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CHANCELLOR KENT: AN AMERICAN GENIUS

Walter V. Schaefer*

This is the first opportunity I have had, during this eventful day, to express my deep appreciation of the honor that you have done me.¹ I realize, of course, that there is a large element of symbolism in your selection of Dr. Kirkland and me to be the recipients of honorary degrees, and that through him you are honoring the bar of our community, and through me the judges who man its courts. Nevertheless, both of us are proud and happy that your choice fell upon us.

I am particularly proud to have been associated with Weymouth Kirkland on this occasion. His contributions to his profession are many. One of the most significant was the pioneer role that he played in the development of a new kind of courtroom advocacy. I should like to read to you what one of our wisest judges, the Honorable U. S. Schwartz, said of Mr. Kirkland in that connection:

*Chief Justice of the Supreme Court of Illinois. This article constitutes the text of an address delivered at a dinner at the Sheraton-Blackstone Hotel, Chicago, on April 18, 1961, held as the climax of a Dedication Day ceremony. The preliminary material, refers to earlier portions of the proceedings of that day.

¹The reference is to the conferring of the honorary degree of LL.D. on Chief Justice Schaefer at a special convocation held earlier in the day. A similar degree, the first so awarded in the history of the College, had been conferred on Weymouth Kirkland, Esq., an alumnus of the College of the Class of 1901 and a member of the Illinois bar, who had served as Honorary Chairman of the campaign to raise funds for the remodeling of the premises of Chicago-Kent College of Law.
When I entered the practice some 50 years ago, there was still to be seen the lawyer of the broadbrimmed hat, long hair, and flowing black necktie—the eloquent orator. But a conflict was being waged. A new type was appearing. It was an echo, I suppose, of the age-old struggle between the orators, interested in eloquence, and the philosophers, concerned with the facts, who sought truth and right, as the ancients put it, and who regarded orators as cosmeticians, seeking only to produce a pleasing effect. The new type of lawyer then emerging was the man who had mastered the facts of the law of his case, and who put that case to court and jury without flourish.

Weymouth Kirkland was the examplar of that new type. He had already established himself as one of the leading trial lawyers of the community. It was my good fortune to observe him in action at first-hand, and the memory of that occasion is fresh in my mind. You can understand the reverence and the hope of emulation with which the young lawyer looks to his superior at the bar. I remember vividly his manner of address to court and jury. He spoke quietly and with moderation. There was no lost motion, no pretense, no declamation, no time for side-play. In later years, I was to meet him in other matters, and to observe him on a number of trying occasions. He was always master of the situation. Some years ago, I visited with the Judges of the Court of Appeals of the Second Circuit. This was soon after the Associated Press case had been heard. I was told that Judge Learned Hand regarded Weymouth Kirkland’s argument in that case as the best he had ever heard. Bear in mind that the Second Circuit embraces the bar of the city of New York.²

As you see from Judge Schwartz’s remarks, Weymouth attained maturity and his status as a legendary figure of the law almost simultaneously. For many years now he has been our

² Unpublished speech of Hon. Ulysses S. Schwartz, Illinois Appellate Court Judge, at the dedication of the Weymouth Kirkland Courtroom of the University of Chicago Law School.
full fledged and well loved legend, and I am happy to be able to add my tribute and that of my colleagues to that which was formally paid to him by the law school this morning.

In the lives of institutions, as in the lives of men, there are days that are appropriate for taking stock; for looking back to appraise the successes and failures of the past, and looking ahead to set the course for the future. This is such a day in the life of this law school.

As your very newest alumnus I can not share with you those memories of men and events that bind the hearts of the older alumni to your school. But I would like to review with you some aspects of the life of the man whose name the school bears, and then for a moment try to see what lies ahead for our profession and the school.

At the outset I must say that I am not certain that Chancellor Kent would have approved all that went on before dinner this evening. He was a stern man. Speaking of his early days as a student he made this observation. You may draw your own conclusions:

My fellow students, who were more gay and gallant, thought me very odd and dull in my taste, but out of five of them, four died in middle life, drunkards. I was free from all dissipations; I had never danced, played cards, or sported with a gun, or drunk anything but water.³

On the other hand, however, he was a firm believer in constitutional liberty, and those of you who need reassurance may find it in this charming anecdote that his grandson told:

He was waited upon by a temperance committee and urged to give his authority and sanction to the principles and aims of a mass meeting by adding his name to the list of those who had pledged themselves not to use intoxicating liquor. And when he was pressed unduly after his first polite negative, he

³ Kent, Memoirs & Letters of James Kent 19 (1898).
made the following reply: "Gentlemen, I refuse to sign any pledge. I never have been drunk, and by the blessing of God, I never will get drunk, but I have a constitutional privilege to get drunk, and that privilege I will not sign away."

Chancellor Kent led a long and useful life in the formative days of America and of American law. He was born in 1763, and died in 1847 at the age of 84. During that span of years he had been lawyer, legislator, law professor, judge of the Supreme Court of New York, Chief Justice, Chancellor, law professor again, and finally an author.

His initial experience as a law teacher was not a happy one. He had graduated from Yale, and then, as was the custom, studied law in the office of a leading lawyer. After eight years of practice in Poughkeepsie, and two terms in the New York legislature, he ran for Congress, and was defeated. He then moved to New York City. He had not been there long when Columbia College, as it was then known, established a professorship of law, and James Kent was unanimously elected by the trustees.

His experience can best be told in his own words:

Columbia College, May 2, 1797.

Gentlemen,—I take the liberty of communicating to you my wish to resign the appointment of Professor of Law in Columbia College, which I have had the honor to hold from you for upwards of three years past; and it is with sincere regret I mention that the institution has not been attended with all the success which you had intended and which I have endeavored to produce. My first course consisted of twenty-six lectures, commenced in November, 1794, and received a very flattering encouragement and steady attention of forty students and several other gentlemen of the city, equally distinguished for their literary accomplishments, and their

4 Id., at p. 165.
zeal for the knowledge and improvement of our municipal law. The second course, in a more correct state, and with several additional lectures, commanded only two students. I then supposed that a more general acquaintance with the plan I had delineated, and the manner in which it was executed, might possibly conduce to the benefit of the establishment, and accordingly published, in the early part of that course, the three preliminary lectures, together with a summary of the entire course, which I had prepared, and which formed the completion of my original plan. In this expectation I was disappointed. The commencement of a third annual course, in November, was duly announced in the public print, but no student appeared to countenance the attempt, and the trial was abandoned.

Having thus acquitted myself to the best of my ability, in the discharge of a duty which I accepted with diffidence, my resignation becomes proper and necessary. I cannot, however, take my leave of the college without returning to you, gentlemen, my grateful and respectful acknowledgments for the very honorable confidence you have placed in me; and be pleased to accept my cordial wishes that the general principles of our constitution and laws may still be academically taught, and that the institution which you have so liberally established may hereafter, under abler professors, and in more auspicious times, be crowned with happier success.

I have the honor to be, gentlemen, with perfect respect,

Your humble servant,

JAMES KENT

The initial failure, while it hurt him sorely, was wiped out by ultimate success. On the day after he resigned, he was awarded the degree of Doctor of Laws by the Trustees of the College. Twenty-seven years later, after his judicial service, he resumed

*Id., at pp. 77-78.*
the post of Professor of Law, and forty-three years later he heard his son, William Kent, deliver his first lecture as one of the professors of law at Columbia University.

Chancellor Kent was acquainted with all of the great men of his day, and the intimate friend of many of them, including John Jay, the first Chief Justice of the United States, and Daniel Webster. But the man whom he most admired was Alexander Hamilton, whom he met shortly after he began to practice law. Kent and Aaron Burr were friends too, at the outset, but their ways had parted long before the fatal duel between Hamilton and Burr.

That duel resulted from a letter signed by a Dr. Charles D. Cooper which said, "General Hamilton and Judge Kent have declared in substance that they looked upon Mr. Burr to be a dangerous man, and one who ought not to be trusted with the reins of government."6

In all that followed, Hamilton never sought to shift responsibility to Kent. It seems likely that Kent had no knowledge of the controversy at the time, for he was in Albany and was commissioned Chief Justice on July 11, 1804, the day that the duel occurred.7

Ten years or so later, after Burr’s trial for treason and his unfortunate experiences in Europe, he returned impoverished to practice in New York, and there he encountered Kent. The fact that this story survived of that encounter inside the Kent family demonstrates, I think, that Kent did have a sense of humor. Kent’s grandson tells the story this way:

Chancing one day, sometime after Burr’s return, to see him in Nassau Street, in New York, although on the opposite side of the street, the Chancellor could not restrain his impetuosity, but rushing across shook his cane in Burr’s face and exclaimed, with a voice choked with passion, "You are a scoundrel, sir! a scoundrel!" Burr flushed at the epithet, and

6 Id., at pp. 33-34.
7 Id., at p. 34.
was about to make a hasty answer; but time and misfortune had dulled the keenness of his temper; and, checking himself, as he paused to consider the age and dignity of his adversary, he contented himself with raising his hat, and making a sweeping bow, exclaimed, "The opinions of the learned Chancellor are always entitled to the highest consideration." He then passed on, leaving the Chancellor somewhat surprised and mortified.  

As a judge of the Supreme Court, as its Chief Justice and then as Chancellor, Kent won renown both at home and abroad. Indeed, Lord Campbell, the biographer of the English Chancellors, said this: "For learning and ability I consider Kent equal to any of those whose lives I have written." Cardozo ranked him with Mansfield, Marshall and Holmes.

But the greatest achievement of his life came after he had reached the compulsory retirement age of sixty years, and had left the office of Chancellor. He returned to New York City and opened an office as what was then called "chamber counsel," which seems to have meant that he served as consultant to other lawyers. He was most successful, and was consulted not only by Daniel Webster, William Wirt and other great American lawyers, but by lawyers from England and Canada as well.

Most important, however, was the fact that Columbia again appointed him professor of law, and he resumed his lectures there. From these lectures came the famous Commentaries. The Commentaries appeared in four volumes published in 1826, 1827, 1828 and 1830. The work was received with great acclaim. Five editions were published during Kent's lifetime. The sixth, which he also prepared, was published after his death. Ultimately there were fourteen editions; the twelfth, published in 1873, was edited by Oliver W. Holmes, Jr. The "Commentaries" was the first systematic attempt at stating the body of American law, and its impact upon the legal profession would be hard to exaggerate.

8 Id., at p. 36.
Moreover, its influence extended well beyond the legal profession, for Kent was prevailed upon to publish in a separate volume the material dealing with American constitutional law, and that volume became a standard text book in the colleges of the country. It is a curious fact that in 1828 he was appointed a member of the Board of Visitors at West Point, and attended an examination in Constitutional Law. His journal noted, "They appeared to be masters of the first volume of my Commentaries." And the cadets that he found most proficient were Robert E. Lee and one named Davis, who may have been Jefferson Davis.

It is not an exaggeration to say that to a large degree this country received its Common Law heritage through the hands of Kent. Speaking of his circuit riding days in northern and western New York, a felicitous writer called him the "Lawgiver to the Land of Leatherstocking." And indeed, so rapid was the pace of the pioneers that he was holding court in the Leatherstocking Country only forty-one years after the events that are related in the "Last of the Mohicans." He heard the ax of the pioneer, and heard it as the death knell of the Iroquois.

But Kent's influence did not stop with New York. You catch something of its pervasiveness from a speech of Lincoln's in Congress, in 1848, in which he characterized Chancellor Kent as "one of the most learned lawyers of his age, or of any age."

There is concern today that the best of our young people are not attracted by the law; that they prefer other disciplines and other ways of life. Whether that is true I do not know. My doubt rests in part upon the fact that the engineers and the doctors voice the same complaint. But it may be that our young men and women have come to believe that law has changed since the days of Kent; that they feel that the frontiers are gone, and that the greater challenges and greater opportunities lie elsewhere.

It is true that the frontiers in the law have changed since Chancellor Kent's day, as have all our frontiers. But it is the form, and not the fact of the frontier that has changed. For demonstration we need look no farther than the course announce-
ments of this law school, and other law schools, over a period that I like to think of as not too remote. There were then no courses in taxation, in administrative law or in labor law, to name just a few of the areas that engross so much of the attention of the bar today. Even twenty five years ago the law of perpetuities was regarded as a fixed constellation in the legal heavens, while today it is everywhere responding, both legislatively and judicially, to the probing analyses of legal scholars. So too with Conflicts of Laws. And the field of Criminal Procedure, where the safeguards of which we proudly boast are so much newer than we like to think, has known basic changes in the last twenty years. The list could be expanded.

The point is that the law is not, and cannot be static. It must respond to changes in our economic and cultural environment. And just as it was necessary for Chancellor Kent to reshape the English precedents to fit "the genius of our institutions," so it is necessary today, that our law be reshaped, by legislation and by judicial decision, to meet the needs of our society. Let me invoke Cardozo to make the point. He is speaking of Chief Justice Holt, and the evolution of the doctrine of respondent superior.

Only antiquarians recall that it is not as ancient as the law itself.

The powers inherent in the judicial office when Holt was Lord Chief Justice exist in undiminished force today. One does not extinguish them by saying that the earlier centuries were formative, and that there has followed a modern age in which the law is a closed book. Every age is modern to those who are living in it. True of course it is, that in the centuries since Holt's time many lines once weak and wavering have become permanent and rigid. Principles and rules that were malleable in his day have petrified with the accumulated weight of precedent on precedent. Land within the territory of the law that was then unsettled or uncultivated has been peopled or reclaimed. Frontiers, however, there still are, and will always be, where the lines of demarcation are un-
certain and debatable, where occupation, if any, has been provisional and timid,—borderlands and marches where minds impatient of injustice refuse to be held back, but point the pathway of advance into regions unexplored beyond. It may hearten spirits such as these to bear in mind the creative energies that dwelt within the legal system at the threshold of the modern era, two centuries ago.\(^9\)

An added urgency, that did not exist in Chancellor Kent's time, presses today upon the legal profession and its law schools. In the formative period, our law evolved in an environment insulated from the rest of the world. That insulated environment is gone and it will not return.

The basic struggle in which our nation is now engaged is a contest for the minds and hearts of the men and women in the uncommitted nations of the world. And in that struggle our greatest resources are not our material assets, our automobiles, our television sets, our automation and the like. Rather they are first, our system of law, with its insistence upon the rights of the individual even against his government, and second, the practical day to day demonstration that a great nation, and its component states, can achieve honorable and efficient self-government through democratic processes.

These aspects of our life are under constant and intense scrutiny, and it is by our performance there that our measurement is being taken on a day to day basis throughout the world. The response of the legal profession must be a heightened sensitivity to injustice, in whatever form it appears, and an increased insistence upon top level performance in the administration of justice.

In the days to come it will be the proud task of this school to send to the bar young men and women who will pursue, with a deeper sense of urgency than has characterized their predecessors, our highest ideals of justice. In that undertaking this school carries with it our hopes, and our confidence.

\(^9\) Cardozo, The Paradoxes of Legal Science 21-22 (1928).