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Address

by

The Honorable Francis Biddle
Attorney General of the United States

MEMORIAL SERVICES FOR MR. JUSTICE VAN DEVANTER

The Supreme Court
of the United States

Washington, D. C.
Monday, March 16, 1942
12:00 Noon, E.W.T.

MAY IT PLEASE THE COURT:

Members of the Bar of this Court assembled this morning in respectful and affectionate tribute to the memory of Mr. Justice Van Devanter. A Minute and resolution were adopted which I have the honor to present, with the request that they be embodied in the permanent records of the Court. The Minute is as follows:

WILLIS VAN DEVANTER was of such stuff as pioneers are made of. When he died his country lost a virile and devoted son.

The story of his eventful life is a record of faithful and distinguished public service. Nevertheless when the long chronicle has been read, the man himself seems far more impressive than the things he did. The simple fact is that he stood forth a man among men.

He was a son of the Hoosier State. Born in Marion on April 17, 1859, his self-development began in the public schools. DePauw University claimed him as the most distinguished of its alumni. In the law school of Cincinnati University he prepared for admission to the bar. After a few years of practise in his home town, during which he served as Deputy County Prosecutor, he answered the call of the West and was among those who helped organize the Territory of Wyoming into Statehood. After having served under appointment by President Harrison as a Justice of the Supreme Court of the Territory, he became Chief Justice of the new State, President McKinley made him an Assistant to the Attorney General of the United States attached to the Department of the Interior. President Theodore Roosevelt commissioned him a Circuit Judge in the Eighth Circuit.

By President Taft he was appointed an Associate Justice of the Supreme Court of the United States. He and Mr. Justice Lamar took their seats upon the Bench on January 3, 1911. From that day to the day of his retirement, June 2, 1937, he devoted himself assiduously to the work of the Court. He was a colleague whose understanding, courtesy and generosity

toward the other members of the Court have never been exceeded. His personal friendliness and cordiality and his desire to be helpful easily survived any disagreement in views. These qualities enabled him to hold the warm affection and respect of every colleague and contributed much to the esprit of the Court.

The course of his life before his elevation to the Supreme Bench fitted him in eminent degree for the work which as an Associate Justice he was called upon to do. His Wyoming experience had given him an intimate knowledge and sympathetic understanding of the people of the great western area.

As Assistant Attorney General, charged with the problems of the Interior Department, he had acquired an unrivaled knowledge of the public land law, of the law of waters as it existed in the western portion of the United States and of the law respecting the Indians as embodied in treaties, acts of Congress and administrative practise. It is not too much to say that, when he came upon the Supreme Court, he was one of the most expert persons in the United States in these fields. Throughout his service on the Court, his counsel and advice on these matters was invaluable to his brethren.

His experience as a lawyer and as a Judge of the Circuit Court of Appeals for the Eighth Circuit had made him familiar with federal practise and with the relation of the federal government to that of the States. His opinions written for the Supreme Court on questions of procedure and on the constitutional relationship between the States and the nation are amongst the most careful, accurate and important adjudications of the Court during his term of service. Each of his opinions was the product of hard work. It is even said that on each of them he spent

prodigious labor. His mental processes were simple and direct and his literary style was wholesome and unaffected. Mr. Justice Van Devanter's knowledge in matters of procedure has been described as "perfectly extraordinary". When colleagues were inclined to regard some question of procedure as one of first impression he would go quietly to the shelves, take down a volume of the Reports and find among the memorandum opinions at the end of the volume a precedent exactly in point.

When some years ago the then Chief Justice and the other Justices were consulted in regard to general orders in bankruptcy, the Chief Justice expressed complete reliance upon Mr. Justice Van Devanter as the strongest man in the Court to deal with such problems.

In a controversy between the United States and Canada, Mr. Justice Van Devanter and Chief Justice Duff served as the Commissioners contemplated by the Convention between the two Governments. The unprejudiced, judicious and tactful way in which the Commissioners discharged their delicate duty brought the controversy to a fair and generally satisfactory conclusion.

Mr. Justice Van Devanter was distinguished for two great judicial qualities. He had, in the first place, a remarkable sense of proportion and never pressed a principle to the extreme in disregard of considerations of policy and practicality. He did not lack the courage to stand, and stand firmly, by a principle which he deemed sound. On the other hand he recognized that reconciliation and adjustment are quite as important, in the light of the facts and the result, as is rigid adherence to principle. In the second place, he had a most orderly and analytical mind. The problems presented by a cause seemed, without effort on his part, to fall into their sequential relation. It resulted that his

exposition of his views in conference was clear and orderly. It has been a matter of remark that, if a stenographer could have been present and had taken down some of his statements of cases, those statements might well have been made the opinions of the Court, so lucid, so orderly, and so comprehensive were they. His extreme conscientiousness and thoroughness in endeavoring to get to the bottom of every question of fact and law presented to him were distinguishing characteristics. He was wont to look carefully into minute details which might conceivably have a bearing upon the case before him and insisted on having it made clear to him what their effect might be. Many judges have assumed that they can ignore details of this sort; but those who practised before Judge Van Devanter recall that often he would pick an important point out of something that counsel had not considered worth dealing with.

If it be necessary to conform to the custom of classifying judges as Liberal or Conservative, Mr. Justice Van Devanter must be styled a Conservative but this is said with a realization that there is more than one species within each genus. His was not the conservatism attributable to tradition or to worldly possessions. He acted in the living present and he preferred the simple life. Himself no stranger to frontier experiences, he had in him the spirit of the men who won the West and of those others who in an earlier day fought for the liberties which have been the glory of America. These he deemed priceless and when he conceived them to be in danger he was vigorous in their defence. He had boundless admiration for the pioneers of that era when going was roughest. "There were no drones in those days" he once remarked "the country would not support them."

Willis Van Devanter was at heart a sportsman and a lover of the great open spaces. In early days Buffalo Bill was often his companion on hunting trips and the future Justice was happy in the companionship of men inured to hardship and danger. He was, however, a farmer even before he was a hunter, for at fifteen he took charge of his grandfather's farm, did the plowing and attended to all the work. When he retired from the Supreme Court it was life on a farm for which he longed and when he bought a farm in Maryland it was the realization of a long-deferred hope. On these fertile acres he spent most of his allotted time. During his public career he had been the recipient of many honors and the object of much eulogy, but it is said that he prized as highly as any other tributes the testimony of a tenant on the place who said of the retired Justice that he was "a helpful farmhand". In his youth, before he headed westward, he had invited Dollie Burhans, of Iona, Michigan, to live his life and share his fortunes. She accepted and they were married. Their life together was exceptionally happy. She bore him two sons who survive their father. Her death came in 1934 when she and her husband were traveling abroad. Death overtook the Justice on February 8, 1941. His two surviving sons, a brother and two devoted sisters were among those who stood with bowed heads when the Chaplain of the United States Senate read the solemn words of the Burial Service.

Such was the man in honor of whom this meeting is held. Many of those present date their friendship for him from the day when, as young practitioners in his court, he showed them kindly consideration and made them feel at home. Strong, straightforward, God-fearing and loyal, let it be recorded of him that he represented America at her best.

RESOLVED that the foregoing Minute be adopted, that a copy of it be transmitted to the family of Mr. Justice Van Devanter; and that the Attorney General of the United States be asked to present the Minute to the Court on behalf of the Bar with the request that it be inscribed upon the records of the Court.

For twenty-seven years Mr. Justice Van Devanter sat as a member of this Court, serving under three Chief Justices, in six Presidencies, during two depressions and a major war. Prior to his appointment, he had rendered distinguished service as a judge of the Eighth Circuit Court of Appeals as well as of State and territorial courts; as an Assistant Attorney General, guiding the Department of Interior through the complex problems presented in the management of the public lands; as an active and successful attorney, conducting an exciting practice in a rugged land; and as a prominent participant in the development of Wyoming from Territory to State. Thus he brought to the service of this Court the fruits of wide experience, happily combined with a fine intellect, great learning and ardent devotion to the judicial office. In his opinions, in conference and in moulding the legislative framework of the Court's jurisdiction, he played an important part in the enduring work of the Court.

Though Mr. Justice Van Devanter was a specialist in several phases of the court's business, his opinions include many cases which attracted widespread interest. Almost at the beginning of his service he held for a divided court that defendants who cornered the cotton market were guilty of a restraint of trade under the Sherman Act (U.S. v. Patten, 226 U.S. 525). He delivered the judgment in the National Prohibition Cases (253 U.S. 350). He spoke for the Court in Pennsylvania v. West Virginia, barring under the commerce clause the reservation by a State for the use of its inhabitants of a major portion of the natural gas produced within its boundaries; in New York v. Zimmerman, 278 U.S. 63, sustaining a state statute requiring secret societies to register their membership; in Johnson v. Manhattan Railway, 289 U.S. 479, untangling the complicated issues of jurisdiction and

policy in an important railroad receivership; in Wyoming v. Colorado, resolving the recurrent problems involved in the controversy between the two states over water rights in the Laramie River (259 U.S. 419, 496; 260 U.S. 1; 298 U.S. 573); in Ex parte Bakelite Corp., 279 U.S. 438 and Federal Radio Commission v. General Electric Company, 281 U.S. 464, distinguishing judicial from administrative action with reference to the constitutional limitation of the jurisdiction of this Court to "cases" and "controversies." On the great issues that divided the Court in recent years, he wrote but rarely, though his position was clear and held with firm conviction. Reference may be made, however, to Evans v. Gore, 253 U.S. 245 and Indian Motorcycle Co. v. United States, 283 U.S. 570, dealing with the extent of immunity from federal taxation.

As a Circuit Judge, Justice Van Devanter had dealt with all the problems of the western states during the years of his service. His opinion in Brewster v. Lanyon Zinc Co., 140 F. 801, is famous for the establishment of the doctrine that oil and gas leases may be declared void for breach of an implied covenant to develop the land. His opinions on this Court reflect his abiding interest in public land questions and his special concern with Indian problems and with the intricate but far-reaching issues of jurisdiction and procedure.

For the Indians he had the deepest sympathy and understanding and in their cases, particularly in his later years on the Bench, he was almost invariably the spokesman of the Court. Each such decision was made the occasion for an essay in tribal history, so that one may trace the wanderings of the Western tribes through opinions such as those in United States v. Reilly, 290 U.S. 33; United States v. The Creek Nation, 295 U.S.

103, and others. He said of the Pueblo tribe, in United States v. Chavez, 290 U.S. 359, 361: "They are essentially a simple, uninformed and dependent people, easily victimized and ill-prepared to cope with the superior intelligence and cunning of others." To the extent of his power, the Justice protected the "ignorant" from the "cunning."

In the field of jurisdiction and procedure, Justice Van Devanter was an acknowledged master. His opinions in the Bakelite, Radio Commission and Manhattan Railway cases have been noted. To these we may add, almost at random, such decisions as the Second Employers' Liability Cases, 223 U.S. 1; Wells Fargo v. Taylor, 254 U.S. 175; Lee v. Chesapeake & Ohio Ry. Co., 260 U.S. 653 and Employers Reinsurance Corp. v. Bryant, 299 U.S. 374, dealing with the vital issues involved in the relationship of state and federal courts; Slocum v. New York Life Insurance Co., 228 U.S. 364 and Baltimore & Carolina Line Inc. v. Redman, 295 U.S. 654, dealing with procedure; and Dahnke-Walker Mill Co. v. Bondurant, 257 U.S. 282, dealing with the scope of appeal as of right on federal questions arising in state courts.

Relatively speaking, Justice Van Devanter's opinions were not numerous, for he wrote with great deliberation and care. Yet his opinions, like all true artistic achievement, conceal the effort involved in their creation. There are no waste passages, no needless quotations, no superfluous citations. The argument moves from premise to conclusion, articulate, closely reasoned and complete, each opinion a model of orderly reasoning and lucid expression. But it was not only for his majority opinions, or for his very few dissenting opinions, that Justice Van Devanter will be remembered. It is the process of deliberation in considering cases that makes the Court an organic entity rather than the aggregate of nine individual votes. In

this Justice Van Devanter rendered invaluable service. His courtesy, his penetrating logic, his enormous knowledge of precedent and his capacity for oral presentation were here brought to bear at the crucial moment. These talents led Chief Justice Taft in 1926 to say that Justice Van Devanter "exercises more influence, a good deal, than any other member of the Court." His service in the conference is attested also by Chief Justice Hughes and, upon his retirement, led to the statement by his brother Justices that his "labors have entered into the very warp and woof of the Court."

The part that Justice Van Devanter played in the drafting and presentation to Congress of the Judges' Bill which became the Judiciary Act of 1925 will be a monument to his memory long after individual cases are lost in the anonymity of time. Following the retirement of Mr. Justice Day, Justice Van Devanter became Chairman of the Committee of the Court engaged in the preparation of the bill. The original draft submitted to the Court in 1921 was largely his work and upon its subsequent introduction in the Congress, the chief burden of explanation of the bill in the Congressional hearings of 1922 and 1924 fell to him. The hearings happily give us an enduring record of those qualities of Justice Van Devanter which served so fruitfully in the conferences of the Court. On all the phases of appellate jurisdiction of the Supreme Court and the Circuit Courts of Appeals, he answered question after question, simply, succinctly, precisely, exhibiting complete knowledge of every intricacy, every detail, including peculiarities of practice even in the territorial courts. The Act itself, serving as it did to extend the system of discretionary review and to provide a unified statement of the appellate jurisdiction, will stand as one of the great legislative achievements of our time.

When Justice Van Devanter retired from this Court at the age of seventy-eight, after thirty-four years of continuous service as a federal judge, he had earned repose. Characteristically, however, he was ready to serve in a District Court to relieve a congested docket, saying quite simply "I am still a judge." So in the last years of his life he presided at the trial of several major cases. His conduct of the trial, his charge to the jury, his treatment of counsel and of witnesses was a model to the profession.

The success in working with others which contributed to Justice Van Devanter's judicial career graced his entire life. His courtesy had an earnestness which was compelling. He had great capacity for friendship. He had the human warmth which knows no line of doctrine. In his personal relations as in his judicial work he sought an element of perfection. When he died the Chief Justice spoke for the Bar as well as for the Court in saying: "He was a man of steady character and rare sagacity, a wise counsellor and a faithful friend."

As a state and federal official, as a judge and as a justice, he gave his life to the service of his country.