

SUPREME COURT OF THE UNITED STATES.

Monday, March 16, 1942.

Present: The CHIEF JUSTICE, MR. JUSTICE ROBERTS, MR. JUSTICE BLACK, MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, MR. JUSTICE BYRNES, and MR. JUSTICE JACKSON.

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MR. ATTORNEY GENERAL BIDDLE addressed the Court, as follows:

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 the stuff of which pioneers are made. 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 even 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 practice 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 practice. 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 were 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 practice 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 as a Conservative; but this is said with a realization that there are 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 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 with 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 the 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. Reily*, 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 Milling 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 were 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 sterling character and of 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.

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The Chief Justice directed that the Minute and Resolutions be received and embodied in the records of the Court.

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The CHIEF JUSTICE said:

Mr. Attorney General, it is altogether fitting that the Bar and this Court, of which Justice Van Devanter was so long a member, should now express and here record their estimate of his character and his eminent services. During most of his active life Justice Van Devanter was a public servant, for whose services there could be no greater reward than recognition that they were well and faithfully performed. Such recognition by his professional brethren is the only reward he would have prized.

No mere catalogue of the events and achievements of his career could give an adequate impression of the man. His distinction was so preëminently that of character and personality, and was so rooted in his conception of the duties and obligations of the judicial office, that we should miss the true significance of his work as a judge if we were to attempt to define it wholly in terms of his public record. But his character and personality were not uninfluenced by environment. All that he experienced in his early days in the West and his later contacts with it did much to shape the pattern of his life. As lawyer, legislator, and judge in Wyoming in its period of

transition from territorial government to statehood, and later as Circuit Judge for the Eighth Circuit, exercising his jurisdiction throughout a vast territory extending westward from the Mississippi River to the foothills of the Rockies, he made his own something of the tradition and outlook of the pioneer West.

He saw and was a part of the expansion of free enterprise in the development of the new world lying beyond the Mississippi. It was a period when, more than any other in our history, men were the masters of their fate. They sought the great West to build homes, acquire property, and establish orderly communities. As good citizens they were zealous to put down the lawlessness of the frontier and to establish laws and courts which would insure the safety of persons and property. Beyond that they asked only for that most natural and characteristic of privileges in a thinly settled country—the right to be let alone. Theirs was the philosophy that that government governs best which governs least, a philosophy not without its effect upon Justice Van Devanter's appraisal of the functions of government under the restraints of a written constitution.

As Circuit Judge his opinions in appellate cases speedily won the recognition of Bench and Bar by the range and accuracy of the legal knowledge which they exhibited, the care with which they were prepared and their clarity of statement. His quick perception, his ready command of the rules of evidence, his alert and incisive mind, gave him special facility in the trial of jury cases. The trials over which he presided as Circuit Judge, of which there were many of note, were conducted with exemplary fairness, courtesy, firmness, and dispatch. He never lost his zest for the forensic battleground. His last judicial service, after his retirement from this Court, was to preside over several trials in the District Court in New York. It was a matter of public comment that under his sure and skillful direction they were models for the administration of trial justice.

As Assistant Attorney General assigned to the Interior Department and later as Judge in a western circuit, he was most frequently concerned with the infinite variety of questions arising out of the administration of the public-land laws. Never content with superficial knowledge or performance, he devoted himself assiduously to their mastery. He thus gained expert knowledge of mining laws and the law of water rights in the semiarid regions of the West, of the laws and treaties affecting the rights of Indians, of the rights of government and individuals arising out of the railroad land grants and other grants of the public lands—all of which continued to occupy the attention of the courts throughout his lifetime. His acquaintance with the history and customs of the Indian tribes, his sympathetic understanding of their inability to cope with the greed and cunning to which they were so often exposed, made him a veritable citadel of justice for this hapless people. Early in his career he had occasion to make special studies in equity jurisprudence and of the procedure and jurisdiction of the federal courts. His knowledge of these indispensable aids to the sound administration of justice was profound.

It was with this background and experience and these special skills that Justice Van Devanter began in 1911 his service as a Justice of this Court, which was to continue for over twenty-six years until his retirement in June 1937. You do well, Mr. Attorney General, to make mention of some of the notable cases in which he wrote opinions for the Court, for they give something of the measure of the man and the lawyer. They remind us that while he brought to this Court the benefits of his special knowledge and experience in particular branches of the law, he was by no means a narrow specialist. They cover a wide range of interests. They evidence the breadth and depth of his knowledge in many fields of the law and reveal the vigor, sanity, and precision of his mind. They exhibit the sense of proportion with which he adapted

principles of the law to the special facts and circumstances to which they were to be applied. They are models of judicial exposition, never discursive, redundant, or sprinkled with irrelevant citations. Simple and direct in statement, orderly, lucid, complete; they give a hint, but only a hint, of the painstaking care which in fact he gave to their preparation.

This Court often had occasion to draw on Justice Van Devanter's exceptional knowledge of procedure and judicial administration for purposes other than the decision of cases and the writing of opinions. A notable example was his supervision, as chairman of a committee of the Court, over the receivership growing out of the boundary dispute between Oklahoma and Texas, which occupied the attention of the Court from 1920 to 1925. Another was his participation in the drafting of the Judiciary Act of 1925. To his special familiarity with the organization and appellate practice of the federal courts, to his skill in draftsmanship in preparing the Act, and to his luminous expositions of its provisions, are due in large measure the enactment of that legislation. It gave to the Court freedom to direct its efforts to the performance of its true function as the highest appellate court of a nation-wide judicial system.

Those whose privilege it was to sit with Justice Van Devanter in this Court know well that the public evidences of his judicial activities conceal rather more than they reveal what was his greatest service to the Court and to the public. It was a service inspired by his high conception of the function of a Justice of this Court, and of the part which the Court itself should play in our constitutional system. He was profoundly aware that the true source of the strength of the Court and the permanency of its influence is public confidence in the thoroughness, integrity, and disinterestedness with which it does its work. In his mind this signified, and rightly so, the need of unremitting study by every judge of every record

and application which comes to the Court for disposition, and the free and frank exchange of views with associates as preliminaries to decision unaffected by extrinsic influences or nonjudicial considerations.

This faith, sustained by his natural fidelity to every task which he undertook, and the force of his example, exercised a powerful and wholesome influence on the deliberations of the Court. Continued without interruption for more than twenty-six years, it would be difficult to overestimate its importance in perpetuating and strengthening this great tradition of the Court. At the conference table he was a tower of strength. When his turn came to present his views of the case in hand, no point was overlooked, no promising possibility left unexplored. His statements were characteristically lucid and complete, the manifest expression of a judgment exercised with unswerving independence. Often his expositions would have served worthily, both in point of form and substance, as the Court's opinion in the case.

He had an abiding faith that reason would afford the solvent for every problem of judicial cognizance. He thought and spoke of this Court as the place for the final appeal to reason in composing the inevitable conflicts growing out of the distribution by the Constitution of the diverse powers of government.

In the provisions of the Constitution, and particularly the Fifth and Fourteenth Amendments, he saw safeguards to those rights and privileges of the individual which he regarded as the chief spiritual values of the society which he had known in his own life and experience. Those who differed with him differed not in their appraisal of such values but in their judgment that an instrument of government, intended to endure for ages to come, could not rightly be interpreted as casting a dynamic society in so rigid a mold. Both were content to resolve their differences by the appeal to reason in the course of adjudication. Both would have regarded as inappropriate and inept the labelling of their differing views of the appropriate boundaries

of constitutional power as either conservative or liberal.

Apart from cherished family ties and the association with friends and colleagues, the work of the Court was his chief interest in life. To that he gave of himself to the uttermost and without interruption until the very day of his retirement. He was a man of simple, unobtrusive religious faith; modesty and simplicity were the keynotes of his life. It was a life untouched by any interest in or desire for wealth. He had a large capacity for friendship. He instinctively sought to find in others the qualities which would merit his esteem. His relations with his colleagues were marked by his uniform courtesy and helpfulness and by their mutual regard. In his daily intercourse with them and in the discussion of every pending problem, his statements were direct, forthright, and crystal clear, because they were the true reflection of his thought.

As we recall the years of association in a common endeavor, the clash of mind with mind in the unending struggle to attain in some measure the ideal of justice under law, there lives in memory this man's devotion and loyalty to a great task, the integrity and sturdy independence with which he wrought. For these are the attributes of the judge, without which there can be no justice. They are the foundation stones of the institution which we serve.

of constitutional power as often as it is exercised. The great question is not whether the power is exercised, but whether it is exercised in accordance with the principles of the constitution. The history of the United States is a history of the struggle for the preservation of the principles of the constitution. The struggle has been a long and a hard one, but it has been a struggle for a noble cause. The principles of the constitution are the principles of liberty, of justice, and of equality. These principles are the principles of the American people, and they are the principles of the American government. The history of the United States is a history of the struggle for these principles. The struggle has been a struggle for the preservation of the principles of the constitution, and it is a struggle that will continue as long as the American people are free to exercise their rights.