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THE CONTRIBUTION OF CHIEF JUSTICE JOHN W. KEPHART TO THE LAW**

RUBY R. VALE*

It has been a great satisfaction for over twenty years to follow the judicial service of a schoolmate. That pleasure has turned to personal pride with the passing years and the attendant excellence of his work as his labors lengthened. I regard myself as fortunate to be privileged in the presence of his fellow Dickinsonians to say a few words in appreciation of the unusual length and exceptional nature of his work as an Appellate Judge.

Time will not permit and others better can tell of the inspiring lesson to the motherhood and youth of America of the devotion of a widowed mother, of the early aspirations and undaunted efforts of her four worthy sons and particularly of the present Chief Justice of this Commonwealth.

A sentence must give his career as lawyer as prefatory to an outline of his contribution to the law. He was graduated from Dickinson Law School in 1894, admitted to the bar the year following, became a Judge of the Superior Court in 1914, a Justice of the Supreme Court of the Commonwealth of Pennsylvania in 1919 and its Chief Justice in 1936. So that at the end of his term his total service will exceed that of any prior Appellate Judge, the next being Chief Justice Gibson, also an alumnus of Dickinson, with a total of twenty-four years and his will be twenty-six years.

It is not easy to summarize even in barest outline a judicial service of such length; so bear with me.

Chief Justice Kephart has written over a thousand opinions including dissenting and concurring, of which approximately eight hundred have been written as an Associate Justice of the Supreme Court. An indication of the character of a judge's

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**An address delivered at a dinner tendered Chief Justice Kephart by the Alumni of Dickinson College.

work may be gathered from a study of his dissents and those of his associates from his opinions. He is not a dissentient judge, having written only about forty-five dissenting opinions, in one-half of which he has been supported by other members of the court. There have been less than twenty-five dissents filed against the opinions of the court which he wrote and in a few instances only are such dissents written and concurred in by other judges.

It is a remarkable fact that two of his dissenting opinions have been sustained by the Supreme Court of the United States.

In *Reed v. Director General of Railroads*,¹ without filing any opinion he dissented from the majority opinion of the Supreme Court of Pennsylvania which held that an employee under the Federal Employers' Liability Act assumed all the ordinary risk of his employment. The Supreme Court of the United States in an opinion by Mr. Justice McReynolds adopted the view of the then Justice Kephart, who denied the assumption of such risk.²

The courts of England and America have made several historic decisions of vital moment in the reconciliation of the rights of the individual in the eternal conflict between the individual and his group. One of the last of such decisions was by the Supreme Court of the United States in *Mahon v. Pa. Coal Co.*³ for it involved the power of a state to deprive an individual of a vested property right in the alleged exercise of its police power.

The controversy grew out of surface subsidence due to the ordinary mining of coal. Pennsylvania enacted the Kohler Act which made it unlawful "so to conduct the operation of mining anthracite coal as to cause the caving-in" of buildings erected on the surface even though the right of surface support explicitly had been waived. The Supreme Court of Pennsylvania in a very able opinion by the then Chief Justice Von Moschzisker, sustained the act, adopting the general principle that the individual's rights are subordinate to the welfare of the group, or as expressed in constitutional language that contractual property rights are subject to the reserved right of the state to modify them by legitimate assertion of the police power.⁴

Mr. Justice Kephart discerned the dividing line between a legitimate use of the police power for the welfare of the group and "a confiscatory enactment under the guise of a police provision"; and with splendid courage filed a vigorous and to the Supreme Court of the United States a conclusive argument in support of his differentiation; for the opinion of Mr. Justice Holmes follows the convincing summary of Justice Kephart's argument with which his dissenting opinion closes.

¹267 Pa. 86 (1920).

²258 U. S. 92 (1922).

³260 U. S. 393 (1922).

⁴274 Pa. 489 (1922).

May I suggest to the lawyers here present that the opinions of the *Mahon* case be read in connection with the opinions in the old *Sanderson* cases,⁵ wherein the rights of the individual were subordinated to the welfare of the group; and tell all who sense an instant peril that Justice Kephart in his dissenting opinion in the *Mahon* case admonishes against the possible use of the police power "to bring about the condition so earnestly longed for by those advocating equalization of property."

Justice Kephart has been reversed only twice by an appellate court and this can be said of few justices of equal years of service.

In *County Commissioners' Petition*,⁶ the Supreme Court declared void an act because of a defective title, which the Superior Court had held gave sufficient notice of the purpose of the act.⁷ *Commonwealth v. Disanto*⁸ is the only case in which the United States Supreme Court reversed Justice Kephart. The Supreme Court of Pennsylvania in an unanimous opinion written by Justice Kephart sustained the validity of a statute which in an effort to prevent the fraudulent selling of steamship tickets penalized all selling without procuring a license. The Supreme Court of the United States held, by a divided court, that the act was violative of the commerce clause of the Federal Constitution. Justices Stone and Holmes concurred in a strong dissent by Mr. Justice Brandeis, wherein he uses the language following, which is conclusive that the opinion of Mr. Justice Kephart is not entirely devoid of reason:⁹

"If Pennsylvania must submit to seeing its citizens defrauded, it is not because Congress has so willed but because the Constitution so commands. I cannot believe that it does."

Again his service is exceptional in that in only one case has an opinion of the Supreme Court of Pennsylvania written by Justice Kephart been subsequently overruled by that Court.

*Greene County v. Southern Surety Co.*¹⁰ is a careful study of the law of Pennsylvania relative to the rights of third party beneficiaries to recover on a contract. After an exhaustive review of the cases the rule is evolved that a creditor beneficiary in the absence of privity of contract cannot recover but a donee beneficiary may recover where there is either a consideration or there are unusual circumstances. While it must be admitted that this rule was against the great weight of

⁵Particularly the dissenting opinion of Chief Justice Paxson to the first appeal, 86 Pa. 401 (1878), published in the last appeal, 113 Pa. 126 (1886), pp. 156 to 162. See also second appeal, 94 Pa. 302 (1880).

⁶255 Pa. 88 (1916).

⁷61 Pa. Super. 591 (1915).

⁸285 Pa. 1 (1925).

⁹273 U. S. 34 (1927).

¹⁰292 Pa. 304 (1928).

authority, Massachusetts, Connecticut and Michigan being the only other states then in accord with Pennsylvania, yet as Justice Kephart demonstrates, the prior decisions of his court made obligatory the continuance of the rule so imbedded in precedent.

Thus the law stood until the Supreme Court in *Commonwealth v. Great American Indemnity Company*,¹¹ in an opinion which neither discussed nor mentioned it, overruled the *Greene County case*; and this only because three things had in the interim happened:

(a) Professor Arthur L. Corbin had written his illuminating "Selected Readings on the Law of Contracts," (b) the Restatement of the Law of Contracts had adopted his view and (c) the Pennsylvania legislature, as Mr. Justice Kephart pointed out in his concurring opinion, had "indicated that public policy favors permitting recovery by the third party beneficiaries in such contracts."¹²

In his concurring opinion in the *Great American Indemnity Company case*, Justice Kephart not only expresses regret at the delay in overruling the *Greene County case* but points out that that case was originally decided because the Court as then constituted was "bound by the doctrine of stare decisis and must await legislative action**** to come into accord with the more equitable, reasonable and prevailing view."

The opinion of the then Judge Kephart in *Ben Avon Borough v. Ohio Valley Water Co.* is certainly the most important decision which he wrote as a member of the Superior Court, and is the source and justification of the highest tribute that can be paid to him as a clear and original thinker. This case is out of the ordinary because his opinion in the Superior Court¹³ reversed the finding of the tribunal below, the Superior Court in turn was reversed by the Supreme Court of Pennsylvania¹⁴ and the Supreme Court of the United States¹⁵ in its turn reversed the Supreme Court of Pennsylvania and affirmed the opinion of Judge Kephart.

The assumption of jurisdiction which the Superior Court made in that decision is without extended discussion of principle or citation of authorities but is of greatest moment in the protection of property by the courts against confiscation, and will take its place as a barrier against the legislative delegation of judicial functions to commissions not authorized under the Constitution.

The Public Service Commission of Pennsylvania had made a rate order and the Water Company against which it was rendered contended on appeal that it

¹¹312 Pa. 183 (1933).

¹²Act of June 23, 1931, P. L. 1181.

¹³68 Pa. Super. 561 (1917).

¹⁴260 Pa. 289 (1918).

¹⁵253 U. S. 287 (1920).

was confiscatory. The Commission maintained the reasonableness of the rate and asserted that its rate was final and could not be revised on appeal to the courts. Judge Kephart denied the conclusiveness of the established rate, held it was confiscatory and laid down the first fundamental rules that should govern the determination of the fixing of public utility rates.

The Supreme Court in an opinion by Mr. Justice Potter, reversed the Superior Court and in effect held that a court could not substitute its opinion of a reasonable rate for the order of the Commission and also sustained the Commission's contention that the legislature could delegate to a commission not only a legislative but likewise a judicial function which was final and conclusive against any review by the courts established under the Constitution. It was this great fundamental question which later was argued with exceptional ability by William Watson Smith and George B. Gordon, in support of Judge Kephart's decision. That case was so important in the great issue involved that it is one of the rare cases wherein the Supreme Court of the United States ordered a reargument; which finally in reversal of the Supreme Court of Pennsylvania and affirmance of the decision of the Superior Court held the rate was properly condemned by Judge Kephart as confiscatory and that the legislature of Pennsylvania under the Constitution of the United States could not deprive a citizen of his right to have that question determined by the courts of the land.

Thus after only a few years on the bench, Judge Kephart established in Pennsylvania the rule of fair present value in contradistinction to replacement value, formulated for general legal acceptance the several elements that determine that value and vindicated for the Nation a fundamental right of individual property, the invasion of which gave to the courts of England so great concern as to cause its Lord Chief Justice Hewart to write his book¹⁶ in admonition against parliamentary usurpation by delegation of a judicial function to its bureaucratic agencies; and against which the Supreme Court of the United States, as today constituted, stands steadfast.

About the time Justice Kephart became a Judge the liberal principle of group concern for the individual was enacted into law by the Workmen's Compensation Act. As a member of the Supreme Court Justice Kephart has written several important opinions, every one of which construed the acts, both State and Federal,¹⁷ as intended by their framers, to advance the social and economic welfare of the worker. *Qualp v. James Stewart Co.*¹⁸ places a liberal construction upon the statutory word "contractor" and allows the employee of a sub-contractor to recover from the principal contractor. *Gallivan v. Wark*¹⁹ determines that the

¹⁶"The New Despotism."

¹⁷*McCully v. Monongahela Ry. Co.*, 289 Pa. 393 (1927).

¹⁸266 Pa. 502 (1920).

¹⁹288 Pa. 443 (1927).

statutory right to compensation does not deprive the injured employee of the common law right to sue the third party tort-feasor.

His contributions to substantive law can but inadequately be referred to here. In torts it was his opinion in *Burke v. Hollinger*,²⁰ which was later amplified in *Ladner v. Siegel*,²¹ that first classified the types of residential and commercial districts in a city so that some definite basis might be formulated to determine when a public garage is a nuisance.

His decision in *Gaydos v. Domabyl*²² is exhaustive and thorough in setting forth the law relating to the recovery of damages in wrongful death cases. In this decision he not only sets forth the parties entitled to damages but clarifies the method of computing the pecuniary loss with such simplicity of statement as to make it a standard for use by lower court judges in jury instructions.

In defining the rights of riparian owners,²³ of pedestrians,²⁴ the doctrine of *res ipsa loquitur*,²⁵ and the duties of a master,²⁶ he has settled doubt by the clear statement of a plain principle.

The contributions of Chief Justice Kephart to equity and constitutional law are not of the ordinary. His equity opinions far outnumber his opinions in any other branch of jurisprudence. Time will permit reference to his discussion of only two branches of this all-inclusive subject.

The use of injunctions in labor disputes is not pleasing to this liberal-minded Justice. While he concurred in the injunction issued in *Kraemer Hosiery Co. v. Workers*,²⁷ because the workers were guilty of violence, he questioned the propriety of the broad terms of the injunction and suggested that the injunction should be modified "so as to restrain**** (the workers), from committing any of the acts" which he had described as "being unlawful." In *Kirmse v. Adler*²⁸ he vindicates the workers' "unquestioned right to present their case to the public in newspapers or circulars in a peaceful way," and also "picketing, if peaceful and unaccompanied by coercion, duress, or intimidation."

In the administration of trust estates the question of apportionment of extraordinary dividends in the form of stock dividends or rights to subscribe, between the life-tenant and remaindermen, has been a source of perplexity to the courts of equity of the different states. Two rules have been formulated, (a) the rule of convenience which gives all income, in whatever form, to the life-tenant

²⁰296 Pa. 510 (1929).

²¹296 Pa. 579 (1929).

²²301 Pa. 523 (1930).

²³*Palmer Water Co. v. Lehighon Water Supply Co.*, 280 Pa. 492 (1924).

²⁴*Gilles v. Leas*, 282 Pa. 318 (1925).

²⁵*Fitzpatrick v. Penfield*, 267 Pa. 564 (1920).

²⁶*Reilly v. Reilly*, 264 Pa. 103 (1919).

²⁷305 Pa. 206 (1931).

²⁸311 Pa. 78 (1933).

and (b) that of intact value which apportions the extraordinary dividends in such way as to keep intact the value of the principal as of the date of the creation of the trust.

Justice Kephart in *Nirdlinger's Estate*,²⁹ following the Pennsylvania principle originally announced in *Earp's Appeal*,³⁰ formulated a rule for the apportionment, which has become not only the fixed rule in Pennsylvania but has been adopted generally by other states. This rule with its modifications was exhaustively expounded by the Chief Justice in *Waterhouse's Estate*,³¹ and probably is the clearest statement of the law of apportionment of income of extraordinary dividends to be found in the books.

This formula of apportionment is now recognized throughout the country as the Pennsylvania rule and became the subject of discussion at a meeting of the American Institute of Law then engaged in considering the restatement of the law of trusts. Such was the interest of Justice Kephart in defending the Pennsylvania rule against attack of its opponents that he was urged to attend that meeting and with great ability explained and with rare sagacity maintained its equitable operation. At the conclusion of his argument, on vote taken, the Pennsylvania rule was recommended and is now incorporated in the Restatement of the Law of Trusts.

Reference has already been made to his contributions to constitutional law, but this should be amplified in a short summary of his mental approach to all legal subjects. He is firm and consistent in adherence to the doctrine that the Federal government is one of delegated powers, with all rights and powers not expressly granted reserved in the states and to the people of the states. He believes that the police power "is the greatest and most powerful attribute of government" and that if "the exercise of the police power should be in irreconcilable opposition to a constitutional provision or right, the police power would prevail." This was by him said in *Commonwealth v. Widovich*,³² wherein the Supreme Court of the United States dismissed the appeal.³³ He, however, realizes that "The United States, being a government of limited powers, does not possess a general police power,"³⁴ stating that the United States government has "a special police power ****in aid of its delegated powers," and that the only power of Congress "to fix such prices must come, if at all, from the war power and not from the police power."

The Chief Justice here was in seeming accord with the Madison and not the Hamiltonian construction of the welfare clause of the Federal Constitution.

²⁹290 Pa. 457 (1927).

³⁰28 Pa. 368 (1857).

³¹308 Pa. 422 (1932).

³²295 Pa. 311 (1929).

³³280 U. S. 518 (1929).

³⁴*Highland v. Russell C. & S. Plow Co.*, 288 Pa. 230 (1927).

His opinion in sustaining the Talbot Act in relief of unemployment proceeds on the theory of a duty in contradistinction to a charity, and he held the statute valid not as an exercise of the police power but in performance of the duty to care for the poor under the explicit constitutional power to appropriate funds for that particular purpose.³⁵

The idea of law as a fixed inflexible rule is not his. His concept of the law is of a vital organism which to the end and purpose of justice "adapts itself to changing conditions as marked by the progress of public, material and social affairs."³⁶ He believes that social progress "must and will break through any judicially established principle, as it must and will break through any law that impedes its growth."³⁷

Although his conception of the law is that of a flux, always in a state, as expressed by Justice Holmes, of "becoming"; yet he realizes the need of adherence to precedent in fulfillment of the need of certainty in the law. This is well illustrated in the third party beneficiary rule as by him stated in the *Greene County* case.

The righteous judge abhors the use of technical rules which will result in injustice. One of the last of Justice Kephart's opinions, and certainly his most argumentative and vigorous dissent, is in *Beirne v. Continental-Equitable Title and Trust Company*,³⁸ wherein, more as an advocate than as a judge, he maintains that a husband should not be sustained in conveyance of his property in admitted fraud of his wife. In this opinion he denounces the rule laid down by the majority of the Court, under which "a husband may easily defeat the claim of his wife after his death even to the extent of making her a pauper."

The highest tribute that can be given to Chief Justice Kephart is, that from his earliest decision in *Ben Avon Borough v. Ohio Valley Water Co.* to the convincing logic of his *Mahon* dissent and the humanity of the *Talbot Welfare* opinion, he has acted uniformly and consistently upon the conviction that the fundamental judicial function is that basal problem of the ages—the reconciliation of society with the individual, of man and his freedom with government and its power. Liberty and order are in constant conflict; individualism and collectivism are contrasting governmental policies. The pendulum of political action swings constantly between the individual and the group.

Mine is the surmise, his is the conviction, that collectivism with its control of all industrial life and attendant economic relations, with its extreme exercise of police power for public health and with its enactment of laws for the individual's

³⁵Commonwealth ex rel. v. Liveright, 308 Pa. pp. 55-85 (1932). Concurring opinion by Maxey, J., dissenting opinion by Simpson, J., concurred in by Drew and Linn, JJ.

³⁶Nesbit v. Riesenman, 298 Pa. 475 (1930).

³⁷Burke v. Hollinger, 296 Pa. 510 (1929).

³⁸307 Pa. 570 (1932).

moral and social good has passed far beyond the limits ever heretofore reached by any government, in the assertion of its right to take from the individual his liberty or his property either for his assumed good or the postulated welfare of the public.

The pendulum is now swinging towards centralization in political action. The Federal Government has taken to itself the powers of the several states and the individual by both Federal and State legislation is submerged in what is conceived to be the good of the group.

The next years will test to the full the mind and courage of our judiciary and I make bold to state that so long as John W. Kephart is Chief Justice of the Commonwealth of Pennsylvania his will be the guiding principle that the welfare of the State can never be higher than the liberty of the individual, and this because social welfare, collective contentment and national liberty are but the sum total of the good, the happiness and the freedom of the individual.

And now a last word not in appraisal of your work, not in surmise of your convictions, nor of hope, other than for your health and peace of mind—but of certainty in the prophesy that when you, no longer a conscientious and courageous judge, shall have laid aside the honored mantle of Chief Justice of this Commonwealth, it will be as unsullied and clean as when it first covered your shoulders, and you will return to the bar and to the friends of your youth and school days a loyal friend and a good man.

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Ruby R. Vale