



PROCEEDINGS ON THE DEATH OF MR. JUSTICE HARLAN.

JOHN MARSHALL HARLAN, Associate Justice of the Supreme Court of the United States, died at his home, in Washington, District of Columbia, on Saturday, October 14, 1911, after an illness of four days. He attended the opening session of October Term, 1911, on Monday, October 9 and the session of the following day. He did not attend any other.

On Monday, October 16, on the opening of court THE CHIEF JUSTICE said:

"Gentlemen of the Bar—It is my painful duty to announce the death of MR. JUSTICE HARLAN. The court will stand adjourned until Wednesday morning next without the transaction of business of any kind to-day."

The funeral of MR. JUSTICE HARLAN took place at the New York Avenue Presbyterian Church on Tuesday, October 17, 1911. The interment was at Rock Creek Cemetery in the District of Columbia.

SATURDAY, DECEMBER 16, 1911.

The Bar of the Supreme Court of the United States and the Officers of the court met in the Court Room in the Capitol at twelve o'clock.

On motion of MR. LOUIS T. MICHENER, MR. AUGUSTUS E. WILLSON was chosen Chairman and MR. JAMES H. MCKENNEY, Secretary.

On motion of *Mr. Solicitor General Lehmann*, the Chair appointed the following members of the Bar, a Committee on Resolutions:

Mr. Frederick W. Lehmann, Missouri, Chairman; Mr. Joseph W. Bailey, Texas; Mr. Elihu Root, New York; Mr. Lawrence Maxwell, Ohio; Mr. William O. Bradley, Kentucky; Mr. Henry E. Davis, District of Columbia; Mr. Swagar Sherley, Kentucky; Mr. William F. Mattingly, District of Columbia; Mr. Blackburn Esterline, Illinois.

Addresses were made by Mr. Solicitor General Lehmann; Mr. Joseph W. Bailey, United States Senator from Texas; Mr. Elihu Root, United States Senator from New York; Mr. William O. Bradley, United States Senator from Kentucky; Mr. Hannis Taylor; Mr. Blackburn Esterline; Mr. Franklin W. Collins.

Mr. Solicitor General Lehmann, for the Committee, presented the following resolutions:

Resolved, That the members of the Bar of the Supreme Court of the United States record their profound appreciation of the life and labors which were brought to a close by the death of MR. JUSTICE HARLAN.

He was dedicated at his birth to the profession of the law by his father, who was himself an honored and distinguished member of that profession, and prophecy of a personal career was never more completely fulfilled than that which spoke in the christening of JOHN MARSHALL HARLAN. He came into an heroic epoch of American history, and, mentally and physically, was cast in an heroic mould. In his earliest manhood he entered upon the practice of his profession and at the same time took part in the political controversies by which the country was then deeply disturbed and which nowhere tried the mettle of American manhood more than in that border-

land of contention of which his native State of Kentucky was a part, and when the discussion of the hustings and of legislative halls proved unequal to the settlement of the problems, he met the full measure of patriotic duty by responding to the call to arms and sharing in the perils and privations which an appeal to the arbitrament of war made necessary. Returning, after distinguished service in the field, to the practice of his profession, he continued his interest and his efforts in behalf of the public welfare, and in the contests of politics was a willing leader of the forces which held his faith alike, whether the prospect was of victory or of defeat.

Disciplined by the experiences of civil and military life and by the duties of public and private station, he came in the full maturity of his powers, to this tribunal, whose broad jurisdiction imposes upon its members responsibilities as serious as can rest upon the conscience of man. For nearly thirty-four years he honored his high position by faithful discharge of its duties. The record of his service is to be found in a hundred and twenty-six volumes of reported cases in the determination of which, with few exceptions, he participated. In seven hundred cases he wrote the opinion of the court, and in many others he wrote opinions, sometimes of concurrence, for reasons separately stated, and sometimes of radical dissent, but whether he spoke for others or only for himself, and whether in assent or in dissent, it was always in the language of honest and earnest conviction.

Personal and property rights, individual and corporate interests, the reciprocal relations of citizen, State and nation, in ever changing phases presented themselves as subjects for adjudication. Indifferent in no instance, there was, however, an especial appeal to him in cases involving those rights of the individual which it was the purpose of the amendments to the Federal Constitution to secure, and he supported the national authority in its fullest scope as the sure means of maintaining those rights.

His style proclaimed the man. It was simple, direct, strong, and rugged. His opinions are supported by abundant authority, but make no vain display of learning, and of their meaning there is no room for doubt.

Virile and masterful, his strength was subdued to a conscience sensitive to right, and his purposes were shaped by a character of perfect integrity. Throughout the many years that fell to his part, as a man, citizen, soldier, and judge, he kept without stain the name he bore and which he cherished as the guide and inspiration of his life.

Resolved, That the Attorney General be requested to present these resolutions to the court for entry upon the record, and that the chairman of the meeting be directed to send to the family of JUSTICE HARLAN a copy of the resolutions with an expression of our sympathy for them in the loss they have sustained.

SUPREME COURT OF THE UNITED STATES.

MONDAY, JANUARY 29, 1912.

Present: THE CHIEF JUSTICE, MR. JUSTICE McKENNA, MR. JUSTICE HOLMES, MR. JUSTICE DAY, MR. JUSTICE LURTON, MR. JUSTICE HUGHES, MR. JUSTICE VAN DEVANTER, and MR. JUSTICE LAMAR.

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The Attorney General then said:

May it please the court, on the first page of the tenth volume of Peters' Reports of the decisions of this court is recorded the fact that JOHN MARSHALL, its Chief Justice, died at Philadelphia on the 6th day of July, 1835, and, in a brief minute, it is added:

"His judgments upon great and important constitutional questions, affecting the safety, the tranquillity, and the permanency of the Government of his beloved country—his decisions on international and general law, distinguished by their learning, integrity and accuracy, are

recorded in the reports of the cases adjudged in the Supreme Court of the United States, in which he presided during a period of thirty-four years."

This simple bald recital of the services of the great expounder of our Constitution concludes with these words:

"As long as the Constitution and laws shall endure and have authority, these will be respected, regarded and maintained."

Perhaps by no other member of this court have these decisions been more highly respected, regarded and maintained than by JOHN MARSHALL HARLAN, the Associate Justice of this court, who departed this life on October 14, 1911, after a length of service nearly coincident with that of the great judge whose name he bore.

MR. JUSTICE HARLAN was born in Boyle County, Ky., on June 1, 1833. His commission as an Associate Justice of this court is dated November 29, 1877, and he took the oath of office on December 10 of that year, being then little more than 44 years of age.

His first recorded opinion is that in *National Bank v. Insurance Company* (95 U. S. 673). His last opinion expressing the judgment of the court is that in *Northern Pacific Railway Company v. Trodick* (221 U. S. 208), rendered May 15, 1911. In the same volume is recorded his very last written opinion, delivered two weeks later, in the case of *United States v. American Tobacco Company*, concurring in part and in part dissenting from the opinion of court.

The records of his activities as a justice of this court during the thirty-four years of his service are, therefore, to be found in the one hundred and twenty-six volumes of its published opinions, from the ninety-fifth to the two hundred and twenty-first, and they cover the entire range of subjects which have come before this court during all those years. From the first to the last, these opinions breathe what Lowell called the "brave old wisdom of sincerity."

JUSTICE HARLAN was born, educated, and came to manhood in Kentucky, then a border State. His father, James Harlan, was a Whig, a devoted friend of Henry Clay, an admirer of Webster, and an earnest believer in the principles of constitutional law as expounded by Marshall. He intended his son to be a lawyer, and, in the expression of his hopes, he named him John Marshall. The future justice was brought up in the school of thought represented by Marshall, Webster and Clay. He began to take part in political affairs when he was but twenty. He was elected county judge of Franklin county when twenty-five. He was an elector on the Bell and Everett ticket, which carried Kentucky in 1860. He threw himself actively into the controversy which developed into civil war in 1861, and, together with James Speed, Attorney General of the United States under Mr. Lincoln, labored successfully to prevent Kentucky from joining the Confederacy. In July, 1861, he was commissioned captain of a company of zouaves. His military service lasted until the death of his father in 1863, when, upon resigning his military commission, he was elected attorney general of his State. He continued active in political affairs and, in 1877, was one of the commissioners charged with settling certain disputes which threatened to disturb the peace of the State of Louisiana. In December of that year President Hayes appointed him an Associate Justice of this court.

Perhaps the fact that his native State was divided in the great contest of 1861-1865, lent a greater intensity to JUSTICE HARLAN'S convictions concerning the true meaning and correct interpretation of the Constitution than he might otherwise have felt, and inclined him to a construction which gave to the National Government the maximum power which the language of the fundamental law would permit. The Constitution and the Bible were the objects of his constant thought and consideration, and if the latter was to him always *vox Dei*, the former, *vox populi*, was no less so. His opinions were expressed in

forceful and vigorous language, and his convictions upon questions of public policy which were involved in the decision of cases in which he wrote, blazed out in language whose meaning admitted of no doubt. When he did not agree with his brethren, he said so in unmistakable terms.

He was impatient of a construction which limited what he believed to be the intention of the people in adopting the war amendments to the Constitution and which thwarted the entire equalization of the negro with the white man in all political and public relations. He expressed the judgment of the court in *Neal v. Delaware* (103 U. S. 370), where it was held that the adoption of the Fifteenth Amendment rendered inoperative a provision in the then existing constitution of the State of Delaware, whereby the right of suffrage was limited to the white race, and that a statute of the State, confining the selection of jurors to persons possessing the qualifications of electors was enlarged in its operation so as to embrace all those who, by the constitution of the State as modified by the Fifteenth Amendment, were entitled to vote.

But in the *Civil Rights Cases* (109 U. S.) he vigorously dissented from the view taken by the majority of the court respecting the Civil Rights Act of March 1, 1875, contending that their opinion proceeded "upon grounds entirely too narrow and artificial."

"I cannot resist," he said, "the conclusion that the substance and spirit of the recent amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism. It is not the words of the law but the internal sense of it that makes the law; the letter of the law is the body; the sense and reason of the law is the soul. Constitutional provisions adopted in the interest of liberty and for the purpose of securing, through national legislation, if need be, rights inhering in a state of freedom and belonging to American citizenship have been so construed as to defeat the ends the people desired to accomplish, which they attempted to accomplish, and which

they supposed they had accomplished by changes in their fundamental law. By this I do not mean that the determination of these cases should have been materially controlled by considerations of mere expediency of policy; I mean only, in this form, to express an earnest conviction that the court has departed from the familiar rule requiring, in the interpretation of constitutional provisions, that full effect be given to the intent with which they were adopted."

Again, in *Plessy v. Ferguson* (163 U. S. 537) he dissented, with equal vigor, from the decision which sustained the constitutionality of an act of the legislature of Louisiana requiring railway companies carrying passengers in their coaches in that State to provide equal, but separate, accommodations for the white and colored races.

"The sure guarantee of the peace and security of each race," he wrote, "is the clear, distinct, unconditional recognition by our Governments, national and state, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United States without regard to race. State enactments regulating the enjoyment of civil rights, upon the basis of race, and cunningly devised to defeat legitimate results of the war, under the pretense of recognizing the equality of rights, can have no other result than to render permanent peace impossible and to keep alive a conflict of races, the continuance of which must do harm to all concerned. This question is not met by the suggestion that social equality cannot exist between the white and black races in this country. That argument, if it can properly be regarded as one, is scarcely worthy of consideration, for social equality no more exists between two races when traveling in a passenger coach or a public highway than when members of the same races sit by each other in a street car or in the jury box, or stand or sit with each other in a political assembly, or when they use in common the streets of a city or town, or when they are in the same room for the

purpose of having their names placed on the registry of voters, or when they approach the ballot box in order to exercise the high privilege of voting."

In *Hodges v. United States* (203 U. S. 1) he dissented from the decision of the majority that the Fourteenth and Fifteenth Amendments to the Constitution operate solely on state action and not on individual action, and that the remedy for wrongs committed by individuals on persons of African descent is through state action and state tribunals, subject to supervision of this court by writ of error in proper cases; and that, consequently, the United States District Courts have no jurisdiction under the Thirteenth Amendment or §§ 1978, 1979, 5508 or 5510, Revised Statutes, of a charge of conspiracy made and carried out in a State to prevent citizens of African descent, because of their race and color, from making or carrying out contracts and agreements to labor.

He protested against the decision in *Hurtado v. People of California* (110 U. S. 516), that the words "due process of law" in the Fourteenth Amendment do not necessarily require an indictment by a grand jury in a prosecution by a State for murder, contending that "due process of law," within the meaning of the National Constitution, does not import one thing with reference to the powers of the State and another with reference to the powers of the general Government.

"My brethren concede," he wrote, "that there are principles of liberty and justice lying at the foundation of our civil and political institutions which no State can violate consistently with that due process of law required by the Fourteenth Amendment in proceedings involving life, liberty or property. Some of these principles are enumerated in the opinion of the court. But for reasons which do not impress my mind as satisfactory they exclude from that enumeration the exemption from prosecution, by information, for a public offense involving life. . . .

"It is said by the court that the Constitution of the

United States was made for an undefined and expanding future, and that its requirement of due process of law in proceedings involving life, liberty, and property must be so interpreted as not to deny to the law the capacity of progress and improvement; that the greatest security for the fundamental principles of justice resides in the right of the people to make their own laws and alter them at pleasure. It is difficult, however, to perceive anything in the system of prosecuting human beings for their lives by information, which suggests that the State which adopts it has entered upon an era of progress and improvement in the law of criminal procedure."

He concurred with the majority of the court in *De Lima v. Bidwell* (182 U. S. 1), in holding that territory (in this case Porto Rico) acquired by the United States by cession from a foreign power is not "foreign country" within the meaning of the tariff laws. But in *Downes v. Bidwell* (182 U. S. 245) he was one of the justices who agreed with the Chief Justice in dissenting from the conclusion that, after its cession to the United States by Spain, the island of Porto Rico was not a part of the United States within that provision of the Constitution which declares that "all duties, imposts, and excises shall be uniform throughout the United States."

In *Hawaii v. Mankichi* (190 U. S. 197), again dissenting from the majority of the court, he maintained that, after the annexation of Hawaii and before the passage of the act of Congress providing a government for that territory, a conviction for manslaughter upon an indictment not found by a grand jury and by the verdict of nine only out of twelve jurors, in accordance with the laws of Hawaii in force at the time of annexation, could not be legal.

But if he was strong and vigorous in dissent, he was equally so in voicing the conclusions of the majority of the court. The vigorous line of opinions dealing with the power of the Federal Government over interstate

commerce are the best examples of the strength of his convictions and the lucidity of his reasoning in constitutional exposition. In them the principles of Marshall's interpretation of the Constitution were fully recognized and applied. In the *Lottery Case* (188 U. S. 321), he demonstrated the proposition that legislation, under the power to regulate commerce among the several States, may sometimes properly assume the form or have the effect of prohibition, and that Congress, under this power, might prohibit the carriage of lottery tickets from one State to another. In *Minnesota v. Barber* (136 U. S. 313), he wrote the decision holding to be unconstitutional a statute of the State of Minnesota which prohibited the sale in that State of fresh beef, veal, pork, etc., for human food, unless the animals from which taken should have been inspected within that State before being slaughtered. In a series of forceful opinions, the last of which was written at the very close of his life, he upheld the right of corporations to engage in interstate commerce without interference or restriction by state authority. These opinions illustrate the surprising freshness and vigor of JUSTICE HARLAN'S mind. In *Western Union Telegraph Company v. Kansas* (216 U. S. 1), and in *Pullman Company v. Kansas* (216 U. S. 56), it was held that the right to carry on interstate commerce is not a privilege granted by the States, but a constitutional right of every citizen of the United States; that the Congress alone can limit the right of corporations to engage therein, and that no State may impose, as a condition of carrying on interstate commerce within its borders, a tax of a given percentage of all the capital of a corporation, represented by its business interests and property, everywhere, within and outside of the State; that a corporation organized in one State and doing an interstate business, is not bound to obtain the permission of another State to transact business within its limits, but can go into the latter for the purpose of interstate business, although subject to reasonable legal

regulations for the safety, comfort, and convenience of the people, which do not, in a real substantial sense, burden or regulate its interstate business, nor subject its other property and interests, outside of the State, to taxation. In the case of the *International Textbook Company v. Pigg* (217 U. S. 91), he applied these principles, in a most interesting and lucid manner, to the case of a Pennsylvania corporation engaged in furnishing instruction, by correspondence with students in various States.

"It is true," he said, "that the business in which the International Textbook Co. is engaged is of a somewhat exceptional character, but, in our judgment, it was in its essential characteristics, commerce among the States within the meaning of the Constitution of the United States. It involved, as already suggested, regular and practically continuous intercourse between the Textbook Co., located in Pennsylvania, and its scholars and agents in Kansas and other States. That intercourse was conducted by means of correspondence through the mails with such agents and scholars. While this mode of imparting and acquiring an education may not be such as is commonly adopted in this country, it is a lawful mode to accomplish the valuable purpose the parties have in view. . . . Intercourse of that kind, between parties in different States—particularly when it is in execution of a valid contract between them—is as much intercourse, in the constitutional sense, as intercourse by means of the telegraph—'a new species of commerce,' to use the words of this court in *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1, 9."

While always asserting with vigor the supremacy of Federal control over interstate commerce, he yet wrote the opinion of the court in the case of *Hennington v. Georgia* (163 U. S. 299), holding valid statutes of the State of Georgia which forbade the running of freight trains on any railroad in that State on Sunday, upon the ground that, while such legislation affected interstate commerce

in a limited degree, it was not, for that reason, a needless intrusion upon the domain of Federal jurisdiction, and would be respected by the Federal courts until superseded and displaced by some act of Congress, passed in exclusion of the power to regulate commerce granted by the Constitution. Where the people of a State deem it necessary to their peace, comfort, and happiness, to say nothing of the public health and the public morals, that one day in each week be set apart by law as a day when business of all kinds carried on within the limits of that State shall cease, whereby all persons of every race and condition in life may have an opportunity to enjoy absolute rest and quiet, that result, he said, speaking for the court, was obtainable by state legislation, which would be valid until Congress should occupy the field by some inconsistent provision of law.

In an opinion remarkable for learning and research, in the case of *Sparf and Hansen v. United States* (156 U. S. 51), he expressed the judgment of the court that, in the courts of the United States, it is the duty of the jury, in criminal cases, to receive the law from the court and to apply it as given by the court, subject to the condition that, by a general verdict, a jury, of necessity, determines both law and fact as compounded in the issues submitted to them in a particular case. He summed up the argument in these words:

“We must hold firmly to the doctrine that in the courts of the United States it is the duty of juries in criminal cases to take the law from the court and apply that law to the facts as they find them to be from the evidence. Upon the court rests the responsibility of declaring the law; upon the jury the responsibility of applying the law so declared to the facts as they upon their conscience believe them to be. Under any other system the courts, although established in order to declare the law, would for every practical purpose be eliminated from our system of government as instrumentalities devised for the protection

equally of society and of individuals in their essential rights. When that occurs our Government will cease to be a government of laws and become a government of men. Liberty regulated by law is the underlying principle of our institutions."

It would prolong this address far beyond the proper limits of this occasion to continue much further the review of JUSTICE HARLAN'S many contributions to the records of the court during his service of more than one-third of a century. Yet no review of his services would be adequate which failed to refer to his participation in the construction and enforcement of the law against unlawful restraints upon interstate commerce and monopolies. Strongly individual in his views and in his characteristics, he was keenly sympathetic with the widespread public dread of the effect upon individualism of the tendencies toward concentration of control over great industries, and the creation of monopolistic combinations which found expression in the now famous Sherman Act of 1890. When the court upon the presentation of the facts in the *Knight Case* (156 U. S. 1), held that act to be ineffective in checking monopoly at its inception, and powerless in the face of the acquisition by a great corporation of ninety-eight per cent of all the manufactories in the United States of a commodity of common necessity, his dissent was expressed in vigorous language.

"If this combination," he wrote, "so far as its operations necessarily or directly affect interstate commerce, cannot be restrained or suppressed under some power granted to Congress, it will be cause for regret that the patriotic statesmen who framed the Constitution did not foresee the necessity of investing the National Government with power to deal with gigantic monopolies, holding in their grasp and injuriously controlling in their own interest the entire trade among the States in food products that are essential to the comfort of every household in the land. . . .

"Undoubtedly the preservation of the just authority of the States is an object of deep concern to every lover of his country. No greater calamity could befall our free institutions than the destruction of that authority, by whatever means such a result might be accomplished. . . . But it is equally true that the preservation of the just authority of the General Government is essential as well to the safety of the States as to the attainment of the important ends for which that Government was ordained by the people of the United States, and the destruction of that authority would be fatal to the peace and well-being of the American people (p. 19).

* * * * *

"There is no dispute here as to the lawfulness of the business of refining sugar, apart from the undue restraint which the promoters of such business who have combined to control prices seek to put upon the freedom of interstate traffic in that article.

"It may be admitted that an act which did nothing more than forbid, and which had no other object than to forbid, the mere refining of sugar in any State would be in excess of any power granted to Congress. But the act of 1890 is not of that character. It does not strike at the manufacture simply of articles that are legitimate or recognized subjects of commerce, but at combinations that unduly restrain, because they monopolize the buying and selling of articles which are to go into interstate commerce." (p. 34).

He summed up the discussion in these words:

"Whatever improperly obstructs the free course of interstate intercourse and trade, as involved in the buying and selling of articles to be carried from one State to another, may be reached by Congress under its authority to regulate commerce among the States. The exercise of that authority so as to make trade among the States in all recognized articles of commerce absolutely free from unreasonable or illegal restrictions imposed by combinations

is justified by an express grant of power to Congress, and would redound to the welfare of the whole country. I am unable to perceive that any such result would imperil the autonomy of the States, especially as that result cannot be attained through the action of any one State.

"Undue restrictions or burdens upon the purchasing of goods in the market for sale, to be transported to other States, cannot be imposed even by a State without violating the freedom of commercial intercourse guaranteed by the Constitution. But if a State within whose limits the business of refining sugar is exclusively carried on may not constitutionally impose burdens upon purchases of sugar to be transported to other States, how comes it that combinations of corporations or individuals within the same State may not be prevented by the National Government from putting unlawful restraints upon the purchasing of that article to be carried from the State in which such purchases are made" (pp. 37-38).

MR. JUSTICE HARLAN wrote the opinion in the *Northern Securities Case* (193 U. S. 197), which was concurred in by three other justices, and in which the conclusions reached were agreed to by Mr. Justice Brewer in an opinion expressing his dissent from the statement of some of the propositions set forth by MR. JUSTICE HARLAN with his accustomed vigor. The case presented was the acquisition by a New Jersey corporation of the control of the capital stocks of two competing trans-continental railroad systems. The majority of the court held that the acquisition by the Securities Company, through such stock ownership, of the power to prevent or restrain competition between the companies brought the case within the statute. JUSTICE HARLAN, in the argument to sustain the conclusion reached, contended that every combination or conspiracy which would extinguish competition between otherwise competing railroads engaged in interstate trade or commerce, and which would in that way restrain such trade or commerce, is made illegal by the act which em-

braces all direct restraints imposed by any combination, conspiracy, or monopoly upon such trade or commerce, and was not limited in its effect to restraints that are unreasonable in their nature.

Justice Brewer, on the other hand, maintained that the correct ruling in the case would have been that the contracts under consideration were unreasonable restraints of interstate trade and as such, within the prohibition of the anti-trust act.

JUSTICE HARLAN wrote the opinion in *Continental Wall-Paper Co. v. Voight* (212 U. S. 227), which involved the right of a purchaser of goods from a combination unlawful under the anti-trust act to plead such illegality in defense of his failure to pay for goods. Holding that upon the facts admitted by the demurrer the plaintiff in effect was seeking the aid of the court to enforce a contract for the sale and purchase of goods which was in fact, and was intended to be, based upon agreements that were parts of an illegal scheme—a scheme based upon a combination intended and which would have the effect directly to restrain and monopolize trade and commerce among the several States and with foreign nations—JUSTICE HARLAN, speaking for the majority of the court, held that the plaintiff could not have judgment for the account sued on, because such judgment would in effect aid the execution of the agreements which constituted the illegal combination.

In the decisions in the cases against the *Standard Oil Company* (221 U. S. 1), and the *Tobacco Combination* (221 U. S. 106), JUSTICE HARLAN, while concurring in the decisions, read opinions expressing dissent from opinions which were concurred in by the other members of the court, with respect to a part of the reasoning advanced in support of the conclusions reached.

JUSTICE HARLAN's individuality and his mental characteristics were the results of heredity and early environment. Another Kentuckian who attained fame in a very different line, writing in his autobiography of experiences

gained during three months' adventurous voyage in Canadian waters, and speaking of the Canadian sailors whose courage and fortitude in the face of hardship and danger had greatly impressed him, says:

"These men taught me much of human nature. I found in them the value of the common man as I probably should have found it nowhere else; for it is so well hidden in our more organized societies that many persons far more discerning than myself fail for all of their lives to see the meaning of ordinary life, and so fail to get the most important teaching the world has to give. In a way, I had been prepared for this coming revelation by my contact with the frontier type of man in Kentucky. But at his best, the man of the forests and plains cannot compare with the seaman in the even, rounded culture of human quality. As I had known him in Kentucky, he was a fine fellow of the conquering type. He had beaten his brute and human enemies and subjugated the wilderness; but he had never well learned what it was to follow a leader, to put his life in his chief's hands in a ceaseless war with a mastering deep." (Autobiography of Nathaniel Southgate Shaler, p. 165.)

JUSTICE HARLAN was a refined example of the type of Kentuckian referred to by Prof. Shaler. He had learned, in the fierce warfare of personal strife during the Civil War, and in the intensity of political contests after the war, to beat his brute and human enemies as his fathers had learned to subjugate the wilderness. But he never well learned what it was to follow a leader—at least, not a living one. He was a student and disciple of Marshall, but among living men he could lead but he could not follow. Where others agreed with his views he would march with them, but when they differed he marched on alone. His was not the temper of the negotiator. Strong, vigorous, self-confident, he stands out as the representative of a type which has made the American character dominant among the nations.

THE CHIEF JUSTICE responded:

Mr. Attorney General, your words go home to our hearts and the resolutions of our brethren of the Bar move us, since they show both the confidence which the Bar reposed in and the affection they bore MR. JUSTICE HARLAN, as well as the veneration they cherish for his memory. The depth with which these feelings are by us shared and the greatness of the sorrow which has come to us by the death of our brother, cannot be appreciated without understanding how completely the discharge of judicial duty in a court of last resort necessitates an effort by all to efface every merely incidental mental and moral tendency to difference of opinion in order that by the perfect equipoise of mind with mind and the union of heart with heart, a composite, wise and just judgment may result.

The disintegration by death of the union resulting from such ties of intimate and affectionate association brings with it not only bereavement, but a sense of despondency, because of the fleeting and perishable result of all human efforts which it apparently exemplifies. The contemplation, however, of the great life which we commemorate dispels the miasma of despondency and calls us to the onward and upward struggle for higher and holier things, since, when rightly measured, the lessons of that life point to the continuing and enduring result for good of duty conscientiously performed. Through the mists of parting and the shadows of death itself, clearing our vision by the light which that life affords, we are enabled to see how greatly the dedication of the life of our Brother HARLAN to the service of his country, during his more than thirty-three years of judicial labor, serves to sustain and to make fruitful for the benefit of all his countrymen the power for good of that ideal and undying personality, the Supreme Court of the United States, the offspring of the devotion of our forefathers to

human liberty and their genius to creating institutions for its perpetuation. So noble in conception and yet so simple in execution; so ordinary in its incidents and yet so majestic as the servant of the whole people; so weak and yet so strong, because founded upon the affection of all the people and depending for its existence upon their continued support.

It would not be appropriate on this occasion, nor is there presently time, Mr. Attorney General, to afford the opportunity to add to the condensed statement which you have made of the career of MR. JUSTICE HARLAN by giving an outline of his services in peace and in war. I shall, therefore, leaving the general subject to some more appropriate occasion, seek only now to depict in the briefest manner some of the most dominant of the moral and mental forces which characterized MR. JUSTICE HARLAN's discharge of judicial duty, as seen from the angle of vision of those engaged with him in such duty, thus, perhaps, speaking from a point of observation which, if not stated now, might possibly pass out of view.

In the first place, there was ever manifested the supreme importance which he attached to the performance of his judicial work and the consequent dedication which followed of every mental and moral faculty of his being to the doing of that work. In the second place, there was likewise consequently manifested a purpose to do justice as it was given him to see it, a justice not resting upon mere metaphysical conceptions or distinctions of casuistry concerning the lines of separation between right and wrong, but a justice based upon what seemed to him to be a common sense of justice, begetting an ever-present and vivid purpose to uphold the right and to frustrate the wrong, and ever to see to it that the weak were not overmastered by the strong. In the third place—and this was the most prominent of all—he possessed a reverence for and an implicit faith in our constitutional institutions, a faith which knew no doubt, and caused him to

believe that the power of adaptability of those institutions was adequate to meet and provide for any possible condition, however complex or novel. And as these dominant qualities were potential in giving shape and form to his mental attributes, the latter in substance were but the reflex of the former. His methods of thought, in disregard of mere subtleties or refined distinctions, led him to the broadest lines of conviction, and as those lines were by him discerned, and differences between himself and others became impossible of reconciliation, the warfare of mind with mind was by him carried on, not with adroit fence or subtle play of reason, but with a directness and entire disregard of all narrower points of view. This was particularly observable with reference to his conclusions on questions concerning powers of government arising from constitutional limitations and the consideration of asserted violations of the rights of individuals protected by such limitations. Once his convictions were definitely formed, so complete was his faith, so ardent was his devotion, so unalterable was his purpose to maintain and perpetuate in each and every particular, as he understood it, the Government under the Constitution which he so much loved, that sometimes the very ardor and zeal with which, when he differed from others, the reasons for his differences were expounded, produced upon the merely superficial observer the impression that there was doubt on his part as to the power of the Constitution, if interpreted in conflict with the views which he held, to successfully continue to accomplish the great purpose which it was ordained to secure; but this was indeed a singularly mistaken view, since it engendered doubt and weakness merely because of the forms in which supreme and perfect faith had found their expression.

It being true, as I have said, that the lessons afforded by the life of the great American whose loss we commemorate and deplore afford a correction of despondency and constitute an incentive, calling upon all to dedicate their

lives to a higher and completer fulfillment of duty, why is it not also true that a right contemplation of that life and its results will serve in some measure to assuage the feeling of sorrow begotten by his death? It was given him to exceed the allotted span of mortal existence, and during his long and useful career to faithfully serve, in war and in peace, his country; to win the affection of all his countrymen, and to afford an elevating and noble example of duty well and faithfully performed. Ah! contemplating that life, its simplicity, its courage, its devotion to duty, its love of country, does not the faith come to us that in the transition from things finite to things infinite it has been given to him to hear the ineffable melody of those words of benediction, the hope of hearing which has led so many millions to consecrate their lives to the performance of duty and the service of God and their country—"Well done, thou good and faithful servant."

Mr. Attorney General, the resolutions which you present will be ordered spread upon the records along with such other tributes concerning the life and character of MR. JUSTICE HARLAN which were evoked by his death.
