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Speech Delivered to Unknown Group Re. Carter's Dissents

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When I received the invitation from my friend Charlie Katz to address this gathering today I was torn between two impulses -- One, that I would follow precedent and decline the invitation, and the other, ^{that} I would ignore precedent and assume the burden of preparing an address that would be appropriate to deliver to a group of young, intelligent, forward looking lawyers. Not being a slave to precedent, I yielded to the latter impulse.

Speaking of precedent, I have a very definite conviction that when a rule has been established by a long line of well considered decisions of the court of last resort of a jurisdiction, it should be respected and followed, at least until changes in the social, economic or political philosophy of the times demonstrate its utter impotency to accomplish the ends of justice.

I agree with what was said by Justice

Stephen J Field of the Supreme Court of California in his dissenting opinion in Ex Parte Newman, 9 California Reports at page 502, that: "The law is a science, whose leading principles are settled. They are not to be opened for discussion upon the elevation to the bench of every new judge, however subtle his intellect or profound his learning logical his reasoning. Upon their stability men rest their property, make their contracts, assert their rights and claim protection. It is true that the law is founded upon reason, but by this is meant that it is the result of the general intelligence, learning and experience of mankind through a long succession of years, and not of the individual reasoning of one or of several judges. The statement just quoted is not in conflict with that of another great writer upon the same subject, that: "The common law is a living process Like all

things that have the principle of life in them, its evolution is marked by trial and error. It is molded and adapted to an ultimate end. That end is justice, imperfect by the limitations of humankind yet lighted by the divine spark of creative thinking. Struggling ever forward, the common law like nature finds many decisions no longer in consonance with its needs and ruthlessly overrules or differentiates them, until like a species no longer in harmony with its environment, the decisions tested by the needs of the times and found wanting, are declared dead."

In other words, the law is not static which Webster defines as "the science of bodies at rest. Yet it should not be as Justice Roberts said in one of his dissenting opinions "like a one way railroad ticket good only on the day on which it is used."

Those who have studied our judicial

decisions know that authority can be found therein to support almost any legal position a litigant may see fit to advance. True, some of this so-called authority may be dicta, and some of the statements relied upon may have been made when the court was discussing a subject foreign to that involved in the case under consideration, but it is likewise true that there are many decisions among the reported cases in our appellate and Supreme Court reports which are in clear conflict with other decisions on the same subject; and when those conflicts are called to the attention of the Court, it is faced with the dilemma of which rule to follow. It is in situations of this character where the conflicting social and economic philosophies of the members of the Court assert themselves. Thus we have dissenting opinions. There may be those who question the propriety of a judge writing a dissenting opinion. But it

is a time honored custom and will continue as long as our courts are composed of vigorous men with positive natures, possessing strong convictions, and the zeal and energy requisite to inspire them to give expression to their views.

My background is that of a country lawyer, practicing in the so-called cow counties. My clients were largely of the common man variety -- laborers, farmers, miners and small business men. To most of them the law appeared to be a necessary evil -- something to be avoided except as a last resort. It seemed altogether too intricate and technical to constitute a satisfactory instrumentality for the administration of justice. It appeared to them, and properly so in many cases, that justice was defeated as the result of technical rules, the basis of which was somewhat nebulous if not obscure. In addition to this

were
basic objection there, the always present spec-
ters of expense and delay which all too often
have resulted in a denial of justice. Natur-
ally the reactions of my clients made a pro-
found impression upon me, and it is not un-
likely that expressions which stem from that
impression have crept into some of the opinions
which I have written as a member of the Supreme
Court of California. I do not say this by way
of apology because it is my philosophy that the
law should be so moulded that in its adminis-
tration justice is brought to the humblest
citizen in the smallest hamlet or village with
a minimum of expense and delay. To accomplish
this result the law must be simplified. Tech-
nical rules of procedure should not be invoked
to defeat a just and meritorious claim or
demand. The technical rules applied by some
courts to various claim statutes is an example
of how just claims may be defeated by fine

upon technicalities. The exclusion of material and relevant evidence on highly technical grounds is likewise a barrier to the establishment of just claims. Gradually these barriers are being broken down as simplicity and common sense supplant formality and austerity. Many lawyers and more judges are slaves to tradition. Tradition is an important help to history, but its statements should be carefully scrutinized before we rely on them. It has been said that "to follow imperfect, uncertain, or corrupted traditions, in order to avoid erring in our own judgment, is but to exchange one danger for another."

If I have a philosophy of the law it is that the law be made articulate and responsive to the present day needs of the people; that antideluvian and antiquated rules of procedure and evidence which impede the simple and expeditious administration of justice be discarded, to the end that wrongs may be redressed

without the expense and delay so prevalent in present day procedure. There is much that can be accomplished in this direction, and to you young, energetic men and women with freshly trained intellects, a challenge is issued to go forth and ^{help} revise and revitalize our system of jurisprudence and make it an effective instrumentality for the administration of equal justice under law.

It is no doubt true that there are those in the legal profession who take advantage of the intricacies of the law and the opportunity for delay to advance the interests of their clients. Such conduct while legally permissible has brought reproach upon both the law and the legal profession. Donald Richberg, a prominent lawyer and one time Director of the National Recovery Administration, made this statement: "The law as a philosophical study is very

interesting. The law as a system of workable rules of human conduct is a project worthy of the highest endeavor. But the modern practice of law, which calls principally for mental ingenuity to help a client do anything he wants to do, seems to me intellectually one of the most degrading occupations in the category of respectable employments. I began to believe that the superlawyer should have the brains of a Machiavelli, the hide of a walrus, and no moral convictions."

Lord Brougham is reported to have said that: "The lawyer is a gentleman who rescues your estate from your enemies and keeps it to himself."

Another author has this to say about a lawyer: "With books and money placed for show, Like nest-eggs to make clients lay, And for his false opinion pay."
Probably the most disconcerting

suggestion ever made about the members of the legal profession was that reported in the Shakespearian Play "Henry VI" as having been uttered by one of the members of the mob seeking to gain control of the government. This suggestion was: "The first thing we do, lets kill all the lawyers."

If the author of this statement were here today, he would either feel greatly discouraged or inspired with the enormity of his undertaking. But we should not be too greatly concerned about the criticism to which we are subjected, in view of the fact that it is not of recent origin or directed against the members of the profession of this generation alone. In fact, we find that the same situation existed in Lincoln's time and was the subject of comment by him about 100 years ago, when he said: "There is a vague popular belief

that lawyers are necessarily dishonest. I say vague, because when we consider to what extent confidence and honors are reposed in and conferred upon lawyers by the people, it appears improbable that their impression of dishonesty is very distinct and vivid. Yet the impression is common, almost universal. Let no young man choosing the law for a calling for a moment yield to the popular belief -- resolve to be honest at all events; and if in your own judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation, rather than one in the choosing of which you do, in advance, consent to be a knave."

Probably the thing uppermost in the minds of most of you assembled here today is the problem of what the profession holds in store for you -- that is, what will be your future in the profession; what opportunities

are available for young, intelligent, educated, energetic, and ambitious lawyers in an already overcrowded legal profession. I may state from experience, as well as observation, that this same problem has confronted every other young man and woman who has been admitted to practice law, and to a greater or lesser degree the same situation existed 35 or 40 years ago with respect to the economic problems which confront a young lawyer. I feel that I can state with confidence that these problems can and will be solved by each and every one of you who is willing to put forth the effort. The fact that you have passed an examination of the character given by the Committee of Bar Examiners of the State Bar of California, is sufficient evidence of your ability and qualifications to justify the prophecy that there is a place in the legal profession for you to fill. "The Golden age is not behind but before you. You may think

that it requires some sort of a genius to attain success in the legal profession. It has been said that: "Genius is only the power of making continuous effort."

You will no doubt be able to demonstrate this to your own satisfaction in the years that lie before you in your professional career.

You should not be discouraged by what appears to you for the moment to be defeat or failure, as there is no failure except in no longer trying, and no defeat except from within. They can conquer who believe they can. It has been said:

"So high is grandeur to our dust --

So near is God to man --

When duty whispers --

Lo thou must --

The youth replies -- "I can."

You face a future beset with many things of interest, many avenues of opportunity; you

will experience many great moments when you can visualize the success of your efforts and can feel that you have accomplished something worthwhile for those you are privileged to serve. You will also feel the anguish of defeat and the disappointments due to the uncertainties of the law, which cannot be avoided. Your success or failure lies entirely with yourself. I know of no formula for the success of a lawyer except the premises of honesty, industry, and perseverance.

Tennyson, the great author and poet, had this to say regarding the career of a lawyer:

"Mastering the lawless science of our law --
That codeless myriad of precedent,
That wilderness of single instances,
Through which a few, by wit or fortune led,
May beat a pathway out to wealth and fame."

In conclusion permit ^{me} to quote an utterance of the late Justice Oliver Wendell Holmes

near the close of an eventful career, which contains an inspiring thought. He said: "No man has earned the right to intellectual ambition until he has learned to lay his course by a star which he has never seen - to dig by the divining rod for springs which he may never reach.

"To think great thoughts you must be heros as well as idealists. Only when you have worked alone -- when you have felt around you a black gulf of solitude more isolating than that which surrounds the dying man, and in hope and despair have trusted to your own unshaken will -- then only will you have achieved. Thus only can you gain the secret isolated joy of the thinker, who knows that, a hundred years after he is dead and forgotten, men who never heard of him will be moving to the measure of his thought - the subtle rapture of a postponed power, which the world knows not because it has no external trappings, but which to his

prophetic vision is more real than that which
commands an army."