

IN THE SUPREME COURT OF PENNSYLVANIA.

In Memory of Former CHIEF JUSTICE ROBERT VON
MOSCHZISKER.

PHILADELPHIA, PA., December 4, 1939.

On Monday, November 27, 1939, Frederick L. Ballard, Esquire, of the Philadelphia Bar, announced in open Court the death of the HONORABLE ROBERT VON MOSCHZISKER, formerly Chief Justice of the Supreme Court of Pennsylvania.

HONORABLE JOHN W. KEPHART, Chief Justice of the Supreme Court of Pennsylvania, Presiding, announced that memorial services would be held on Monday, December 4, 1939.

On Monday, December 4, 1939, at the convening of Court, Joseph P. Gaffney, Esquire, Chancellor of the Philadelphia Bar Association, on behalf of that association, addressed the Court as follows:

CHIEF JUSTICE KEPHART: Mr. Gaffney.

JOSEPH P. GAFFNEY, ESQ.: With your Honors' permission, The Philadelphia Bar Association seeks upon this occasion to have inscribed upon the records of your Honorable Court, a minute attesting its profound sorrow at the passing of one of its most distinguished members, ROBERT VON MOSCHZISKER.

In 1899, he subscribed to its constitution and thus became a member of the oldest Bar Association in the United States. It was founded in 1802 by the then leaders of the Bar of America, many of whom had either participated in or been eye witnesses of the War for Independence.

He prized his membership in the Philadelphia Bar Association, which continued without interruption until

his death. Now his name is added to that long scroll of its honored dead.

Others here present will shortly speak of his outstanding ability and service as lawyer and jurist. I shall but mention another of his many qualities—his burning zeal for the welfare of his native City. Born in Philadelphia, he never forgot and was ever grateful to it for the opportunities afforded him. In our many personal meetings through the years, I can hardly recall an instance where the conversation did not at some point turn to Philadelphia and its affairs. The Bar indeed has lost an eminent member and this City and State a foremost citizen.

Former Chief Justice VON MOSCHZISKER was also a member and a past president of the Pennsylvania Bar Association. Robert T. McCracken, Esquire, also a past president of that Association, is here and with the permission of your Honors, I present him.

CHIEF JUSTICE KEPHART: Mr. McCracken.

ROBERT T. MCCrackEN, ESQ.: When a man of unusual capacity and extraordinary attainments resides among us and mingles with us daily, we are prone to overlook, except on rare occasions, his outstanding qualities. Especially is this the case when this man, because of innate modesty and desire for self-effacement, succeeds in attaining for himself the semblance of the commonplace. Such a man was ROBERT VON MOSCHZISKER.

Diffident by nature, detesting all forms of self-enlargement, keenly appraising his own position in relation to that of his fellows, he dwelt among us during these last nine years, since his retirement from the office of Chief Justice, as nothing more than what he constantly termed himself—a hard-working lawyer. Only now and then did those in intimate contact with him catch a glimpse of the inner man, the born leader of the years gone by.

The high position attained by ROBERT VON MOSCHZISKER in the body politic of this Commonwealth was in part ordained and in part accidental. It was ordained that, in the closing years of the last century, there should come to the Philadelphia Bar a young man of penetrating vision and prodigious energy, with a passionate love of the law. It was ordained that, in a few short years, this young lawyer should be chosen by the leaders in public life to fill a vacancy on the Common Pleas Bench. It was ordained that he should establish such a record on that Bench in half a dozen years that he became the unanimous selection of his party for elevation to this Court on the retirement of Chief Justice MITCHELL. But it was an accident, the accident of several deaths, that only two members of the Court preceded him as Chief Justice after his election, so that precisely eleven years after he first took his seat on this tribunal, he found himself installed in the loftiest office attainable by a lawyer in this Commonwealth, the office of Chief Justice of Pennsylvania.

His performance of his high duties on this Court is too familiar to everyone in this room to call for or warrant rehearsal or elaboration. He brought to the task an intellect keenly analytical and nicely balanced, a temperament attuned to the judicial tempo, unflagging industry and unbounded enthusiasm for the work. His love of the law was a real passion. He never wearied of pondering over its fundamentals, of searching out its roots, of delving into its traditions. He instinctively comprehended the genius of the common law—its origins in the customs of the people, its slow growth in step with the progress of popular government, its adaptation to the changing needs of the citizenry. A law reformer in the true, the constructive sense of the term, he yet insisted on the beneficence of stare decisis—its necessity as a judicial theorem. The legislature, to his way of thinking, was vested with the power to change the law. It was the duty of the Courts to interpret, preserve and sustain. Yet no man was more ready than

he to accept an enactment of modern thought into statutory form, and where necessary to give it force and vigor through interpretation. Once the thought of the people had crystallized into legislation suitable to the demands of our changing economy—measures such as the Workmen's Compensation Act, the Declaratory Judgments Act, and the various uniform State laws—he was among the first to adopt and to vitalize. He was wont to remark that the function of the Court is to apply ancient principles to current conditions—that of the Legislature to provide new remedies for new maladies.

His reverence for the Constitution was profound—yet it was an admiration for the living rather than a respect for the dead. The great pillars of the Bill of Rights, the fundamental provisions for the three branches of the government and the guaranties against tyrannical encroachments upon the liberties of the people he held to be immutable. Any attack upon them, however subtle, he instantly perceived and fiercely resisted. Yet no one familiar with his many opinions interpreting both the State and Federal Constitutions would call him a strict constructionist. He would brush aside far-fetched applications of constitutional doctrines when the attack on the legislation seemed to him petty or futile. The presumption of constitutionality in legislative enactment was ever present in his mind.

He was, to my mind, a master of judicial style. His opinions disclose a broad grasp of the problems involved, with their implications, but they also reflect precise thought and infinitely careful selection of terms. Not for him the sweeping phrase, the striking simile, the trenchant paradox. Too often such elements in judicial utterance return to plague the Court, if not the writer. He endeavored to confine the expressions in his opinions to the question involved in the appeal, leaving to other controversies the development of other conclusions. Yet with all this he contrived to render his opinions graceful and not without color. Now and

again he would see an opportunity to write, in the form of an opinion, a monograph upon some branch of the law requiring clarification. Such departures from his customary method were rare, but when they came forth, something of real value was added to the literature of the law.

The manifold activities of the Chief Justice, as distinguished from those of the Associate Justice, are better known to his Brethren on the Court than to the Bar. All that we could appraise were their public manifestations. Chief Justice VON MOSCHZISKER presided always with dignity, often with a lively sense of the drama of the controversy. At times he disclosed impatience, but never impatience of inexperience. He was intolerant only of carelessness, of lack of consideration or industry. He believed, and rightly, that counsel presenting a case to an Appellate Court should know more about the facts and the law of that case than any other man in the world, except, perhaps unfortunately, his opponent. Such a result can be accomplished only by industry—and lack of industry was to him the unforgiveable sin. Yet he commonly closed the discussion with a kindly thrust, bringing home, in unforgettable manner, the valuable lesson. He saw no reason why an argument should not be enlivened with humor or current comment, and he frequently indulged in both—briefly and always to the point. Moreover—and this cannot be too greatly stressed—no man who argued a case before this Court in his time—or since—was justified in leaving the Court room feeling that the problem presented had not been adequately heard or that it would not receive entire consideration.

Promptness and punctuality were to him among the cardinal virtues. I have often heard him discuss them during the years he was on this court and since. He would say that a man who keeps his appointments to the minute saves the time of three men—his own, that of the man with whom he has the appointment, and that of the man he has just left, who is thus permitted

to keep his next engagement without delaying some other man.

In the last case that I argued against him in this Court two months ago, when I handed him my appellee's brief two days late—it was due on Saturday and I gave it to him on Monday—he said to me, with a wicked gleam in his eye, that he hoped I would live long enough to learn how to properly practice law. But punctuality was more than an end in itself with him—it was the first step on the road to accomplishment. Not only did he insist that Court open at 10:00 o'clock precisely, and that the half hour rule be observed—he also saw to it that the work of this Court, and, as you, Mr. Chief Justice, have so admirably done, that the calendars of all courts throughout the Commonwealth be kept up to date. I have frequently heard him announce, at the last session of the term, late in June or early in July, that the Court adjourned for the summer with no unfinished business on its docket. Such an announcement cannot be made unless the belt moves on at steady pace throughout the entire term.

There are many other monuments to this man's career upon which one might profitably touch—the initiation of the Judicial Conference, the creation of the Board of Governance; the formulation and promulgation of the rules for character examination of applicants for admission to the Bar, now known throughout the nation as the Pennsylvania System, and gradually acquiring imitators in other States; the publication of his lectures and essays on legal topics, notably his splendid work on Trial by Jury, a masterpiece of historical research and penetrating analysis; his interest in and Presidency of the State Bar Association; and finally the magnificent achievement of the Committee on Procedural Rules of which he was Chairman, under the appointment of this Court, at the time of his death. But I shall leave those matters to those who follow me. There were too many facets to this man's

personality, too many milestones in his journey, to form the subject of a single appraisalment.

It may be summed up, I think, in one final word, in the recalling of the dominant theme in the symphony of his life. I refer to his illimitable love of his profession. To him a high minded lawyer—on or off the Bench—was the noblest Roman of them all. As man attains his loftiest stature, his nearest approach to the Godhead in the administration of Justice, so, he believed, the ministers of Justice were a body set apart, anointed almost as those of a holy order. Even the term “ethical,” with which most of us are content, was to his mind scarcely adequate as defining his conception of the stature of the lawyer or the Judge. His imagination was stirred rather by the untranslatable phrase “noblesse oblige.” He believed that we, all of us, at the Bar and on the Bench, who are charged with the task of laying down and applying rules for conduct between man and man in an ordered society, are performing the highest, most useful and most sacred of human functions. Many of us may be unequal to our undertaking, but that any of us should be false to our trust was to him unthinkable.

This passionate regard for the calling prompted his every activity. There were other sides to his nature, it is true. He loved good music—he rarely missed a concert of the Philadelphia Orchestra. He had a fine appreciation of good literature—he was a selective, rather than an omnivorous reader. He traveled widely and often—always to points where varying societies might be studied and enjoyed. Indeed he told me last summer that he did not know how many times he had been to Europe—he had long ago lost count. But first, last and all the time, he was a lawyer. He never pretended to be anything else. He did not want to be anything else. Other fields awakened his interest—the profession of the law dominated his life. There was no assumption in it, no conscious narrowing of his thought processes to one channel. He just could not help it.

There was his land, the land of his early choice, and in that land he dwelt at all times happily, vigorously, dreaming of none other. Only his family, to whom he was deeply devoted, loomed larger in his horizon than his profession. Nothing else really mattered.

There, your Honors, is something of the man ROBERT VON MOSCHZISKER as I knew him—and I feel that I knew him well. So well that his loss is to me irreplaceable. But even beyond his memory, beyond the time of the youngest of us all, his contribution will live on. He has left the Commonwealth, which he loved with a fierce nationalism, a better place to live in than he found it. What more can be said of any man?

MR. GAFFNEY: The judicial career of ROBERT VON MOSCHZISKER began in the Court of Common Pleas No. 3 of Philadelphia County. Upon his elevation to the Supreme Court, he was succeeded by HON. HOWARD A. DAVIS, now the President Judge of the Court of Common Pleas No. 3, who, with the permission of your Honors, will now address you.

CHIEF JUSTICE KEPHART: President Judge DAVIS.

HON. HOWARD A. DAVIS: Mr. Chief Justice and Associate Justices:

The Bench and Bar of Philadelphia County appreciate this opportunity to pay respect to the memory of the former Chief Justice of this Court, ROBERT VON MOSCHZISKER. We are grateful that we are permitted to here express our respect and admiration for the life and character of Justice VON MOSCHZISKER.

Chief Justice VON MOSCHZISKER came to the Court of Common Pleas No. 3 from the office of Assistant District Attorney. For the years that he served as a Common Pleas judge and as a Justice of this Court, counsel and litigants were at all times grateful to him for his courteous treatment. In his death our Commonwealth has lost a judge devoted to his duty.

Upon his retirement from this Court, he resumed the practice of law and the Bar has lost a colleague who won for himself the respect of his fellow attorneys.

His career was remarkable in view of his years. He died in the 70th year of his age, devoted up to the last to his profession. And those who knew Justice VON MOSCHZISKER will certify that they have lost a good and faithful friend. And it was necessary to know him more or less intimately to understand his kindly feeling.

He was the child of poor, honest, God-fearing people, and his advancement in the public service is evidence of his studious and persistent work in the line of his chosen endeavor.

He was one of the youngest men to achieve the Bench in the Common Pleas Court and the Supreme Court of the State. He was born in Philadelphia, March 6, 1870. When Judge VON MOSCHZISKER was eleven years of age his father died and his mother a little more than a year later. In 1896 he was admitted to the Bar. After his admission, his preceptor, Edward Shippen, made him an associate.

In 1902 he began his career as a public servant when he was appointed third Assistant District Attorney. Within a year he was moved up to second Assistant, and then to first Assistant.

In 1904, he was appointed judge of Court of Common Pleas No. 3, and was subsequently elected at the age of 33 for a term of ten years. In 1910 he was elected Justice of the Supreme Court. I had the honor to succeed him as judge of Court of Common Pleas No. 3. Not yet 40 years of age, he began his term as a Justice of this Court and became Chief Justice in 1921. Serving the full term of 21 years, he retired to private practice in 1931.

During his term of service, he found time to publish several books, a "Judicial Review of Legislation," and "Trial by Jury," and delivered a series of lectures before the University of Pennsylvania Law School. He was always interested in the development of the prac-

tice and the simplification of the laws. His ability was recognized in the award of the degree of Doctor of Laws by the University of Pennsylvania, Lafayette College, Dickinson College, Pennsylvania Military College, Temple University and Juniata College.

His words and thought and wisdom are bound up in the volumes of the Supreme Court Reports. They will live to guide posterity. The influence of these higher standards of faithful service, which he left to us as a heritage, points the way to the higher and nobler things of life, civic virtues and impartial justice.

It is but proper that the Courts of Common Pleas, of which he was a member so many years, leave with you this solemn tribute to the memory of our colleague, Chief Justice VON MOSCHZISKER.

MR. GAFFNEY: Upon the expiration of his term as Chief Justice, ROBERT VON MOSCHZISKER returned to active practice of the law. One of his close personal friends and professional associates was Boyd Lee Spahr, Esquire, whom, with your permission, I now present.

CHIEF JUSTICE KEPHART: Mr. Spahr.

BOYD LEE SPAHR, ESQ.: Mr. Chief Justice and the Justices of the Supreme Court of Pennsylvania:

While the work of ROBERT VON MOSCHZISKER as a Judge of this Court is preserved in the reports of the Court covering twenty-one years and to some extent in the reports of the lower courts during his seven years' service as a judge of the Common Pleas, it is eminently fitting that there should be some more intimate record of his life, both as a judge and as a man. To one who knew him for thirty-five years, with daily intimacy during the last nine, it is a sad duty to state such record and yet one which should be done and is done as a mark of deepest esteem, coupled with genuine affection.

ROBERT VON MOSCHZISKER was born in this City of Philadelphia May 6, 1870, the son of Franz Adolph von Moschzisker and Clara Harrison. His father belonged

to a family of high standing in what was the Austrian part of Poland, became an officer in the Austrian army but joined the forces of Kossuth in the uprising of 1848, was a prisoner of war, escaped to England, where he taught in King's College, London, later studied medicine and came to America to practice. He married Clara Harrison, of English descent. Both Dr. von Moschzisker and his wife died when their son was a lad and he was thrown largely on his own resources. Fortunately he attracted the attention of Edward Shippen, a well known lawyer of the day, in whose office he began the study of law. After a year of travel in the southwest, Mexico and Central America he resumed the study of law and was admitted to the bar of Philadelphia County on June 1, 1896. In 1902 he was appointed Third Assistant District Attorney of Philadelphia County, rapidly becoming Second and First Assistant. The outstanding ability which he showed in his preparation and trial of important criminal cases marked him as a coming man and, in November, 1903, at the early age of thirty-three, he was elected a judge of the Court of Common Pleas No. 3. During his tenure on that bench he wrote upwards of 400 opinions and out of the many which were appealed only five were reversed by the appellate courts. In 1909 he was nominated by the Republican party for the vacancy existing in the Supreme Court of Pennsylvania, elected in November of that year, and took his seat as the junior Justice of this Court January 3, 1910, being at the time four months short of forty years of age, one of the youngest men ever elevated to this high tribunal.

On January 3, 1921, as senior Justice he became Chief Justice upon the retirement of Chief Justice J. HAY BROWN. He presided over this Court until his resignation November 24, 1930, a little over one month before the expiration of his term. He resumed the practice of law for a period of almost nine years, until his death in this City on November 21, 1939.

His written opinions are to be found in Volumes 227 to 301, inclusive, of the State Reports and consist of 1370 decisions, a total of almost 5,000 printed pages, equivalent to nine volumes of the State Reports. Of these, 851 were the opinions of the Court written by him, 6 concurring opinions, 487 per curiams and 26 dissents.

Over the long history of this Court, beginning with the appointment by William Penn of William Crispin as Chief Justice in a letter to Governor Markham, dated at London August 18, 1681, many of the justices have appeared to specialize in one or another of the various branches of the law—construction of wills and the administration of decedents' estates, questions of title to land, criminal law, corporation law, and matters of pleading and procedure, but the range of Judge VON MOSCHZISKER's opinions covers all of these and many more. It is impossible within the limits of this brief review of his judicial career to refer at any length to the scope and importance of his decisions in upwards of 1300 cases and I shall mention only three which, as it happens, are all reported in 284 Pennsylvania, which report covers decisions of this Court at the May and October Terms, 1925. I refer to these because they illustrate the wide scope of his judicial activity in diverse branches of the law and also because of their importance both in substance and procedure. The first is *Commonwealth ex rel. the Attorney General v. Benn*, in which the Chief Justice in an exhaustive opinion held that the Public Service Commission was not a court of record but was an administrative arm of the legislature, that the Governor in legal effect was the agent of the legislature in making appointments subject to the consent of the Senate and that the Governor could not remove a Commissioner without the consent of the Senate. It is interesting to note that the Supreme Court of the United States in *Humphreys, Executor v. United States*, 295 U. S. 602 (1935), although it cites no cases other than its own earlier decisions, held that the President

of the United States had no authority to remove a member of the Federal Trade Commission except for the specific grounds set forth in the Trade Commission Act on reasoning which closely follows that of Chief Justice VON MOSCHZISKER in the Benn case.

In *Harper v. Consolidated Rubber Company*, he clarified the question as to whether title to mortgaged premises is in the mortgagor or in the mortgagee and held as a general proposition that the title is in the mortgagor and that the lien of a mortgage of a corporate mortgagor is subordinate to that of state taxes assessed against the mortgagor, although settled after the mortgage was recorded.

In *Kariher's Petition*, he upheld the constitutionality of the Uniform Declaratory Judgments Act of June 18, 1923, and pointed out the scope and usefulness of that act in simplifying and shortening procedure.

Judge VON MOSCHZISKER would undoubtedly be classed as a conservative. He was steeped in the common law and the statutory law of Pennsylvania, but he never permitted the doctrine of stare decisis to extend beyond its proper limits. He looked upon the law as a living thing, a science which must grow and develop with the times.

In addition to the high quality of his decisions and in addition to the execution of his full share of the opinions of the Court, he was an outstanding administrative chief. With the vigor of comparative youth and with a mental and nervous force which his rather slight physique appeared superficially to belie, he kept the work of the Court up to date and saw to it that there was no undue delay in the disposal of business and in the handing down of opinions. In addition to this he supervised the complete revision of the rules of this Court shortly after he became Chief Justice. He also found time to inaugurate the Judicial Conference of all the judges of the Commonwealth in 1928. Originally called to consider changes in the administration of the criminal law, the second conference in 1929 broad-

ened the scope of consideration to all branches of administrative law. While this conference was discontinued for some years, it has since happily been revived under the leadership of the present Chief Justice. In 1922 Judge VON MOSCHZISKER became a member of a committee of five, of which the Chief Justice of the United States was chairman, appointed by the American Bar Association, to formulate canons of judicial ethics, which canons were adopted by the American Bar Association in 1924 and on which committee he performed important service.

During his term as Chief Justice he delivered numerous addresses before law schools and bar associations, which are to be found in collected form in three volumes, entitled respectively: "Trial by Jury," first published in 1922, with a second edition in 1929; "Judicial Review of Legislation," published in 1923; "Stare Decisis, Res Judicata and Other Selected Essays," published in 1929. In the last named volume is the article dealing with the rule of this Court as to the statement of question involved, which article was originally published in 34 Yale Law Review 287. This article points out, in forceful clarity of language, the importance of crystallizing the issue before the appellate court by the requirement of the statement of it in the briefest and most general terms, and the beneficial effect of the rule as applied to the restricted period of argument before this Court so that both the advocate and the Court can concentrate on the controlling points in the case.

In 1937 he became the Chairman of the Procedural Rules Committee appointed by this Court and, collaborating with the members of the committee, composed of outstanding members of the bar of Pennsylvania, drafted certain rules governing the business of the non-appellate civil courts, which were adopted and promulgated by this Court September 8, 1938. Since then this committee under his leadership has continued its consideration of additional rules and the last active work which he did was to preside over the meetings of this

committee on October 20 and 21, 1939, immediately prior to his entering the hospital on October 22.

The degree of Doctor of Laws was conferred upon him by the University of Pennsylvania, Dickinson, Lafayette, Juniata, Pennsylvania Military College and Temple University. He was elected an honorary member of the Phi Beta Kappa Society by the Alpha Chapter of Pennsylvania at Dickinson in 1921.

At its first meeting after his retirement from the bench, namely, in June 1931, he was elected President of the Pennsylvania Bar Association for the customary one year term, and in the same year he was elected a trustee of the University of Pennsylvania, which position he held at the time of his death.

On June 29, 1912, Judge VON MOSCHZISKER was married to Anne MacBeth, daughter of George A. MacBeth of Pittsburgh, who survives him, as do their three children, Kate von Moschzisker Disston, Bertha von Moschzisker and Michael von Moschzisker.

On September 27, 1929, Judge VON MOSCHZISKER delivered an address at the unveiling of an inscribed boulder marking the birthplace of John Bannister Gibson, who was born in 1780, at Gibson's Mills, then Cumberland, now Perry County, Pennsylvania, in which he extolled the greatest of his predecessors as Chief Justice. There is a striking similarity in the career of these two men, separated by almost one hundred years. They both became Common Pleas Judges at the age of thirty-three. Gibson became a justice of the Supreme Court at the age of thirty-six; von Moschzisker at the age of forty. Gibson's tenure on this bench was thirty-seven years, the longest in the history of the Commonwealth and one impossible to duplicate because of the constitutional limitation of twenty-one years. He was Chief Justice twenty-four years. With that exception the chief justiceship of Judge VON MOSCHZISKER for nine years is the longest in the history of the Commonwealth. I know of no better way to close than to quote the epitaph on the monument of Chief Justice GIBSON

in the old cemetery at Carlisle, written by Chief Justice BLACK, and to apply it to Chief Justice VON MOSCHZISKER:

"In the various knowledge which forms the perfect scholar he had no superior. Independent, upright and able, he had all the highest qualities of a great judge. In the difficult science of jurisprudence he mastered every department, discussed almost every question, and touched no subject which he did not adorn. He won in early manhood and retained to the close of his life the affection of his brethren on the bench, the respect of the bar, and the confidence of the people."

MR. GAFFNEY: As the concluding speaker, and again with the permission of your Honors, I present HON. GEORGE WHARTON PEPPER.

CHIEF JUSTICE KEPHART: Mr. Pepper.

GEORGE WHARTON PEPPER, ESQ.: May it please your Honors: I can add little to what has been so well said by others. My tribute must be felt rather than spoken.

I predict that, as time passes, ROBERT VON MOSCHZISKER'S reputation as a great judge will wax rather than wane. By the quality of his public service he has attained judicial immortality.

Among his many fine judicial qualities there was at least one that is as great as it is unusual. This was his complete detachment from every consideration except the merits of the controversy before him. I have practiced law for fifty years and I have seen whole companies of judges come and go. I can say with conviction that I never knew one who could so effectively disregard the parties to a litigation and focus his whole attention on the issue. No friend of his, happening to be a litigant in his court, ever received treatment from him the least bit more favorable than that accorded the adversary. No enemy of his, if he had an enemy, would have had any reason to anticipate a decision in the least degree tainted by hostile prejudice.

That in his judicial capacity he was no respecter of persons is not an indication that he lacked depth of feeling. He had in fact a great capacity for affection and his friendships were many and lasting. For many of us the sun will shine less brightly because ROBERT VON MOSCHZISKER is no longer in our midst.

It so happened that I was given, many years ago, an opportunity to record my admiration for our friend's fine judicial quality and my absolute confidence in his integrity. When early in 1923 Mr. Justice PITNEY resigned from the Supreme Court of the United States, Senator Reed and I, after most careful consideration, decided to recommend ROBERT VON MOSCHZISKER for appointment as his successor. We submitted his name to President Harding and gave our reasons for thinking that he would add great strength to the Court. The President was much impressed and strongly indicated a desire to name him. Shortly thereafter he sent for us and said that his intention had been shaken by opposition coming from within the Court and that he was unwilling to make an appointment that was not unanimously acceptable. He finally decided to nominate Mr. Justice SANFORD, who was understood to have been the personal choice of Chief Justice TAFT. I have nothing but respect for the memory of Mr. Justice SANFORD but I have always been of opinion, and never more strongly than in recent years, that the appointment of ROBERT VON MOSCHZISKER would have enabled him to render in the Supreme Court of the United States a quality of service of which the country stands greatly in need.

I noted with satisfaction the emphasis laid by Mr. Spahr on Chief Justice VON MOSCHZISKER'S opinion in *Commonwealth v. Benn* and the suggested relationship of that decision to the judgment of the Supreme Court of the United States in the Humphreys case. It so happens that because I had argued a similar case I was consulted by counsel for Humphreys when his brief was in course of preparation. The Benn decision was called

to his attention and he applied with good effect the principle which this Court had vindicated and which the Supreme Court of the United States later accepted as the basis of its decision.

Following the expiration of his term as a judge of this Court he gave himself with diligence to the practise of the profession. If he was not as happy at the bar as he had been on the bench it was because he was always less interested in influencing the minds of others than in making up his own. While he worked diligently, advised wisely and served his clients faithfully, he lived and died a judge.

When physical ailment led him to seek surgical treatment he faced the impending operation with his usual equanimity. I am not privileged to know the incidents of his brave struggle to substitute unconquerable will-power for ebbing physical strength. I am certain, however, that he abundantly satisfied that acid test of manliness which Kipling has embodied in familiar verse:—

“If you can force your heart and nerve and sinew

“To serve your turn long after they are gone—

“And still hold on—when there is nothing in you

“Except the will that says to them ‘Hold on’”—

and certain, too, that when the losing fight was over, ROBERT VON MOSCHZISKER went to meet his Maker a gentleman unafraid.

CHIEF JUSTICE KEPHART: Though our late Brother von Moschzisker left the bench nine years ago, it seems but yesterday that he was here, in this courtroom, presiding at our sessions. When he retired we knew he would still be among us; this knowledge, and his visits, then tempered our loss. Now we are deprived of that consolation. Having occupied the chair of Chief Justice for nine years, during which time his association with Brother SCHAFFER and myself was very close, it was

with the deepest regret that we who sat upon the court over which he presided saw him depart.

None could intimately know the former Chief Justice without respecting him, without being inspired with a feeling of deep affection for him. For twenty years and ten months he was a member of this Court. Those years, spanning the anxious days of war and the beginning of the chaotic era of the depression, brought grave responsibilities to the Supreme Court. During his years of service he encountered judicial problems for which there was no precedent in legal history. We were fortunate indeed to have his calm, cool judgment, buttressed by a great legal mind, to aid the Court in its deliberations. When he came to this Bench he brought with him the vigor of youth, the vibrant force of a strong personality. He possessed that knowledge of the law so eminently necessary to an appellate judge, a deep sense of the responsibilities of his office, and a true judicial attitude. He once said: "I have tried not to let the law stand still," and the hundreds of opinions bearing his name signalize how well he succeeded in his purpose. If you would ask that we select some particular phase of the law in which he excelled, we would reply that his judicial talents were of such character that to select one would be to do injustice to others.

His energy was tireless. He never left the courtroom without carrying in his mind the thought of his cases, to such an extent that at times he forgot his private interests. He exemplified, indeed, a true servant of the Commonwealth. An appellate judge appears best in consultation, and if there is weakness in his armor of legal knowledge or statesmanship it is there that it will be discovered. Yet there the loss of our now deceased Brother was most keenly felt.

Chief Justice VON MOSCHZISKER rose to great heights as a jurist. He was a worthy successor to a long line of distinguished Chief Justices, and when the judicial history of the State is written it is in this light that he will be remembered. At the time of his death he was direct-

ing the revision of our code of civil practice as Chairman of the Procedural Rules Committee under the supervision of this Court, and it was he who at the instance of the State Bar Association established the Board of Governance. If these had been his only contributions to the development of the science of law, his name would be preserved among the names of those who have advanced materially our system of jurisprudence.

In accordance with our custom, these proceedings will be inscribed in the State Reports, that those who come after us may know with what esteem **ROBERT VON MOSCHZISKER** was held by all of us, his colleagues and his friends.