UNIVERSITY CONVOCATION

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That the Law School of Syracuse University has a new and beautiful home, adapted to its modern needs, we hail as a sign of vitality and progress. It brings the physical equipment of the school up to the standards of its teaching staff, the quality of the citizenry whose interest has made the new building possible, and the character of the men and women it has graduated into the legal profession. We gladly join in congratulating Syracuse University on this achievement.

But the fame of this structure will rest on the quality and character of the discipline and inspiration that here will be passed on to coming generations of men and women of the law. It not only will shape their individual careers but will contribute largely to shaping the public service of the State of New York and of the nation. The young people who pass through these portals are destined by reason of their professional training to exercise an influence upon society and to carry burdens of government far beyond their numerical proportion. In these surroundings they will enjoy a season of disinterested analysis of the legal structure of society and of its evolution. This will be a period—perhaps their last period—for examination of the law without the distorting, but very gratifying, influence of retainers. Here they will form a philosophy of life and law that will abide, throughout their careers. What a responsibility rests upon such an institution!

It may seem paradoxical that the day the student enters these portals he will probably know exactly what he means by law, while when he leaves the law school he will not. He is apt to enter the professional school thinking, as laymen usually do, that the law is a comprehensive series of written commands plainly telling one's rights, duties and liabilities enforceable in court. When the graduate has been fortunate enough to acquire a client, he may find it embarrassing to admit that the law of the client's case is a little uncertain. The client is apt to suspect that the lawyer rather than the law is uncertain and that perhaps he should look for another; for most laymen, I have found, believe that there is no difficulty in finding the law if a lawyer knows enough to open the right book at the right page.

In this era of written law the idea that what has never been written into statute or constitution may be law, and that what is written therein may not be law, is difficult to convey to a layman without destroying his belief in law itself. Perhaps an example that concerns one of the most decisive acts of our nation will illustrate. No one, I suppose, doubts that General Eisenhower is constitutionally the President of the United States. Few people

* At the time of his death on October 9, 1954, Mr. Justice Jackson had substantially completed the preparation of an address which he had been invited to deliver at the dedication of the new home of the Syracuse Law College. This article consists of the manuscript of that address in its form at that time.

sitting at their television sets watching the two national conventions realized that neither these conventions nor the parties holding them have any recognition or standing whatever in the Constitution and very little in statute. As a practical matter these conventions limit the choice for President to two nominees. Which one will be named is then decided by Gilbert and Sullivan types of electors who "always voted at their party's call and never thought of thinking for themselves at all." This was not the system provided by our Constitution. The forefathers thought this should be a nonpartisan decision, and so they devised a plan by which the states would choose their leading citizens to meet with others and deliberate upon a choice, canvassing the merits of various candidates and choosing a President. The electoral system set up as a device to insure deliberative and nonpartisan choice for President is no longer living law. Of course, in the light of custom it would be absurd to say that, because conventions not provided for by the Constitution control the choice of the electoral college, the result is unconstitutional. But it is valid only because we must recognize that even the most fundamental law yields to changing times and conditions and to the customs and usages of men.

The student who comes into the school is likely to anticipate a body of fixed principles and enactments which he will learn, and then he has mastered the law. But not since the law of the Medes and the Persians, which changeth not, has the mastery of our profession been so simple and so final. The most they can expect is to learn how to get a good start at keeping up with the law. Perhaps only from the perspective of a long professional life can one appreciate the fluidity of the law. It is when I compare the curriculum of today with the curriculum that I faced forty-three years ago that I see what changes two score of years will bring about. In those days we had not begun to worry about the law of aviation or of atomic energy and had only begun to see automobile negligence and insurance laws in the offing. There was no labor law beyond a little consideration of the relation of master and servant as a branch of the law of contracts, just as the law of securities was a part of the ordinary law of sales. Little attention was given to taxation, for the really litigious kind of taxation, such as income, sales, use and estate taxes, had not yet come into fashion. Nor did the practicing lawyer bother much about international law. That was a hobby of some nice elderly gentlemen in the profession, but I never dreamed that I might participate in an international proceeding with lawyers from five different legal systems who would conduct their proceedings in four languages simultaneously. Nor did we pay much attention in those days to federal law, for the law that was important to most people was made in our state capitals, and Washington was concerned only with tariffs, railways and other large matters. Now, not even a housewife is safe without advice as to the federal statutes, and the practice of law requires more and more specializing in certain narrow fields, for one cannot keep abreast of it all.

But if the law were static and changeless, it could offer little more of intellectual interest than an exercise of memory. The real romance of the law is the combination of continuity and change, the reconciliation of stability with progress. The student will find the process of applying the law through the courts to be a process of constantly modifying old doctrines to fit new conditions. I can imagine no more fascinating and romantic study than the process by which this adjustment comes about. Let us consider some examples of the growth of the law.

About a hundred years ago, in the westerly counties of New York and Pennsylvania, large fields of oil and gas were discovered. Petroleum was a product known of old, but the magnitude of these discoveries, together with the advent of the machine age which needed fuel and lubricant, soon produced a vigorous and litigious industry. The local courts in oil counties began to try oil and gas lawsuits. But there was literally no law of oil and gas. Here was a vagrant, subterranean substance which did not fit into any category of property, as did the immobile minerals, like a seam of coal. Soon the courthouses of these rural county seats were ringing with arguments between country lawyers as to the basic legal nature of this substance and its quality as property. What title did the landowner have to a migratory mineral thousands of feet below the surface which may have moved onto his soil from that of another and might be drawn off by a well drilled on neighboring land? When, if at all, did it become subject to private ownership? And there were disagreements over the terms of the leases, many of them homemade, or drawn by lawyers dealing with an unfamiliar subject matter. The rights of the royalty owner and of the lessee were in conflict. In those country courthouses, judges were poring over their books, seeking analogies to decide cases and making a new law of oil and gas in the manner in which Von Jehring says law is always made—by contest and struggle between interests. We may readily believe that the lawyer for each side asserted that to be the law which served his client's interests, and in every case one or the other of the litigants left with a low opinion of the law and no satisfaction except perhaps that of giving his name to a leading case. But there gradually emerged out of experience a law of oil and gas. As later discoveries were made under different conditions in Texas and in Oklahoma, those states, too, developed their law, having the Pennsylvania decisions as precedents but adopting different theories to meet the conditions of the place and of the time.

Another dramatic example of the growth of the law to meet new conditions is in the law of running waters. Both the civil and the common law developed where rainfall was plentiful, and as long ago as Justinian, running waters were common to all and the property of none. The doctrine of riparian rights was adopted and developed in the eastern part of the United States where lands were amply watered. The law followed the principle of equality which requires that the corpus of flowing water becomes no

one's property and that aside from rather limited use for domestic and agricultural purposes, each riparian owner has the right to have the water flow down to him in its natural volume and channel unimpaired in quantity. The riparian system does not permit water to be diverted from the stream to diminish the supply below. This general doctrine became the settled law of the entire eastern part of the United States.

But as population moved westward, this idea was obliged to yield to different economic and climatic conditions. Gold was discovered in the mountains, and water was necessary to separate the precious from the dross. The miners were in the mountains before farmers came into the valley, and the miners appropriated the waters of running streams, carrying them far from their natural courses and dissipating them. The custom of appropriating water acquired the authority of usage in the mountains, although it was contrary to the law on the books. Then came the farmers, and they, too, wanted to divert the streams to irrigate parched lands. Later, a right to appropriate waters, to remove them from the stream, was asserted by many of the great cities which desired to carry the waters from the mountain to their inhabitants. Under the riparian rights doctrine none of these diversions could take place, and the streams would pass through the normal channels where they were largely wasted in the sea. The courts of all the arid states for years were perplexed with contests, not only over the right to appropriate running water but as to priorities of appropriation. Lawyers battled for the interests of their clients, and out of actual experience the judges adapted abstract principles of law. The appropriation system was established as the law of the arid states, and the appropriation first in time is best in title, even though it may deprive the downstream owner of the benefits of the stream while the upstream owner diverts them to lands remote from the watershed. The story of some phases of this struggle in California is related in *United States v. Gerlach Live Stock Co.*, 339 U. S. 725.

An entirely different method of growth has been manifest in the way we have approached the changes of doctrine necessary to aviation. Instead of proceeding by experience from case to case, we have attempted to anticipate the needs by legislation. For uncounted years it had been the doctrine of the common law that ownership of surface of the land carried with it all that lay beneath and all that was above it. Then, in 1938, Congress declared that the United States possesses and exercises complete and exclusive national sovereignty in the airspace above the United States, and provided for a public right of freedom of transit for air commerce in this space. However, more than twenty states adopted a uniform aeronautics act which declared that sovereignty in the space above the lands and waters of the states rests in the states, except where granted to and assumed by the United States pursuant to a constitutional grant from the people of the state—presumably a reference to the commerce clause of the Federal Constitution. It also provided that ownership of the space was vested in the owners of the surface

beneath it. The United States Supreme Court, in a case to which no state was a party, and without reference to these statutes, uttered the dictum that the doctrine that ownership of land included the airspace above it "has no place in the modern world." *United States v. Causby,* 328 U. S. 256, 261. But the Court held that a use of the airspace which disturbed the domestic tranquility of a chicken roost below was a taking of the land and must be compensated. The Court also has held that the states are free to levy personal property taxes upon planes landing on airports within their territory. *Braniff Airways, Inc. v. Nebraska State Board of Equalization,* 347 U. S. 590 (June 1, 1954). Aviation is still in its infancy, but it is plain that there will need to be much more and perhaps sounder growth in the law of land and air as that industry develops its full potentialities. It is not clear to me whether it is better that law try to anticipate experience or experience be allowed to develop law.

I have emphasized the part of the advocate in stimulating and guiding the growth of the law. The attorney usually has little choice of the principles he will advocate. He usually is confronted with a client in a predicament, or one who has some particular interest at stake. He may not be free to advocate the doctrine that, except for his retainer, he might think sound law. But if he is not responsible for the position he takes, he is responsible for the way he champions it. Our adversary procedure relies upon the client's interest as the incentive to bring before the court every available argument and reference that will help prove his contention. It is upon this clash of interests that our adversary system depends for the material for judgment.

I suppose it is safe to say that on their facts the great majority of cases that come to the lawyer will win or lose themselves in spite of his efforts. It also is true that some may be won or lost despite the desires of the judge, who may wish to decide otherwise than he feels constrained by controlling law to do. But in those rare cases where the law is in flux or is unsettled, or ill adapted to its time, the real spirit of advocacy finds its opportunity. Those are the cases young lawyers dream of and old ones talk about. Those are the ones into which the true advocate before the court throws his whole being. "Oh, the little more and how much it is!"

In our system of legal education, unlike the practice in continental Europe, we give the same training to the prospective advocate and judge, for in our political system one can never tell who will turn out to be on the bench and who at the bar. But there is great realism as well as logic in treating the practicing bar and the judiciary as separate professions. It is not true that a good trial lawyer always will make a good judge. It is not easy for one to shift from the warm partisanship of advocacy to the cold neutrality which is supposed to express itself so circumspectly as to give the impression that the author never warmed to his subject.

But thoughtful, well-rounded and alert advocacy does play an important part in the growth of the law. The judge may write the decisions, but

counsel must select the test case, make a solid record and put forth a persuasive, well-organized, honest and earnest argument. If such a case is not won, losing counsel may feel that he has aided the court, perhaps has saved it from an even worse error than the one he thinks it committed.

It should not be necessary in this day to tell our young lawyers that hard-wrought, well-reasoned advocacy does count in the courts. But there is a school of commentators who regale them with statistical and other material to prove that results show only the judge's predilections, prepossessions and prejudices. Of course we have them, and where we differ from these commentators is that it is our duty and our effort to overcome our prejudices, while it is their privilege to exploit theirs. But since many of these critics are law professors, I find it hard to understand why they seem never to attribute any decisions to good or bad advocacy. They assume the decision is conditioned only by what is in the judge's mind before argument, not by what argument brings to him. I think this is a disservice to youth, for if the teachings of the law have no effect on the minds that receive it, even if on the bench, it is hard to see how teaching the law is an honorable calling.

The fact is that most of these critics never had experience in advocacy or in the practice of law. Those who have known that legal training has forced them many times to tell clients that they have no case, or cannot engage in undertakings, when the lawyer's every interest and desire would be to give contrary advice. He is not less faithful to the law as he sees it when he has no such interests in the result.

It will be the mission of those who occupy this new law school home to teach law, not as a memory exercise but as an intellectual discipline to enable [these] students to help shape the doctrines and institutions of their time to the conditions of a new society. There is no closed book of law; it is always being written, and only a constructive attitude will yield the satisfactions of which our profession is capable. The successful advocate will not be a narrow-minded man; he will comprehend the larger purposes that the law must serve and the larger processes by which it takes its course.

There is an old saying, attributed to the Chinese, that a man never may step in the same river twice. Its waters change from high to low, from muddy to clear, and are always moving on, never the same as the day before. But the stream is permanent, marking perhaps a national frontier, bearing the world's commerce and sustaining life in the valley it refreshes.

So we may speak of the law. One can never dip into the same body of law twice. Each day come new decisions, new statutes, new conditions that call for change. Our students of today do not step in the same waters into which we of older generations ventured. But they are in the same great stream that for centuries has been continuously flowing from generation to generation, marking the boundaries beyond which citizens and officials must not go, bearing the commerce of the world by upholding the integrity of

the promise, sustaining an orderly and decent way of life. It has borne to us the wisdom of the Roman forum and of Westminster Hall; it has served monarchy and republic, dictatorship and democracy.

In the new home of Syracuse Law School the youth will learn to distinguish between the temporary and often unsatisfactory quality of the waters and the permanent and immeasurable value of the stream of the law. They will learn that "a Government of laws and not of men" may be an ideal, capable of only imperfect attainment, but that it is not a shallow cliche. They will believe in law, in its administration by men as detached, impersonal and dispassionate as humanly possible. They will strive to extend the reign of law into international and domestic areas of lawlessness. They will aid the courts to keep the stream of law both from a deadly stagnation and from destructive floods. They will carry on the tradition of this University, which not only is high in academic law but has for generations been in the midst of a bar that has given our state and nation some of its most distinguished advocates and judges. What a tradition to uphold!