

In Memoriam

WARNER WALTON COPE

[At the opening of the court in Bank on the 4th of January, 1904, Mr. Warren Olney, on behalf of the Bar Association of San Francisco, presented the following memorial, adopted by the association on the death of Warner Walton Cope, formerly chief justice of the supreme court of California. The memorial was received by the court, which ordered it spread upon the minutes and published in the Reports.]

In the person of Judge W. W. COPE, recently deceased, we find one of the notabilities of our bench and bar, and at the same time one of the most beloved. He may not have flashed upon us as showily as some others of our profession, but his was a light that shone brightly and steadily from first to last—a light never once obscured by the faintest cloud of wrong-doing or of dereliction of duty. And he was a strong man, both mentally and physically, and like so many men of that kind, plain and simple in all his ways.

He enjoyed the great distinction of serving on the supreme bench with Field and Baldwin, and of being a great factor of the court thus constituted—a court which, as all must admit, has left behind it a trail of judicial splendor. At no time, therefore, has it been more fitting for us of the profession to speak memorial words of a departed brother.

WARNER WALTON COPE was born in the state of Kentucky, where he was educated and where he grew up to manhood; and he died in San Francisco at the home of his son, Walter, on the seventeenth day of January, 1903. Had he survived two weeks longer he would have reached the age of seventy-nine years. He was part and parcel of the pioneer days of California, for he came here in 1850, first taking up his residence in the county of Amador, and entering there upon his chosen profession of the law, in which

he soon manifested his great capabilities. This led to his appointment, on the twentieth of September, 1859, as associate justice of the supreme court to fill the vacancy created by the resignation of Chief Justice Terry. On Chief Justice Field's retirement from the court, Judge Cope became the chief justice, and this position he filled until his own retirement in January, 1864. The work of Judge Cope on the supreme bench, so far as that work can be imperfectly disclosed by the published reports, is to be found in those reports from volume fourteen to volume twenty-three inclusive. An examination of these volumes will abundantly show Judge Cope's great industry and the wide range of his legal mind. All kinds of questions were handled by him in a masterful manner, and he participated in some of the greatest causes that ever came before the court. During the time he was on the bench he wrote no less than two hundred and thirty-one opinions, nearly all of which were concurred in by his brother judges, and no one of which shows anything less than careful and deliberate preparation.

As matter of interesting personal history we note that the case in which he first delivered an opinion was that of *People v. Ball*, 14 Cal. 102, wherein it was held that in an indictment for larceny of money, the money should be described as so many pieces of the current gold or silver coin of the country, of a particular denomination, according to the facts, and that describing the money as "three thousand dollars lawful money of the United States" was insufficient.

He was one of the first to establish in this state the jurisdictional value of the decrees of the probate court, he having held, in an opinion delivered by him for the court in the *Estate of Cook*, 14 Cal. 130, that a decree of the probate court ordering a claim to be paid, rendered on petition of the administrator, and without objection by him, was final and conclusive, and could not be collaterally assailed, nor even directly assailed, on the ground that it was rendered on insufficient evidence.

His was the first voice on our supreme bench to declare in an opinion delivered by him for the court in *Mokelumne Hill Company v. Woodbury*, 14 Cal. 265, wherein was involved the question of stockholder's individual liability, that that liability was primary, not secondary; that it is

not in any sense contingent, but is absolute and unconditional; and that the responsibility of it commences with that of the corporation—a doctrine which, extensive and varied as has been the litigation in this field, has remained firm and unshaken.

He was the pioneer in the matter of receivers for insolvent corporations, he having held, in speaking for the court in *Neall v. Hill*, 16 Cal. 146, that courts of equity had no jurisdiction as such to take the property and business of an insolvent corporation away from its board of directors through the instrumentality of a receiver, and that nothing of this kind could be done short of explicit statutory warrant. On this case has been mainly built all the many cases which in recent years have arisen involving the question of corporation receivers.

One of the most noteworthy opinions, and perhaps the ablest opinion of Judge Cope's, was that delivered by him in the important case of *Lin Sing v. Washburn*, 20 Cal. 534, wherein was involved the question of the validity of the first anti-Chinese legislation essayed in this state. The statute sought to levy a monthly tax upon resident Chinese, and it was held, Chief Justice Field, dissenting, that the statute was void.

In the great case of *Biddle Boggs v. Merced Mining Company*, 14 Cal. 279,—the leading case, perhaps in the United States on the subject of estoppel *in pais*,—Judge Cope united with Judge Field to give the decision of the court reversing the judgment of the court below, and putting estoppel *in pais* within the most clearly specified limitations.

It would take us too far afield to make more special comment on Judge Cope's judicial work, but enough has been here presented to show that he was a great an important figure on the bench.

In style Judge Cope's opinions are closely wrought, without any display of rhetoric, without unnecessary words, and altogether void of figures of speech. In fact, they are extremely austere, but logical and convincing, and bearing evidence of care and thought. He was the last man in the world to let his pen run away with him, or to be strangled in the coils of his own verbosity. His sole thought seems to have been, when the case was once decided, to give the

reasons for his decision in as plain and unambiguous a manner as he could command. Indeed, never was any judge less possessed of the vanity of composition.

Judge Cope was firm as a mountain when once his mind was made up, but never obstinate or perverse. This is well illustrated by the long litigation over the nature of the title to the pueblo lands of San Francisco in a measure culminating in the celebrated case of *Hart v. Burnett*, 15 Cal. 530, wherein we find the monumental opinion of Judge Baldwin, concurred in by Chief Justice Field, with Judge Cope dissenting, his opinion being based on the rule of *stare decisis*. From that opinion we beg leave to extract the following pregnant words:—

“The questions affecting the merits of the controversy were long since settled by this court, and whatever may be our opinion of the correctness of that settlement, I think that a due regard for the doctrine of *stare decisis* requires that it is strictly adhered to. I shall never hesitate in a proper case to co-operate with my associates in correcting the errors of this tribunal, but I am unwilling to interfere where the effect may be to create confusion in titles, and destroy rights acquired and held upon the faith of former adjudications.”

And so it was that when some of the same questions subsequently came before the court in *Payne v. Treadwell*, 16 Cal. 240, he consistently expressed himself as follows:—

“I concur in the judgment of affirmance, and place my concurrence upon the ground that all the questions in this case have been passed upon and settled by this court, under such circumstances that we are not at liberty to regard them as open to any further controversy or discussion.”

His mind was singularly hospitable to persuasive argument, and if once he was satisfied he was wrong, no one was quicker to freely acknowledge it, as witness the two cases of *Argenti v. San Francisco*, 16 Cal. 255, and *Zottman v. San Francisco*, 20 Cal. 109, in the former of which Judge Cope, and in the latter of which Judge Field, delivered the opinion, the two opinions being contrarious in view. But in the *Zottman* case, Judge Cope came over to the view of his associate, and frankly spoke as follows in his concurring opinion:—

“I am of the opinion, notwithstanding the position taken
“by me in *Argenti v. The City of San Francisco*, that the
“views expressed by the chief justice upon the questions in-
“volved are correct. The ground assumed in the case of
“*Argenti* was not essential to the determination of that
“case, and, upon further reflection, I am convinced of the
“error of the reasoning upon which my conclusions were
“arrived at. The error arose from paying too little at-
“tention to the restrictive provisions of the charter.”

A smaller man than Judge Cope would have contented himself with saying that the *Argenti* case went off on a question of pleading, and did not involve the merits as did the *Zottman* case.

After Judge Cope's retirement from the bench, he successfully resumed the practice of the law, having been associated at different times with the late Judge Daingerfield, the late Mr. William H. Fifield, and Mr. James T. Boyd. As a practitioner at the bar, Judge Cope was careful and thorough in preparation, and vigorous and wise in presentation—always the soul of courtesy, and punctilious in every professional obligation. He was very strong and clear in oral argument, but plain of speech, as he had ever been in his judicial opinions. He was a born lawyer,—that is, his mind had a logical cast, and it naturally ran in legal channels. He grasped firmly the facts of a case, and was quick to find the rule and apply it. He was a staunch opponent of the multiplication of exceptions, rightly believing that the excess of such is to leave us without any rule at all. He kept his mind concentrated on the essentials of the case, and was not easily misled by illusory non-essentials.

About ten years before his death, Judge Cope virtually retired from active practice and took up his residence in Contra Costa County, where he successfully cultivated nuts and fruits.

In early manhood he married the lady to whom he was a devoted husband until her death a year before his own. The blessing of good children was theirs, three sons and three daughters being now in life, one of whom has himself been a judge.

At the time of his death Judge Cope was one of the directors of Hastings College of the Law, and for a long time

had been such, and for a number of years he was president of the San Francisco Bar Association.

He was a man of fine presence and of dignified demeanor; but his dignity was never self-conscious or unbending. The humorous was well developed in him, and as a companion he was as delightful as a man could well be. Indeed, he endeared himself to all with whom he came in social contact. His very presence was a sign of sympathetic good cheer, and when death took him a void was made in many a heart. We do not deal in superlatives when we say that no man among us has more honored the bench and bar than has Judge Cope, and that no professional brother has passed away from us the memory of whom the survivors will treasure more.