

FAREWELL ADDRESS OF GEORGE A. MALCOLM ON RETIRING AS DEAN OF THE COLLEGE OF LAW, UNIVERSITY OF THE PHILIPPINES

Mr. Dean, Henceforth to be known as King George the Second of a law school, recognized and approved, a member of the Bureau of Comparative Law, American Bar Association, a member of the Association of American Law Schools, and soon to be a member of the honorary Order of the Coif.

Gentlemen of the Faculty, Henceforth to have a warm spot in my heart, because of your sacrifices and splendid co-operation.

Members of the Alumni Association, Henceforth to be my instructors if I am to conform to the description of a judge, as one who has first rate instruction from good lawyers.

Students of the College of Law, Henceforth, if you need advice on delicate matters of state, see the Dean; if you wish to borrow a few thousand pesos, see the Dean; if you aspire to a high position, see the Dean; for now I must be a sort of Dean for all law schools and all law students, favoring none above another.

Friends All, I thank you for this unmerited demonstration in my honor. In response to your kind action, permit me a few words of a personal nature, and some observations relative to my conception of my duties on the Supreme Court.

I speak nothing but the truth when I tell you that I sever active connection with the University of the Philippines with deep sorrow. There has been with me, since the day the Governor General surprised me with the news of my nomination as a Justice of the Supreme Court, none of the feeling of elation which a promotion usually carries with it. I remember that when I was appointed a clerk in the office of the Secretary of State of Michigan, it seemed, as I walked up the steps of the Capitol, that the building belonged to me. Now, on the contrary, there is a feeling of dejection on leaving our University. As a matter of fact, I have made myself sick trying to decide if I should not decline appointment to the Supreme Court and could I have thought of any way which would not have appeared as a gross breach of courtesy to the President, I should have declined. At last, I have come to consider it my duty to assume the new and high position. I had intended to leave the University very shortly under any circumstance. My work in the University, my work for legal education, and in a lesser degree, for public speaking, political science, and university life, to which I have given the last seven years in study, travel, and investigation, is finished. It is much better for someone else with a new energy, and a new view-point to take up the work. And let me tell you, I

leave the College of Law in capable hands—with you, the loyal students; with you, the successful alumni; with you, the learned Faculty; with you, its distinguished President, and with you, sir, its brilliant and able Dean.

Life seems made up of breaks. I look back in reminiscent mood to the days of my youth on the farm and in the country school. I could have stayed there, a farmer, but I chose to make the break. I came to the village school, working in the printing office, lighting street lamps, and doing odd jobs. I could have stayed there, a printer or a merchant, but again, I chose to make the break. I came to the State University, and with the aid of a beautiful mother, I graduated in Arts and Law. I could have joined the teaching staff of a number of colleges and universities or gone back to be prosecuting attorney of my home county, with a chance to try for a seat in Congress. But again, I chose the great adventure. I came to the Philippines, with an expensive education in my head, three dollars in my pocket, and no job in my hand. I soon found that employers were not especially interested in my degrees but only in what I could do. And now after a little more than ten years in the Philippine service, there comes another break.

If I consider my first attempt at social service, the inauguration of new ideas and ideals of legal education, accomplished, I yet shall carry with me one title, that of General Editor of the *Philippine Legal Series*, which gives me the basis of my second attempt at civic betterment. Already two self-sacrificing and competent lawyers are at work on a *Philippine Digest*, patterned on the best modern digests. Already, Philippine scholars are awaiting the completion of the new Philippine Codes to turn out legal treatises. With the permission of the Dean of the College of Law, I shall retain my position of General Editor, and with the concurrence of my colleagues on the Supreme Court, I shall devote the hours which usually go to social intercourse to the development of a Philippine legal literature. England has her Blackstone; the United States, her Cooley; Spain, her Manresa; almost every country, some law writer of international fame. But where are the Blackstones, the Cooleys, the Manresas of the Philippines? What author of Philippine origin is cited by the Courts? I conceive this a legitimate field of judicial activity, to endeavor to provide the Philippines with a local legal literature.

There is another work of equal importance in which I hope to be permitted to do my part. Constantly we read of successful meetings and accomplishments of the different professional associations; that is, of all but one—Law! Why is this? Are the lawyers less capable, less progressive, less patriotic, than the pharmacists, the farmers, the doctors, the engineers? Assuredly, there are splendid men in these other professions. But just as certainly are their equals to be found in the Law. Most of the leaders of the Philippines belong to our profession. Is it lack of money? Even if money were the prime essential, which is debatable, yet, there is a considerable amount in the treasury of the Philippine Bar Association. Are the officers of the Association inefficient? If they are, then I am also, for I am an officer. But

Agoncillo, Cruz Herrera, Diokno, Arnaiz, Chicote, O'Brien, McMahon, and Gloria are good lawyers and fine gentlemen. No! The answer is in the apathy and the lack of co-operation of the Philippine Bar. Here then is work for you and me, work for all lawyers in the Philippines. Before them, there lie many useful fields of activity. I would like to see the Bar Association with active committees, recommending progressive laws to the Philippine Legislature, or formulating methods to discourage unnecessary litigation, or constructing a home for the Association. I would like to see branches in Iloilo, Cebu, Zamboanga, Pangasinan, and elsewhere. I would like to see the Bar Association publishing an informing and scholarly Philippine Law Review. Porto Rico, with not nearly the same number of lawyers as the Philippines, publishes a satisfactory review. I would like to see the day when the Supreme Court shall refer all questions of legal ethics to the Bar Association for recommendation, and when the Association on its own initiative will take action to disbar unscrupulous lawyers. I would be happy to use my official position to accomplish this purpose. And I would like to see the day when no judicial appointments will be made without the Governor General consulting the Bar Association, and when the Bar Association, forgetting political and personal feelings, will recommend only the best men for the position. I believe the Chief Executive would be glad to honor a conscientious Bar Association in this way. Here then lies our present duties—to attend a general meeting of the Bar Association, and encourage others to do so; to join the Bar Association; and then to make it a real Philippine Bar Association.

I have spoken to you, my friends, in this personal way, to an extent which may be unwise. When I count the number of pronouns, I am ashamed. If I have done so, it has been mainly to ask your help in these crusades and to encourage you to plan your life for the good of your country.

Coming to the second portion of my address, my conception of the duties of the Judiciary, I intend to be indiscreet still further. Good friends have, time and again, urged me to be discreet. To some, you know, "discreet" is defined as one without opinions, the state of having no backbone; example, the jellyfish is discreet. But being a bachelor, matrimonially speaking, it is about my last chance to be indiscreet before I wed myself to discreet judicial duties. Perhaps six years from now, I will wish to modify my indiscreet opinions. Six years is named, for that length of time has passed since I delivered my inaugural address as Dean of the College of Law. Today I would not change a word of it. Nor do I specially care if others disagree with what may be termed the fine spun theories of a Philippine radical. If to be a progressive in the law is to be a radical, then I am happy to be so named. If to be a radical is to have opinions, then I am glad to join with Brandeis and Pound and Coudert and Holmes and others who, shocking conservatism, are moving toward "the new freedom" in the law.

I go to the Supreme Court with the utmost respect for its history and traditions. Great men sat upon that Court in Spanish days. Great men are there now. Willard and Moreland, Trent, Carson, and Johnson balanced by Arellano and Torres, Mapa and Araullo, not specially mentioned to make invidious distinction, but merely to give honor where honor is due, are names which would shine in the legal history of any country. I know the tittle-tattle of legal criticism. I have heard lawyers criticize this or that opinion or this or that judge. I have done the same. The lawyer was not to blame; in fact it was merely the exhibition of the prime quality of a good lawyer, belief in the rectitude of his cause. Yet judge for judge, and opinion for opinion, let him who is impartial compare the Supreme Court of the Philippine Islands with the courts of last resort of the States of the American Union or with the courts of other countries, and the good name of the Supreme Court of these Islands will lose nothing by the comparison.

Yet, however able our judiciary, one must frankly admit that there is widespread and popular dissatisfaction with the administration of justice. Fortunately, it is much more evident in other countries than here. Meeting this situation squarely is the duty of all, especially of the Judiciary itself.

The first criticism which is presented is disapproval of the law's delay. How can justice be expedited? The Legislature can help by the enactment of short practice acts, and by limiting appeal. Lawyers and judges can help by avoiding or prohibiting technical delay. How can the Supreme Court of the Philippine Islands assist?

The Supreme Court is called upon to decide about one thousand cases annually. This, with the incidental motions, if every case is to be discussed, authorities are to be exhausted, and polished opinions are to be turned out, places an intolerable burden on the Court.

If I may be permitted, there is one section of the Judiciary Organization Act which might well be borne in mind. Section 15 reads: "In the determination of causes, all decisions of the Supreme Court shall be given in writing, signed by the judges concurring in the decision, and *the grounds of the decision shall be stated as briefly as may be consistent with clearness.*" As decided in *Ocampo v. Cabangis*, this language is, of course, merely directory. A Court can follow it or not as it pleases. But to my mind it is a wise injunction. "Briefly as may be consistent with clearness" means not a transcript of the record, not a long list of quotations from digests, encyclopedias, or cases, not a statement and re-statement of arguments, but merely a short narrative of essential facts, consideration of the vital issue or issues, presentation of propositions, and judgment.

But even this construction I would use only for important cases deemed valuable as precedents. Many times, even against the complaint of attorneys, a case which involves no new principle can be resolved as affirmed, modified, or revised without opinion. Or it may be that the decision of the trial court is worthy to be copied

without comment, or that there is another opinion on all fours. In any of these instances, I find nothing to be gained in re-stating facts or principles or in endeavoring to demonstrate axioms of the law. Only the vanity of the writer of the judicial masterpiece is flattered, and the pocket of the paper manufacturer is benefited. The Supreme Court under American innovation is not permitted to hand down oral opinions. But it is not certain but what under the English system which permits of a case to be argued in the morning, and decision to be delivered in the afternoon, justice is accomplished just as nearly as under our system wherein attorneys make long oral arguments and submit extended briefs, the Court discusses the case thoroughly, and then, perhaps months or years afterwards, an exhaustive opinion and judgment is handed down. Lord Coke says in a quotation from his reports followed by our Supreme Court, "If judges should set down the reasons and causes of their judgments within every record, that immense labor should withdraw them from the necessary service of the commonwealth, and their records should grow to be like *elephantini libri, of infinite length and, in mine opinion, lose some of their present authority and reverence; and this is worthy for learned and grave men to imitate.*" And in England the Judiciary enjoys a greater prestige than in the United States or the Philippines.

Again I see nothing to be gained in long dissenting opinions. Such opinions merely serve to make the law uncertain. Ordinarily they are only an outlet to relieve the feelings of the judge who has failed to convince his colleagues, and who by this means can let the public know in ironic but always perfectly courteous judicial language, exactly what his opinion of the mental caliber of his associates is. The idea of the dissenter is about that which Franklin once expressed of Adams, that he "was an honest man, often a wise one, but sometimes wholly out of his senses."

Nor do I see the wisdom in consuming valuable time in chasing the illusive word through books of synonyms. Let us hope that pure English or pure Spanish goes onto the paper in spontaneous dictation, for good language intensifies good law. But if the dictator has not the mental alertness to use plain straight-from-the-shoulder red-blooded language, then, I say, leave distinctions in phrasology to the rhetoricians and pass on to legal principles.

The cluttering of opinions with citations and authorities does not appeal to me. The reports are now so numerous that he is indeed a poor lawyer who cannot cite a case to substantiate his theory. An all too common practice is for briefs to include a quotation from an encyclopedia with a long list of citations appended, most of which are found on investigation to be not in point. Now, I have the greatest admiration for the Common Law. I believe ordinarily in the doctrine of "stare decisis," for it means legal stability. But there is the danger of lazy and mechanical imitation. I always want to be assured that the reasoning of the precedent is sound and that it is applicable to existing conditions. The law is progressing like all sciences. It has a social concept which not long ago was lacking. It must meet

the new and complex conditions of a changing civilization. It is a forward-looking law, while precedents look backward. Throughout it there runs a legal philosophy which aims at a humane law leading to the goal of justice. Usually law and justice coincide, but if they disagree, then I would forget the law and do justice. "The cardinal principles of justice," the United States Supreme Court said in *Holden v. Hardy*, "are immutable." Because of human imperfections, justice is difficult enough to attain. It should not be made more so by an inflexible and blind law.

There is an example under our Penal Law which arrives at the same conclusion. Now, I also admire the precision and clearness of the Civil Law. But sometimes it makes judges merely expert mathematicians. Take a case under the Penal Code. A Judge of First Instance, after hearing the evidence, and remember that he is in a better position to do justice than the appellate court since he has seen and heard the witnesses testify, gives judgment for a certain penalty, a penalty not in accord with the rules of the Penal Code. Justice is done. Some bright lawyer appeals. And the Supreme Court by adding circumstances is forced to increase the sentence. The law is followed. Mayhap justice is scorned. The result attains even in such a grave matter as the imposition of the death penalty, which results in the concurrence of certain prescribed and unalterable circumstances. In my judgment the Philippine Legislature will win the applause of all patriotic citizens if at the next session it pass a new Correctional Code based on the modern conceptions of penology and criminology and intended to prevent crime and to reform, not to punish offenders. Let the Legislature also repose confidence in the impartiality of the Judiciary and prison officials by giving to them discretion in the imposition of penalties. I look for our Legislature in the continuance of the same wisdom it has heretofore shown in the enactment of progressive laws, to place a modern humane Correctional Code on the statute books.

If the Judiciary do what the people want, it will look through the form of procedure to the substance of a just result. I believe with Justice Moreland that procedure is the means to an end, and not the end itself. If from the pleadings it is humanely possible to decide the case, let it be done, or let the Supreme Court go out of its way as it often does to point the course for the lower court in order to avoid further appeal. So, also, with our artificial rules of evidence. I would strictly adhere to the rule to set aside no judgment unless it is made to appear that the error affects the substantial rights of the parties. Technicality, a sign of an undeveloped legal system, pours money into the pockets of the lawyer but takes it unjustly out of the pockets of the client.

In this connection, there is one part of the oath which next Monday I shall take which appeals to me—"that I will do equal right to the poor and to the rich." The rich can hire the finest legal minds. The poor must often rely entirely on the impartiality of the Courts. The lot of the laboring man especially merits considera-

tion. Industrious, honest, patriotic—laws which will give him more comforts and more protection are to be commended.

The Judiciary cannot shut its eyes to what is going on in the world about. It cannot go into monastic seclusion and accomplish practical justice. The study of men is as complicated and is as important as the study of books. I have acquired more good hard sense from a Chinese tienda-keeper in Binondo than I have in the reading of some books.

The ideal type of a judge is for me Oliver Wendell Holmes of the United States Supreme Court. Justice Holmes has found time to produce a legal masterpiece which will be remembered when his work on the Court is forgotten. He has found time to take a sincere interest in labor and humanity. And in the Court he has followed original methods which bring results. Often you can see him reading authorities or making notes from records while attorneys are arguing cases orally. The attorney is not flattered but after all many cases could just as well be left to depend on serious presentation in the brief and not on oratory. The Justice is also said to take up a case, read it carefully, make up his mind immediately, write a short opinion, and pass on to the next case. These short opinions may be termed superficial and are often unsatisfactory to counsel. On the contrary they are really a criterion of depth of mind, dealing mainly in essentials and legal propositions and leaving it to the attorney's intelligence to fill up the gaps of evolutionary argument.

The Judiciary must think of itself as a part of the government. This being so, the Judiciary will conceive a strong paternal government. It will properly follow the English-American rule, and not the Continental rule, and will regard all men as equal before the law, by holding public officials to strict accountability. It will, however, not attempt to encroach upon the powers of the Chief Executive and to embarrass him in the performance of acts of state. For a similar reason the Courts will not attempt to embarrass the Legislature by holding many laws invalid. The formulation of policy is for the Legislature, the elect of the people, and not for the judges. In this respect the Continental meaning of "unconstitutional" which restricts the power of the Courts is to be preferred to the American doctrine which means that the act is beyond the power of the Legislature and, therefore, void. Judicial vetoes, or a revising Judiciary, are not essential to good government. I like a system similar to that of Massachusetts, which permits the Legislature to seek the opinion of the Supreme Court before a bill is enacted into a law. Plainly, therefore, while it is well for executive and legislative branches to be closely associated, it is best for the judiciary to keep strictly aloof from these fields. The Judiciary should only assume its true role of construing the law, of protecting the people, and of imposing self-restraint on the people. Thus circumscribed, the Judiciary will not encumber the other powers of government and will gain more time for the accomplishment of its own peculiar functions.

The most valuable agency to keep officials, including the Judiciary, within the law, is the force of public opinion. We must necessarily draw a line between mere licentiousness and freedom of speech. One must be curtailed. The other must be encouraged. But even if a petition or a newspaper article contain a mis-statement, I, for one, believe in leniency. I would even go so far as to permit criticism of the Courts so long as the criticism does not impede the course of justice. We want a government of law, and not of men. And we can only attain it through a liberal and equitable construction of our drastic libel law. A good name is to be desired, but so also are the loving favor and the great riches of an informed and courageous public opinion.

My friends, the Philippines need a legal education with high standards. They need a legal literature produced by eminent scholars. They need a strong and harmonious Bar Association. They need a judicial system accomplishing justice speedily, keeping to its own sphere, and enforced by public opinion. The field is wide. There is work for all. Let us do our duty as befits good lawyers and good citizens.