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ADDRESS OF GEORGE W. MAXEY, CHIEF JUSTICE OF THE SUPREME COURT OF PENNSYLVANIA*

Eight years, less three days ago, Chief Justice Kephart presided from this bench at this hour over a memorial meeting in honor of a retired Chief Justice of this court, Robert S. Frazer, who had died on the preceding July 31st. Such is the march of time that we assemble this morning to pay tribute to him who then presided here. After seventeen years service as Associate Justice and four years as Chief Justice, he retired from this bench on January 1, 1940, and on August 6, 1944, he too, "crossed the imperceptible frontier to the Undiscovered Country."

The world has been aptly described as "a stage where every man must play his part." One by one the actors leave the stage and others take their places. There is no pause—the play goes on. When any man has taken an important part in life's drama, it is appropriate that there should be some official appraisal of his work.

Judicial service has its rewards, but glory and fame are rarely among them. Judicial acts stir no mass emotion. Law promotes order and order makes for silence. The law of gravitation regulates the material universe yet its operation is so unobtrusive that for centuries it was undiscovered. Until the philosophic mind of Isaac Newton had reached its maturity no human being had perceived that even the falling of an apple was in obedience to a law. Since the functioning of law makes such a slight impact upon public consciousness those who enunciate and interpret law can neither expect acclaim nor envisage monuments erected to their memory. The judgment of a tribunal may affect the course of history long after the public has forgotten the name of him who pronounced it.

Though jurists do not often compete successfully with generals and statesmen for pedestals in "Halls of Fame," yet among that limited section of mankind included in the legal profession eminent judges do attain some degree of lasting renown. The character, intelligence, and the personality of a judge are revealed in his opinions, and as long as they are read and admired oblivion will not be his portion. A judge, like a painter or a sculptor, leaves his impress upon his product. Chief Justice Black said of Chief Justice Gibson: "His written language was a transcript of his mind; it gave the world the very form and pressure of his thoughts." We who read Gibson's opinions feel that we know him almost as well as did Black, his great associate and successor.

But few, if any, American judges can attain the distinction of a Marshall or a Gibson, who served as the respective heads of the nation's and the state's highest courts when our basic laws were in process of formulation. When these

*At the proceedings in memory of the late Chief Justice John W. Kephart, Nov. 12, 1872—Aug. 6, 1944; Justice of the Supreme Court, Jan. 6, 1919—Jan. 6, 1936; Chief Justice, Jan. 6, 1936—Jan. 1, 1940; in the Supreme Court at Pittsburgh, Pennsylvania, on Sept. 25, 1944.

judges began their work large areas of the law were uncharted. Their bold, vigorous and far-sighted intellects functioning on powerful tribunals for over a third of a century, left but few areas of the law unexplored. Yet all judges do live, either vividly or dimly, in the judgments they rendered and in their opinions. Just as the most persuasive witnesses for an artist at the bar of history are his works, so the best qualified witnesses for a judge are his recorded official utterances. In London's St. Paul's Cathedral is entombed Sir Christopher Wren, who designed that edifice and superintended its building. The epitaph on his otherwise undecorated sepulchre reads as follows: "Si monumentum requiris, circumspice"—"If you are seeking my monument, look about you." So the judges of the appellate courts of this state may say: "If you are seeking our monuments, look in the official reports."

It was Judge Kephart's distinction to serve longer on the appellate courts of Pennsylvania than any other individual since Judge Gibson died in 1853, for his 21 years of service on the Supreme Court was preceded by five years of service on the Superior Court, beginning in January 1914. When Governor James A. Beaver made an official visit in 1888 to the Soldiers Orphans School at McAlisterville, Pa., an address of greeting was delivered by John W. Kephart, a youth of sixteen years, who was being educated at that school and who was destined twenty-six years later to sit on the Superior Court as an associate of Judge James A. Beaver during the month of January, 1914, Judge Beaver dying on the 31st day of that month.

During his 26 years of judicial service Judge Kephart heard over 10,000 issues argued and he wrote opinions in approximately one thousand cases. Some of these opinions are on subjects of such importance and are so sound that they will long be classed as "leading cases." He also wrote some notable dissenting opinions. In *Mahon v. Pennsylvania Coal Company*,¹ decided in 1922, the views he expressed as to the constitutional limitations on a state which attempts to appropriate private property without compensation under the guise of exercising police power to promote the public good, were adopted by the U. S. Supreme Court in a 6 to 1 decision,² with seven judges sitting.

A general whose mastery of the military art gained him a succession of unparalleled victories on the battlefield declared that "energy is the indispensable quality of great success." Justice Kephart's energy is revealed in the number and comprehensiveness of his judicial opinions and in his four years efficient administrative work as Chief Justice, during which period 1622 cases were considered and disposed of promptly.

It was in large measure due to Chief Justice Kephart's initiative and energy that the Act of June 21, 1937, P. L. 1892 was passed which gave the Supreme

¹274 Pa. 489.

²260 U. S. 393.

Court "the power to prescribe by general rule the forms of actions, process, writs, pleadings, and motions, and the practice and procedure in civil actions at law and that one's comprehension is dulled by isolation from one's fellows and by a ment by this court of a Procedural Rules Committee to assist it in the preparation, promulgation, and administration of those rules. The first Chairman of this Committee was former Chief Justice Von Moschzisker. He died on November 21, 1939 and Chief Justice Kephart was appointed his successor on January 2, 1940, one day after his judicial retirement. Like all other members of this committee he served without remuneration.

While Chief Justice Kephart never slighted his judicial work his interest in life was not bounded by his profession or his position. He knew that law is a part of life, and that to be a just judge one must be a comprehending judge and that one's comprehension is dulled by isolation from ones fellows and by a withdrawal from the world of affairs. Judicial decisions are phases of society's functioning and are of the very texture of history. Justice Holmes declared: "The life of the law has not been logic; it has been experience"³ Senator Beveridge said of Chief Justice John Marshall: "The pen with which Marshall wrote *M'Culloch v. Maryland* was fashioned in the Army of the Revolution," in which he served as a soldier. Justice Kephart's humble beginning and his experience in practical life made him the better qualified to grapple with the problems which came before him as a judge. It has been well said that "the law takes on something of the heart and soul as well as of the intellect of him who construes it." A judge should possess not only intelligence and legal learning, he should also possess undertsanding of and sympathy with, all classes of individuals, i. e., he should possess "social awareness."

Chief Justice Kephart possessed understanding and sympathy and scorned the spirit of caste. Though he sometimes exhibited impatience he was basically kind. His long judicial tenure did not harden him to human rights. In criminal cases he applied in full force the long established and just principle that "the facts and circumstances (relied upon to sustain a charge of crime) must not only be consistent with and point to the guilt of the accused, but they must be inconsistent with his innocence."⁴ Whether judging those accused of crime or those accused of unethical conduct, he treated the principale of "presumption of innocence" not as a mere cliché; he required convincing proof of guilt before condemnation. He also believed that those who fell, who had paid the penalty and who were truly contrite should have a chance to rise again. He knew that tough individuals do differ in their intellectual and moral equipments, the omniscient man, the infallible man and the perfect man are each like "the indispensable man," of whom the proverb says: he "is yet to be."

³Holmes: *The Common Law*, Ch. 1.

⁴*Com. vs. Benz*, 318 Pa. 465, 472.

Those of us who served with Justice and Chief Justice Kephart will always have many vivid and pleasant memories of our interesting and many-sided associate. He will never be forgotten by his friends and acquaintances and the character and volume of his work on the highest courts of this state assure him a distinguished place in our judicial annals. If he could speak to us now I think he would say:

"No funeral gloom, my brothers, now that I am gone,
No corpse-gazings, tears, black raiment, graveyard grimness;
Think of me as withdrawn into the dimness,
Yours still, you mine.

Remember all the best of our past moments and forget the rest,
And so to where I now wait, you come gently on."