

In Memory of Former CHIEF JUSTICE JOHN W. KEPHART

PITTSBURGH, Pa., September 25, 1944.

The opening of the session of the court for the Western District was attended by many of the Judges of the courts of Allegheny, Cambria and other counties and by members of the bar of these counties for the purpose of paying their respects to the memory of the late Chief Justice JOHN W. KEPHART, who died on August 6, 1944.

The proceedings were as follows:

CHIEF JUSTICE MAXEY: We will now proceed to hold a memorial service in honor of the late Chief Justice KEPHART. I recognize President Judge JOHN H. McCANN of Cambria County.

JUDGE McCANN spoke as follows: It is with a feeling of profound sorrow, that on behalf of the bench and bar of his native county, I pay tribute to the life and memory of an intimate friend, and one of the most illustrious sons of Cambria County—Hon. JOHN W. KEPHART.

I met him and knew him early in life's journey for both of us. I talked with him, and planned with him, and dreamed with him, a good part of the way. I know that on that journey, the path was seldom smooth. It had many steep ascents, and many dangerous passes, rock strewn, with snipers in the hills, armed with the weapons of envy and malice.

Of sturdy stock, son of a gallant soldier father and a spartan mother, he never faltered on his journey. His indomitable will overcame every obstacle in his pathway from the beginning until "Journey's End".

John was one of a family of five—Harman, Schuyler, Samuel and Gertrude. Their father died when John was

two years old, and all five entered the Soldiers' Orphans School at McAlisterville, Pennsylvania.

Their mother lived to see her highest ambition realized, her son John wearing the ermine of the Appellate Court. Samuel, a distinguished officer of the Army of his Country, and Harman, State Treasurer of Pennsylvania, and her daughter happily married to Mr. Dudley Tate Easby, another distinguished Pennsylvanian.

When death took away the breadwinner of the family, Henrietta Kephart, the widow, with five small children had a difficult problem to solve, especially in those days. I knew her well. She was a woman of commanding presence, quiet dignity, a charming personality and of sublime courage. She was poor, if to be without money is poverty: but the family was infinitely rich in the precious heritage of an honored name, and the deep affection and devotion of a loving mother, who sacrificed herself, and gave up her happiness by separating from her children and sending them to a school, where they could equip themselves for the battle of life. Her children were her wealth, and like that other mother of ancient days, when asked by the conqueror, where her jewels were stored, pointed to her fine sons and said: "These are my jewels." Henrietta Kephart could have spoken truthfully the same words. She was proud of her family, rejoiced in their success, and in their happiness, until her journey ended, and I was one of those who carried her to her last resting place.

Judge KEPHART was happily married to Florence Evans, the amiable and talented daughter of the late Hon. ALVINE EVANS, a distinguished lawyer, of Cambria County, and a former member of Congress. Two sons and a daughter, Mrs. T. McDowell Anderson, survive him. Both sons are lawyers. A. Evans Kephart already has made a name for himself as a lawyer and as a member of the State Senate from a Philadelphia District. His second son, John W. Kephart, Jr., is a Deputy Attorney General of Pennsylvania. Both sons had prac-

ticed law with their father, since his retirement from the bench.

The tragedy which separated him from his family and loved ones at the very peak of his intellectual power cast a shadow of gloom over our entire community. He was in comfortable circumstances, master of his own time, had an important and distinguished clientele. His sons were growing up with him, and the whole professional environment was ideal. Loved and respected, he had everything to live for.

But JOHN KEPHART still lives in the hearts of those he left behind. His cheerful little smile (whimsical at times) that was peculiarly his own, his soft, pleasant musical voice, the sparkling eye, the boyish countenance, the easy careless gesture, the warm handclasp, and the many other little mannerisms, which endeared him to his friends, still live among us, all a part of his personality, which will always diffuse its charm.

Like a vase in which roses have once been distilled,
You may break; you may shatter the vase if you will,
But the scent of the roses will cling to it still.

And in another sense, he will be remembered by the bench and bar. His courtesy to the bench, his kindness and consideration for the young lawyer, and his tireless effort to help his friends, and make them feel at home in the Appellate Courts will never be forgotten.

His friends outside the law will not forget him. His charity to those who deserved it was boundless. But very few even of his intimate friends ever heard of it. Many young men, lawyers and others, realized their ambition because of his help. He did these things quietly, often secretly. His charity was more than almsgiving. It was the impulse of a warm, generous, human heart.

As a young lawyer, he tried many cases for poor people, and old people and with these he never troubled about fees. His own struggle to succeed, and the difficulties he had to overcome, made him sympathetic to the cares and trials of others.

I might sum it all up by saying he was a good man, a kind man, a Christian gentleman; one of the most tolerant men I ever knew. He was a loyal friend, and a generous foe. We at home knew him and loved him. We followed him to the end of life's journey. To him, now we say "Good-Bye" dear friend. We know you realized the Christian's hope: eternal rest.

CHIEF JUSTICE MAXEY: I recognize former Judge FRANK P. BARNHART of the Cambria County Bar.

JUDGE BARNHART spoke as follows: Mr. Chief Justice MAXEY and Associate Justices of the Supreme Court of Pennsylvania:

On behalf of the Bar of Cambria County, I have come to lay its tribute of admiration, respect, honor and love on the bier of a great lawyer and a great judge. And yet I come not so much to say a word of sadness and sorrow at his passing; but rather to express joy and pride and gratitude because of his magnificent achievements and the legal lustre he has shed upon his home county, which he loved so much, and in a larger sense upon the State and Nation.

The Chief Justice's early life is an inspiration to every American boy. His father died when he was of the age of five and he then entered Pennsylvania State Soldiers' Orphans School, at McAlisterville. At the unprecedented age of fourteen, he became Colonel of the School Battalion and at the age of sixteen, he was graduated as valedictorian of his class.

After leaving the Soldiers' Orphans School, he worked as a telegraph operator, saved some money and entered Allegheny College at Meadville. At the end of the second term, his money exhausted, he went back to work. He saved some more money and succeeded in working his way through Dickinson Law School and was admitted to practice law in Cambria County.

He was County Solicitor in our county when I was admitted to the Bar. It was my privilege to get a close-up

view of this unusual man. My view was, I think, not too close to obscure my perspective. He possessed a great legal mind. His mind worked like a steel trap, sprung after mature thought and then vise-like in its grip. His courage knew no faltering. He had a fighting heart that never missed a beat and never knew defeat.

I remember in 1913 when he was a candidate for Judge of the Superior Court. He was then unknown save in our own county. A member of the Luzerne County Bar wrote me and asked who was this man, KEPHART, that had the audacity to run for the Superior Court. I prophetically replied that he was the most resourceful man I ever knew and that his nomination and election were a possibility and even a probability. We all remember that novel and memorable campaign.

Through the years that followed, his record on the Superior Court and then on the Supreme Court, has been replete with legal lore. He was a prodigious worker. During his career on the Appellate Courts, he heard more than ten thousand cases. His thousand opinions, covering a period of more than a quarter of a century, will ever remain a tribute to his rare accomplishments as a jurist. Dean Wigmore wrote that Judge KEPHART was one of a few jurists of the nation who have made valuable contributions in their opinions.

CHIEF JUSTICE MAXEY then spoke as follows:

Ladies and Gentlemen of the Bar:

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 judges began their work large areas of the law were uncharted. Their bold, vigorous and farsighted 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 view, he, in his dissent, 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 United States 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 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 in equity" for the trial courts of this state and which authorized the appointment 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

¹ 274 Pa. 489.

² 260 U. S. 393.

by isolation from one's 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 understanding 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 principle 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 though individuals do differ in their intellectual and moral equipments, the omniscient man, the infallible

³ Holmes: *The Common Law*, Ch. 1.

⁴ *Com. v. Benz*, 318 Pa. 465, 472.

man and the perfect man are each like “the indispensable man”, of whom the proverb says: he “is yet to be”.

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.

It is ordered that these proceedings be entered in the court minutes and published in the Official Reports.

The Court then took a brief recess in honor of the late former Chief Justice.