us well.

There is pretty general agreement that the administration of the law can be bettered in respect to the matters to which I have adverted. Other changes are in the air concerning the wisdom of which there is not such general agreement. The soundness of the rule of stare decisis is again under critical examination. The English courts, backed by a people who
are primarily lovers of order, have clung without deviation to the rule that a decision of the highest court of the land is the law until changed by Parliament. The English proceed upon the principle that it is better to have a settled rule of conduct, even though it be imperfect, than to have no rule at all. The Civil law, on the contrary, proceeds upon the general assumption that nothing should be settled until it is settled right. The theory of a prompt legislative correction of judicial mistakes does not always work out, and in constitutional cases the legislature is powerless. And where a broader experience, or changing conditions, or more mature reflection, makes clear that an old decision is not sound, judges are sorely tried when confronted with the proposition of wrongly deciding a particular case on account of it, and at the same time further crystallizing an error. On the other hand, society cannot exist without rules; and if the rules are to be changed with the varying whims of the personnel of the bench, it is an invitation to all to violate the rules and to defend on the ground that the rule violated was never the law, but only a mistake. Although the subject has received the attention of the courts for years, no entirely satisfactory passage between the Scylla and Charybdis of these two principles has been discovered. Your generation may be able to find it.

Leaving the field of strictly professional problems, we find controversial ground in the field of governmental activities. The ramifications of modern society are such that legislative bodies find more and more use for commissions and bureaus to which are delegated the duties of concretely applying abstract principles laid down by the law-making body. Other commissions are established to determine facts in present controversies, in aid of the judicial branch. This situation gives rise to the growing complaint that we are reverting to the bureaucratic governments of the monarchs of old. The propriety and necessity of fact-developing agencies as an aid in the discharge of governmental functions is not seriously disputed. The controversy arises over the finality of their conclusions. One school of thought leans to the view that as long as there are notice and hearing, the personnel of the final arbiter is not of vital importance. The other school clings to the view that in our three-part government, every citizen has a right, sometime and somewhere, to bring his troubles to the attention of a court, and that the doors of our courts of justice should never be entirely closed to even the humblest of our citizens. The subject is too involved and troublesome to do more now than to suggest to you that this is one of the problems that deserve your close attention.

Another controversial subject concerns itself with the extent of the power of our government over its citizens. It is a problem that will not stay settled. Our courts have struggled with it since they were organized. Prior to the adoption of our constitution, the power of government over its subjects was theoretically complete. The framers of our constitution undertook to stake out certain fields of individual rights upon which government might not encroach. What the boundaries are of such fields is the question. One group believes the stakes, as set by the constitution, mark out definite but comparatively small tracts of individual right. The other group, commonly called the conservatives or reactionaries, believes that the constitution makers intended a radical departure from the absolute
power of government over the individual, and that they intended to stake out comparatively large, if somewhat indefinite, fields of personal rights. Just what was the intention of the colonists who adopted the constitution will never be known. It is doubtful if they had any conscious thought about the problems of today. I have but a thought or two to leave with you in this connection. The constitution is a declaration of general principles; the application of those principles must and does change with a changing world. Statutes that would have been in clear opposition to those principles fifty years ago may not now be in conflict with them, where conditions have radically changed. The zoning ordinances are but an example. Fifty years ago, an ordinance that would have denied a man the right to erect a grocery store on his own land might well have been deemed to be arbitrary, just as today a similar ordinance in a country town might serve no public purpose. The development of urban life has been such that now all courts agree that there must be some system, for the public good, in the building of the great cities of today. One other thought: The people of this country are entitled to any sort of government they want; if they want an absolute government, they may have it. But if a fundamental change is to be made in the structure of our government, it ought to be made by the people, and not by their legislatures or their courts.

I have roamed around enough to establish the proposition that there is work ahead; that problems exist that you must solve, if they are to be solved. In grappling with the questions to which I have referred, there is room for experiment; we can cut and try without danger to the institutions of free government. There are, however, at least two tendencies now apparent in this country which involve fundamental principles which do not change, and concerning which there is no room for experimentation or temporizing. Strangely enough, they are exact opposites. I refer to the subjugation of the civil authority to the military, an absolute government which we call martial law; and to racketeering, which is the denial of the authority of any law.

When I speak of martial law, I do not refer to the use of troops to aid the civil authorities; I refer to the suspension of the power of civil authorities in a restricted territory, and the substitution therefor of martial law. In a very true sense, the expression "martial law" is a misnomer, for it is not law at all in the sense that we are accustomed to use the word; martial law is the will of the commanding officer. There is a place in a free country for martial law, for even the iron hand of a swashbuckler in uniform is infinitely better than no law at all; if the civil authorities no longer function, if the courts are closed and the executives abdicate, so that the civil law is but a name and not a living force, then martial law is proper. But functioning civil authorities must not be displaced by the military, simply because the executive is restive under the restraints imposed by the constitution and laws of our country.

The most direct threat to our government, however, is the system of racketeering that has fastened itself upon so many of our cities, and whose tentacles are now reaching out for the Arcadia from which I come. Racketeering is a blunt denial of the authority of any law. Its edicts come from dives instead of legislative halls; its decrees are passed by a criminal sur-
rounded by bodyguards, instead of by a judge on the bench; they are car-
ried out by machine guns in crowded streets, instead of a sheriff backed by
the authority of his office. Gangdom has not confined its operations to the
underworld and its activities; it is imposing its will upon honest, hard-
working, law-abiding citizens of our cities. Its only authority is the terror
inspired by its ruthless killings. Either the law or racketeering must go.
They cannot exist side by side, for it is as true now as it was three-
quaters of a century ago, that this country cannot "endure permanently
half slave and half free." I cannot help but believe that the force of
public opinion, when thoroughly aroused, is such that racketeering can and
will be scourged to its den. But go it must, and if the orderly processes
of the civil authorities are inadequate for the task, the military must be used.

For we live in a Universe of Order, so decreed by an all-wise Creator.
The planets in their orbits and the stars in their courses follow, with match-
less precision, a system of law and order. The great Chief Justice held
that "This is a government of laws, and not of men." There must be some
law, even though it be martial law. Denying any authority except that of
terrorism, a challenge to law and order has come to us from gangland; we
must meet it.

The lawyers are the sentries of our government. Because of their
training, they are better able than any other class to detect the stealthy
approach of the enemies of our free institutions. You, the lawyers of to-
morrow, are about to take your post in the watchtowers of our republic.
Conscious of your peculiar responsibility, I can do no more than com-
ment to you the first general order to every sentry as he takes his post—
"To be always on the alert," for as was said long ago, "Eternal Vigilance
is the price of Liberty." The lawyers of yesterday have done their part;
the lawyers of today are doing theirs; you will, I know, carry on.