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Every Day is "Law Day"

Judge Lee E. Skeel*

PRESIDENT EISENHOWER proclaimed May 1st of this year as "Law Day," and the day was formally observed throughout the nation. Gratifying as that was, it is hardly enough, in this or any other era, for self-satisfaction about American appreciation of our heritage of liberty under law.

More important than appreciation of this priceless heritage is appreciation of the stern duty that goes along with it. Unless we daily earn this prize, we daily lose some of it. Its real strength is the revitalizing effort we add to it in our daily lives. There soon would be no precious "liberty under law" if we thought only to enjoy it, and not to serve it.

If we want to preserve this greatest of all gifts of the past, we must deeply resolve to merit it in our own deeds. Every day must be "Law Day" in our hearts and in our acts.

"Liberty under law" will remain ours only if we all accept the obligation to maintain the privileges of democracy ruled by law.

No lawyer will be startled by being reminded that our system of government finds its strength in the administration of its affairs by separate branches; that is, by the administrative, the legislative, and the judicial departments. There is no great difficulty in defining the orbits within which the first two exercise control. Their functions are largely political, in the sense that their services respond to social demands. Those entrusted with these offices are the direct representatives of the people.

In these departments, limited as they are by provisions of the Constitution as to their separate functions, there is only the slight possibility that tyrannical abuse of power can succeed. Constitutional guarantees alone cannot preserve good government, but when they are supported by a strong and independent judiciary, freedom is maintained. The judicial department of our government, therefore, is the keystone in the structure of democracy. Our greatest concern as lawyers is to define the functions of this third member of the triumvirate of governing authority and its proper part in sustaining the democratic process.

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[*Editors' Note:* This is the gist of an address recently delivered by Judge Skeel before the Akron Bar Association.]

The historical background of our Common Law and its continued growth and development to meet the needs of our civilization is a subject that every lawyer should keep constantly in mind. The law is one of the realities of community life transcending all others in importance. Yet it seems not to be definitively definable.

Ulpian once said: "Justice is the constant and perpetual will to allot to every man his due." Blackstone said: "Law is a command of the state directing that to be done which is right and prohibiting that which is wrong." Neither of these definitions, nor many others formulated by recognized authorities, have been found to be wholly satisfactory. Even if we are unable to define *Law*, or to say exactly what it is, everyone is concerned with what results from the lack of it, and stands in fear when not protected by its power. And so we will speak briefly of its historical background and seek a key to its well-recognized control in maintaining the democratic way.

Growing out of human experience and from man's instinctive yearning for law and order, it had its beginning in the ancient days of the autocratic patriarch of the clan or chief of the tribe. Through the thousands of years of the tyrannical empires of the ancient world—Egypt, Babylonia, Assyria—freedom was unknown. Incredible magnificence ruled over incredible squalor, aided and supported by superstition. Then the way to live in harmony with others, by self-control and by limiting or circumscribing individual action by self-imposed rules, applicable to and recognized by all alike, was demonstrated by the Greeks six hundred years before the birth of Christ.

About the same time, the Bible laid down the basic laws of morality. Much of the Greek contribution to the development of the law is found in the writings of their immortal philosophers, their brilliant understanding of life's purposes has never lost its luster to philosophers since their day. But Greek civilization, while creating the basis for the democratic way, did little for the processes by which the law could be used to sustain "liberty under law." It failed to develop, in its system of administering justice, a professional class dedicated to the law. Their judicial proceedings were held before popular tribunals, without the direction or control of a trained judicial officer. A trial determined only the interests of the litigants then before the court. It made no attempt to apply to the proceeding the precedents of prior legal disputes involving like questions.

In sharp contrast, Roman civilization can be said to have contributed the methodical basis for development of rule by law and establishment of a legal system for sustaining law and order. The people of the Roman Republic and of the succeeding Empires had a deep instinct for constitutional government in which fixed rules of law were established as the bases of its judicial system. Not merely justice in a particular case, resting on rules applying only to the particular judgment, was the objective. Rather, it was the development of a body of law that would guide social conduct and under which all would be judged alike.

The foundation on which this great social advance was built, and part of its evolution was the creation of a professional class whose efforts were dedicated to the development and administration of law based on justice between men. The whole body politic was relied upon only insofar as was necessary in order to enforce judgments based on the law. This is the point in history where rule by law, not by the arbitrary decree of the ruler, had its beginning. It must be clearly noted that the basic credit for this advance must go to the professional class developed in the process, whose work was concerned with the law—*lawyers* of great ability, who created the foundation for liberty under law. To Augustus, Gaius, Cicero, Hortensius, Ulpian, Julian, Papinian, Quintilian, Justinian and many others—emperors, jurisconsults, judges, praetors, law teachers and writers—the civilized world owes a debt of gratitude. Their greatness must be attributed to their realization of the fact that when law, justly created, rules the people, injustice can result only from human error.

Starting from different avenues of approach but with like purposes, and based on the historical background of early Germanic institutions, later there was developed the Common Law of England and of today. Through its formative period of trial and error, in the many local courts, especially the courts of the Hundred and the County Courts of the 10th, 11th and 12th centuries, and in other courts of wider jurisdiction later created by royal edict, the Common Law took form. Its form was the result of recorded decisions in litigated disputes. Its progress was guided by a professional class—*lawyers*—whose efforts were dedicated to developing rules to protect individual rights by law.

Many factors contributed to its ultimate greatness. The judges and lawyers of medieval days, and after, studied the

Codes of the Roman Civil System—the subject of continued study by many legal scholars after the decline of the empire. The Church Courts, for a period in English history, assumed jurisdiction over the secular courts, and during that period they too contributed to the development of a stable legal system. In summing up the background of the Common Law of England, Wigmore, in his *Panorama of the World's Legal Systems*, says: "And so what with William and his successors, and Domesday Book and Westminster Hall and Bracton and the Inns of Court and the Year Books, the class of the 1400's finds England with a single unified Common Law of its own, a distinctive one, not merely a branch of the crude Germanic System. This fact is directly attributable to the composite scholarship of the judges and those supporting the judicial branch of the democratic way—lawyers, law teachers, and writers and legal philosophers." By their devotion to the task of declaring and defining the basic rights of man in an ever-evolving industrial civilization, the Common Law has been rightly accorded recognition as a world legal system, the foundation of "liberty under law."

As was said by Lord Pollock in his work on the *Expansion of the Common Law*: "For the law is not a collection of propositions but a system formulated on principles, and although judicial decisions are in our system, the best evidence of the principles, yet not all decisions are acceptable or ultimately accepted, and principle is the touchstone by which particular decisions have to be tried. Decisions are made, principles live and grow."

So it is that we, secure in our great judicial system, can proclaim our way of life as surely the victor over totalitarian ideologies. At the same time we must never forget that our system must ever be supported by all of us, as lawyers and as members of our society, with the same devotion shown by those who have gone before us in maintaining the vitality and supremacy of the law. Goethe once said: "That which thou has inherited from your father, that you must earn in order to possess it."

As always we must face the vital problems of our era, as the members of the legal profession faced the problems of past eras.

One modern problem of first importance is how to maintain stability and justice in the management of government and personal rights. Writing in the *Saturday Review* under a title distasteful to lawyers—"Should People Distrust Lawyers?"—a prominent member of our profession recently said: "First of all

it must be acknowledged that a sense of stability, the state of a community which permits intelligent planning for the future on the part of its citizens, is essential to freedom." He cited instances in the modern history of totalitarian states where the hero of yesterday, without change of fact or reason, suddenly was branded a traitor, and mysteriously disappeared from his usual habitat without explanation or right or privilege of inquiry.

Dean Pound once said: "The administration of justice, according to law, means administration according to some standards more or less fixed, which individuals may ascertain in advance of controversy and by which all are reasonably certain to receive like treatment. No system fully realizes this ideal. Even in the most mature systems, causes arise constantly for which the rule must be made or ascertained after the event. But this is a necessary evil arising from the infinite variety of human action and the constant change to which all things are subject. . . . Civilization increases this complexity and so demands law, that is rule and order in the administration of justice, so that men may act assuredly with reference to the future. . . . To a certain extent, the will of society as to the relation of individuals with each other may be ascertained and declared in advance. But, as a rule, this is possible only along general lines. Hence, for the great mass of causes, uniformity and certainty are to be reached in no other way than by requiring the magistrate to bring a trained reason to bear upon them." It is the function of the law and of the lawyer to maintain a stable society, and to that end, the members of the legal profession must be ever vigilant.

Yet, here a warning must be sounded. The law must never become static. We may set down as "determined," many principles needed to stabilize our society, but we must always leave room for change and growth. The vital strength of the Common Law is the ability of its votaries to bring "a trained reason to bear" in resolving changing social relations, according to law, based on justice among all men.

Delay in the administration of justice is likewise, in part at least, the lawyer's problem. Justice delayed certainly is justice denied. To *create* delay in order to gain advantage over an adversary, in solving a legal dispute, is unconscionable. Worse, it erodes the system of law itself. Failure to support a change in procedure that will minimize delay, where such a change can be made without surrendering lawful rights, is a violation of the

oath of a lawyer taken upon his admission to the Bar. That part of the oath says: "I will not delay any man's cause for lucre or for malice."

At least two ways in which delay in the judicial process today can be avoided are—first, pre-trial procedure, and second—proper use of the right, if the facts justify such action, to file a motion for summary judgment. Under the Rules in the Federal system, these procedural rights now are being used with marked success. The legal profession is demeaned, for example, when a general denial is filed in a case, when the facts pleaded cannot be honestly denied but because of form of the pleading no legal liability can result other than interest on the debt. This "trickster's" gambit can suspend the day of reckoning of a debt absolutely due, for an extended period, only because of the condition of the court docket. But delay thus obtained is unworthy of a lawyer. Likewise, the justification for pre-trial is so obvious, when pre-trial is properly conducted, that its perversion is unforgivable.

These and other current subjects must be considered in the light of the function of our judicial process. Our courts are not inquisitorial in character. They consider only such evidence as is presented (except for such facts as are judicially noticed) in determining questions of fact. Likewise, the manner of invoking the court's jurisdiction is at the discretion of a party and of his lawyer, not of the court. The court does not advise either side of its judgment in advance. This is known in the historical development of the Common Law as the rule of neutrality. The lawyer thereby becomes a full partner in the judicial process, equally responsible with the court in the administration of justice. This is the essential element whereby the impartial administration of justice is to be distinguished from the exercise of autocratic power—a free, alert, and dedicated legal profession.

The trial of every case is a part of the system by which the Common Law continues to grow. The rights of one client invoke the rights of all others under like circumstances. Elihu Root defined the duties of a lawyer when he said:

"He is a poor-spirited fellow who conceives that he has no duty but to his clients and sets before himself no object but personal success. To be a lawyer working for fees is not to be any the less a citizen whose unbought service is due to his community and his country with his best and constant effort. And the lawyer's profession demands of him something more than the ordinary public service of citizen-

ship. He has a duty to the law. In the cause of peace and order and human rights against all injustice and wrong, he is the advocate of all men present and to come. If he fail in loyalty to this cause; if he have not the earnestness and sincerity which comes from a strong desire to maintain the reign of law; his voice will ring false in the courts and will fail to carry conviction to judicial minds.

“The institutions which today are the foundation of our way of life, that make possible the maintenance of liberty under law, are not indestructible. They were achieved by the devoted and courageous efforts of our predecessors and unless we have the courage to defend and preserve them they may pass away as many times before human institutions have passed away only to be known to history.”

Never before in history has there been such a persistent effort to substitute strange doctrines in place of the basic rules that have in the past pointed the way to social justice. Seeking a short cut to economic and social success, some men would willingly destroy what history has shown to be true and just. Such attempts must be met and subdued by every lawyer who believes in the fundamentals of *liberty under law*.

This is indeed the task of the lawyer, and his challenge.

To every lawyer, and to every man of good will, every day in the year must be “Law Day.”