

IN MEMORY OF MR. JUSTICE BUTLER.

Members of the Bar of the Supreme Court, and Officers of the Court, met in the Court Room, on January 27, 1940, to commemorate the high character and service of Mr. Justice Butler, who died in Washington, D. C., November 16, 1939.¹

The meeting was called to order by Mr. Solicitor General Biddle.²

Mr. Biddle said:

"This meeting of the Bar of the Supreme Court of the United States is called in commemoration of the late Mr. Justice Butler, who died on November 16, 1939. He had not sat since June 5th of that year, the last day of the term, when, in the absence of the Chief Justice and of Mr. Justice McReynolds, he presided over the Court.

"Justice Butler was born six years after the Civil War, and grew up in Minnesota during the reconstruction period, and in the vigorous and unregulated thrust of immense material expansion. He was self-made, working his way through Carleton College by teaching; admitted to the bar when he was twenty-two; serving as Assistant County Attorney, County Attorney and Special Assistant to the State Attorney General. When President Harding appointed him to the bench in 1922, his firm was one of the leading law offices in St. Paul. He was a regent of the University of Minnesota for more than fifteen years.

¹ See 308 U. S. pp. III and V.

² The members of the Committee on Arrangements for this meeting were: The Solicitor General, Chairman; and Messrs. Frank J. Hogan, J. Harry Covington, Charles Warren, and Seth W. Richardson, all of Washington, D. C.

"Justice Butler was a court lawyer, trained in the rough and tumble of general practice. He had the trial lawyer's conviction that the trial and argument of cases were necessary to turn out a complete lawyer. He was a voracious worker, absorbing and disentangling the tough material of facts with skill and patience, and arranging them with clear precision. He was conscious of his office as a judge, scrupulous to maintain its high dignity, and somewhat withdrawn into the reserve which he felt should characterize the position.

"But behind any aloofness, members of the highest court hold and express convictions. Difference in point of view on great national issues finds its way not only into Congress, but ultimately in the Court, sometimes with urbanity, as with Justice Sutherland, often with a passionate conviction, as with Pierce Butler, who stood by his guns and would not be silenced. By such stuff, whatever the immediate result in a particular case, is the democratic process enriched.

"He was brought up in a school of thought which had not learned to doubt the implications of its perhaps over-simplified assumptions—laissez-faire, individualism, free competition. These things meant the American way. By this way he had come to the top and the failure of others to arrive seemed to indicate personal fault rather than economic disadvantage. The frontiers were open. Success was at the end of a straight road.

"He did not change as the frontiers changed; and perhaps this quality of steadfast resistance to a different world was what Justice Holmes had in mind when he spoke of him as a 'monolith.' He had courage and unalterable convictions. To those to whom his outlook seemed inexpressive of our changed economy, and narrow in dealing with the human problems of constitutional construction, Pierce Butler appeared ultra-conservative. For those who thought like him he expressed the American way. We all know that he filled his high office with zeal and a courteous dignity.

"His partner, for many years, in St. Paul, was the Honorable William D. Mitchell, a former Solicitor General and Attorney General of the United States. I move that Mr. Mitchell be elected Chairman, and Mr. Charles Elmore Cropley, Clerk of the Supreme Court of the United States, Secretary of this meeting."

This motion having been carried, Mr. Mitchell took the chair and called upon a Committee on Resolutions³ for its report.

Mr. George Wharton Pepper, acting for the Committee, presented the following

RESOLUTIONS.

At a meeting of the members of the Bar of the Supreme Court of the United States held on January 27th, 1940, to take appropriate action following the death of Mr. Justice Butler, the Committee appointed by the Solicitor General reported this Minute for submission to the meeting:

"Pierce Butler's life story is an epic of America. From his birth on a small Minnesota farm to the day of

³ Those who composed the Committee were: Mr. William D. Mitchell, of New York, Chairman; Messrs. Henry F. Ashurst, of Arizona; Garret W. McEnerney, of California; Patrick J. Farrell, John Spalding Flannery, and George E. Hamilton and Mrs. Mabel Walker Willebrandt, of Washington, D. C.; Messrs. Alexander W. Smith, Jr., of Georgia; James M. Sheean, of Illinois; Robert Stone, of Kansas; William Marshall Bullitt, of Kentucky; J. Blanc Monroe, of Louisiana; William L. Rawls, of Maryland; Barton Corneau, Robert G. Dodge, and Charles B. Rugg, of Massachusetts; Charles W. Bunn, Michael J. Doherty, and Fred B. Snyder, of Minnesota; Daniel N. Kirby, of Missouri; John W. Davis, Charles Evans Hughes, Jr., Daniel J. Kenefick, and Nathan L. Miller, of New York; Arthur T. Vanderbilt, of New Jersey; J. Crawford Biggs, of North Carolina; Charles J. Murphy, of North Dakota; Robert M. Rainey, of Oklahoma; John G. Buchanan and George Wharton Pepper, of Pennsylvania; P. F. Henderson, of South Carolina; William L. Frierson and J. E. McCadden, of Tennessee; Hatton W. Sumners, of Texas; George T. Donworth, of Washington; and Louis Quarles, of Wisconsin.

his death while a Justice of the Supreme Court of the United States his record was one of obstacles surmounted, of professional distinction achieved, and of merit appropriately rewarded.

“His father and mother, Irish immigrants from County Wicklow, had settled in Dakota County, Minnesota, where they lived the life of pioneer farmers. They reared a family of eight children, of whom the future jurist was one. He was born on St. Patrick’s day (March 17th), 1866. Strong of body and of vigorous mind, he dominated his environment and used its limitations as opportunities for self-development. A country school-teacher at sixteen, he qualified for admission to Carleton College at Northfield, Minnesota, from which he was graduated in 1887. During his student days he did farm chores early and late, and in the daily interval rode a farm horse to school. Having determined to become a lawyer, he moved to Saint Paul and in 1888 was admitted to the bar.

“His abilities were early recognized, and after serving for two years as an assistant he became the County Attorney of Ramsey County. In this way he acquired proficiency in the art of the successful trial lawyer and was noted for his capacity to win the confidence of all the diverse elements of which local juries were composed.

“In 1897 he began the general practice of the law. Here again his character and ability made their mark and important clients were eager to retain him. While throughout his career he represented great railroads and other powerful corporations and became in this sense a corporation lawyer, he never sacrificed his independence of judgment and it was always he who dominated the client. His professional services were often placed at the disposal of the Government and he figured in many important cases arising under the Anti-Trust Laws and the Railroad and Utility Statutes. He was of the sort that men instinctively trust. He became one of the notable figures in the life of the great Northwest.

When it was known that he was to appear, the court room was wont to be crowded with people eager to hear him and to see him in action.

“He had great energy, prodigious memory and large capacity for logical thinking. His character was a unit without internal stress. There was inherent a belief that there exists a philosophical rightness, and he sought to apply it to each matter in hand. A skillful legal tactician, his sole strategy was to drive forward unswervingly in the direction which he regarded as the right one. Expediency never justified retreat or indirection.

“As senior member of the firm of Butler, Mitchell and Doherty, he was constantly at work and always with notable fidelity to court and client. For the five years from 1913 to 1918, he served as a member of the Committee of Counsel for the Federal Valuation of Railroads. In 1919 he was of counsel for shareholders in proceedings in Canada under the Canadian Northern Acquisition Act. Later he was appointed one of the counsel for the Dominion of Canada in the Arbitration at Montreal held under the Grand Trunk System Acquisition Act. In this proceeding William H. Taft sat as one of the arbitrators. Although Mr. Taft dissented from the decision supporting the views urged by Mr. Butler, their association led to a warm friendship. The acquaintance with his powers and fairness gained in the course of that association doubtless was a factor in Chief Justice Taft's later recommendation of Mr. Butler for appointment to the Supreme Court, when a vacancy was caused by the retirement of Mr. Justice Day. It was on November 23, 1922, while he was serving as counsel in the Toronto Railway Arbitration, that he, a Democrat, was nominated by President Harding to be an Associate Justice of the Supreme Court of the United States. The nomination not having been acted upon at that session of Congress, the President re-nominated him on December 5, 1922. He was confirmed by the Senate on December 21, 1922, and on the 2nd of January, 1923,

the judicial oath was administered and he took his seat upon the Bench.

“During his seventeen years of service on the Court he saw his country pass through an era of unstable prosperity and into a period of resulting depression. Under such circumstances it was not surprising that many should lose faith in the soundness of the American tradition; but with such a life story behind him, it was inevitable that the faith of Mr. Justice Butler should never waver. He had, indeed, that capacity for deep emotion which was his by inheritance, but his experience had taught him to think realistically.

“Fearful of the rule of men in place of the rule of law, he appealed to the accumulated body of the law as a continuous social expression and not as what might appear at a particular time to be enlightened social self-interest. He did not believe that the law is merely what the judges may from time to time say it is. He believed that there is a law that is greater than the judges and he was zealous to avoid its misapplication merely because the end in view appeared at the moment to be desirable.

“He had faith in the power of objective reasoning and in the intellectual integrity of man, with correlative responsibility of the individual to develop himself and pursue the course that to him seemed right. This faith in the individual man was expressed by resistance to any attempted infringement of the bill of rights, and, in the absence of constitutional amendment, to centralization of government and to extension of its powers over the individual. He felt that greater material welfare under a paternal government—if possible of achievement—rather than ennobling the citizen would debase him by destroying his integrity and denying his will to exercise his moral and intellectual forces. He refused to concede that the individual is a helpless creature of an environment built by others, and opposed the kind

of humanitarianism that would relegate him to that position.

"It would be out of place in this Minute to attempt an analysis of his judicial opinions. That will follow in due course. Suffice it to say here that during all the years of his service he contributed to the Court not merely sound learning and ripe experience, but calm judgment and the stabilizing influence of tested character.

"While Mr. Justice Butler was a man of deep conviction, he could differ from other men without losing their good will. He was far from being a bitter partisan. Rather he was a man of generous sympathy and broad comprehension. His friends included old and young alike. Institutions of learning conferred honorary degrees upon him. The law students of Georgetown University named a law club in his honor. An American in the best sense of the word, he retained throughout his life an affectionate regard for the land of his ancestors. A visit to Ireland in 1934 was esteemed by him to be one of the happiest episodes in life. He was a lover of outdoor life, and on his farm in Maryland sought refreshment of spirit—whenever the rigorous round of judicial duties permitted.

"The land and people of Minnesota remained close to him, and he carried with him great and irreplaceable knowledge of the history of the Northwest, gathered from his own youthful experiences, from delighted reading of earlier days, and from wide personal knowledge of most of its later leaders and characters. The mention of a name would start a flow of reminiscence and anecdote reaching back into the development of that country, all full of the color of its personalities.

"The domestic life of such a man was certain to approximate the ideal. Happily married and deeply devoted to wife and children, his was a Christian household characterized by plain living and high thinking. He was a devoted member of the Roman Catholic Church.

The reality of his religion brought him comfort at times of domestic affliction. The high pressure of judicial work, and disease common to advanced years, overcame the powerful physique which was his by inheritance and conservation. After a brief illness, he died, in Washington, on November 16, 1939. At his funeral in St. Matthew's Cathedral all sorts and conditions of men attended in silent tribute to his memory. Today representative members of the Bar of the Supreme Court of the United States are in their turn witnessing to their admiration and affectionate regard for one whose simple godliness and faithful public service endeared him to all who came within the circle of his influence.

"*Resolved*, that the foregoing Minute be adopted; that a copy of it be transmitted to the Attorney General of the United States for presentation to the Court and that the Chairman of this meeting be directed to forward a copy of it to the family of Mr. Justice Butler."

Eulogies were delivered by Messrs. Wilfrid E. Rumble, of Minnesota; George I. Haight, of Illinois; Robert A. Taft, of Ohio, (delivered on his behalf and in his absence by Senator John A. Danaher, of Connecticut); Thomas D. Thacher, and William D. Mitchell, of New York.⁴

The resolutions were then adopted, and the meeting adjourned.

⁴ For a full account of this meeting, containing the resolutions, all of the addresses, and an excellent portrait of Mr. Justice Butler, see a pamphlet entitled "Pierce Butler," edited by the Committee and printed and distributed by Mr. Cropley. This publication contains also the speech made by the Attorney General in presenting the Resolutions to the Court on May 20, 1940, and the response of the Chief Justice upon that occasion, which are printed *infra*, in this volume, pp. XIII, xv, *et seq.*

MR. JUSTICE BUTLER.

SUPREME COURT OF THE UNITED STATES.

MONDAY, MAY 20, 1940.

Present: THE CHIEF JUSTICE, MR. JUSTICE McREYNOLDS, MR. JUSTICE STONE, MR. JUSTICE ROBERTS, MR. JUSTICE BLACK, MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, MR. JUSTICE DOUGLAS, and MR. JUSTICE MURPHY.

Mr. Attorney General Jackson addressed the Court as follows:

“Mr. Chief Justice and Associate Justices: The Bar of the Supreme Court has delegated me to lodge in your keeping its proceedings in memory of Mr. Justice Butler. By resolution it has expressed its high estimate of his life and services.”

[Mr. Jackson read the Resolutions, which are set forth *ante*, p. vii *et seq.*, and proceeded:]

“Men eminent in the legal profession, former associates in the practice of the law, and public leaders have paid him eloquent and affectionate tribute. All of these tributes I offer for your records.

“I should not presume to add words of my own, except that the proceedings are lacking in one viewpoint which I should be qualified to supply.

“I knew Pierce Butler only as a Justice of this Court. He had reached the full maturity of his great intellectual powers. He was too earnest and forthright to wish me even on such an occasion to deny or minimize the conflict which your reports witness between the general philosophy I have advocated here and much of that to which he was so consistently devoted. But across that gulf, which always exists between two men who regard each other as representing ominous trends, I felt the

strength, the warmth, and the sincerity of a great character—one of the most firm and steady men I have known.

“His character was shaped by a hard way of life that left lasting convictions and attitudes in men who experienced it. Existence in a pioneer country, where nature is often hard and hostile and the competition of the elements is relentless, presents the choice between courage and self-discipline—or extinction. It offers a simple and rugged society in which place is won and held only by will and work and worth. It develops intense love of liberty and hatred of restraint and a self-reliance that does not know how to dodge, and never fears to stand firmly and, if need be, alone. These were the primary characteristics of Mr. Justice Butler.

“To them he added an accumulation of learning and experience and legal abilities which won for him the respect of all shades of opinion at the Bar. In many cases here I feared his interrogations more than the argument of my adversary. He knew his way among the intricate procedures of the law. He knew from long experience the arts of advocacy. He could sense the point in an argument where the most candid advocate is tempted to stop a little short of a complete revelation, and he knew where there was an urge to overemphasis. His questions from the bench cut to the heart of our cases. He could use his ready wit, his humor, his sarcasm or his learning with equal ease and skill. He was relentless in bringing the lawyer face to face with the issues as he saw them. I think I never knew a man who could more quickly orient a statement of facts with his own philosophy. When the facts were stated the argument was about over with him—he could relate the case to his conceptions of legal principles without aid of counsel.

“Even if it were otherwise appropriate, I have neither the perspective nor the detachment necessary to appraise

the place that his work as a Justice will take in the annals of this Court. Time only will write the verdict on its permanence and its significance. He has left a body of deliberate comment and seasoned judgment on the problems that have vexed this Court, as well as government and society, during his judicial life. The future will have no difficulty in learning what he meant and what he stood for. A man of no subtlety or sham, he pronounced his judgments without finesse, indirection, or obscurity. He has recorded the measure of his disagreement with the currents, and his deep anxiety about the drifts of our time.

"If only time can judge the verity of his work, it is equally true that only contemporaries can appraise the verity of his character. While the future will find that his work will speak for itself, it will turn to the testimony of contemporaries to learn the elusive qualities of the man.

"For those who shall ask 'What of the man?' we may record that in the memory of those who sought to win him in argument he will stand out as an impressive and formidable figure even among associates in whom those qualities were by no means rare. His judicial attitude was not one of frosty neutrality, but one of intensity and certitude of conviction on basic philosophies of life and society and law and government. He had no merely negative standard of goodness; experience and conviction committed him to profound affirmations, and he exemplified them unceasingly and with power. Among the public men of my time, I have known no one of more affirmative and immovable and masterful character than Mr. Justice Butler."

The CHIEF JUSTICE responded:

"*Mr. Attorney General:* The resolutions you have presented on behalf of the Bar fittingly epitomize the traits of character and outstanding achievements of an eminent

advocate and judge,—who would have considered this tribute by his professional brethren as the best possible reward for his long and arduous service.

“The early environment of Pierce Butler suited his ambition and talent. It was not ill fortune that in his childhood and youth he had to meet the rigorous demands of pioneer life in the northwest; that he had to win by self-denial and strenuous exertion the educational advantages which seem slender indeed as compared with the abundance of a later day. For he was in the midst of the opportunities of a fast developing community, where the very air quickened endeavor and the abilities and eager efforts of those endowed with physical and mental vigor received almost instant recognition. It was not ill fortune that he began the practice of the law in Saint Paul at a time when great enterprises were in the making, when legal talent held the key to a career of distinction and the standards of Bench and Bar were as high as in the older eastern States.

“The opportunities for practice had a most desirable variety, but, in accord with the traditions of the Bar, the highest prizes were to be won in the field of advocacy. Pierce Butler by temperament and aptitude was especially fitted for the contests of the forum. He had the fighting instinct, and his training developed rare skill in the use of the advocate’s weapons. He soon had opportunity for public service as prosecuting attorney, and thus early secured wide recognition of his unusual talents. Favored by nature with a powerful physique, and with a distinguished mien aided by a deliberate and impressive manner of speech, he became a respected but dreaded antagonist. He was not content with showy and superficial successes with juries. He aimed at a thorough knowledge of the law and a complete mastery of facts, which especially commended him to the higher courts. He had a passion for exactness. He was not addicted to subtlety and he hated pretence. He recognized just

authority. He was faithful to every trust. He was rigorous in his self-discipline and spared no effort to realize his ideal of the careful and exact adviser, the zealous but accurate advocate, the intrepid vindicator of what he conceived to be the legal rights of those whose causes he espoused.

"It is not extraordinary that with the natural advantages of a noble bearing, with his indomitable will and courage both in attack and defense, with his unflinching industry and devotion to what he believed to be justice according to law, he rapidly rose to eminence, and his expert advice and assistance were sought in matters of the gravest importance of both private and public concern. There are not wanting those who disparage the training and experience of the successful advocate, ignoring the fact that among the varied activities of our democratic society there exists no harder school of discipline, no wider opportunity for the study of human relations or for the detection of faults and abuses, no more insistent demand for a sound practical judgment and for rectitude and fair dealing, than are found in the exacting daily work of the legal practitioner who tries to live up to the ethical standards of the best traditions of the Bar and thus to win the highest professional esteem, which is denied to the trickster and shallow pretender however otherwise apparently successful.

"It was with these qualities, and with that reputation, that Pierce Butler came to this Court at the height of his powers. He had already shown at this Bar his exceptional skill and thoroughness in the presentation of cases. In the *Minnesota Rate Cases* (230 U. S. 352) he presented one of the ablest, most comprehensive and most careful briefs ever submitted to this Court. On the bench, he at once demonstrated an extraordinary capacity for the sustained judicial labor which our work demands, and to the last he was faithful in every task, indefatigable, fearless, conscientious. At the conference table, he was ever

ready to present and defend his views with keenness, always with earnestness, and not infrequently with the thrusts of wit and eloquence which brought vivid reminders of forensic battles. He was always thoroughly prepared by close study of records and, endowed with an extraordinary memory, he justly took pride in his ability to marshal facts and precedents in the most impressive manner.

“It was natural that, with his success in winning his way to distinction in an expanding community, with his appreciation of liberty and law, he should have been eager to conserve both the essential authority of government and the freedom of enterprise. The former was necessary in order to insure the latter. His conservatism was rooted in profound religious convictions. It was always manifest that he had definite principles and he had no sympathy for those whose only principle was to be without principle. Cherishing the ideals of authority and certainty, he demanded adherence to precedent and deplored what he considered to be an undue flexibility in constitutional interpretation. As he put it,—‘Generally speaking, at least, our decisions of yesterday ought to be the law of today.’ He was a strong defender of the conception of property rights which he believed to be secured by the accepted construction of the due process clause. He believed in that conception as an essential stimulus to effort and as holding a better promise of social progress than governmental plans involving restriction of individual initiative. He believed in the right to choose one’s calling, to pursue it unfettered, so far as consistent with good order and the equal rights of others, and to maintain and hold the material rewards of honest endeavor. In short, he sought to keep open the traditional path to individual achievement which he himself had trod.

“While solicitous for the public order and the authority of law, he was equally a stickler for the rights of those accused of crime to be protected against the abuses of

authority. He was zealous for the maintenance of just government but vehemently opposed to any action under any guise which he deemed to be arbitrary and capricious. He expressed his thought in the words of one of his opinions, which was quoted in one of the addresses at the meeting of the Bar: 'Abhorrence, however great, of persistent and menacing crime will not excuse transgression in the courts of the legal rights of the worst offenders.' *United States v. Motlow*, 10 F. 2d 657, 662. And in his dissent in the first *Wire-tapping case*, he thus voiced his conception of the appropriate interpretation of the great clauses of the Constitution for the safeguarding of personal liberty: 'This Court has always construed the Constitution in the light of the principles upon which it was founded. The direct operation or literal meaning of the words used do not measure the purpose or scope of its provisions. Under the principles established and applied by this Court, the Fourth Amendment safeguards against all evils that are like and equivalent to those embraced within the ordinary meaning of its words. That construction is consonant with sound reason and in full accord with the course of decisions since *McCulloch v. Maryland*.' *Olmstead v. United States*, 277 U. S. 438, 487, 488.

"And with these views which I have endeavored briefly to interpret,—as I think he would wish them expressed—he wrought to the end,—a man of deep-seated convictions, religious and political, with unflinching loyalty to basic principles as he conceived them,—a personality of rare force and determination, and yet with the kindest disposition, the most generous sympathy, the warmest heart.

"It is not for us to speak of the sorrows that afflicted him, of his fortitude in severe trials, of the depth of his affection for those united to him by the strongest human ties. In the midst of judicial responsibilities which he was fully sharing with us, we were keenly aware of the

private burdens which pressed upon him and were so bravely borne.

“We mourn the loss of a great co-laborer. As the scenes of particular controversies swiftly shift, there abides the treasured memory of strength, of trained talent industriously applied, of unswerving integrity and fidelity,—the virtues of the just judge, always an exemplar and an inspiration,—the virtues which make secure the foundations of the temple of justice.”