

## In Memoriam

### ELISHA WILLIAMS MCKINSTRY

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[At the opening of the Court in Bank of the 8th of November, 1902, Hon. J. M. Seawell, on behalf of the Bar Association of San Francisco, presented the following memorial, adopted by the association on the death of Elisha William McKinstry, formerly an associate 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.]

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Judge MCKINSTRY was born in Detroit, Michigan, April 11, 1825. He was of Revolutionary and Puritan stock. Both his father and grandfather served as officers in the War of Independence; and through his mother he was descended from William Bradford, the second governor of Plymouth Colony, who came over in the Mayflower. Having received a liberal education as a student at Kenyon College, Ohio, and Columbia College, New York, he studied law, and in 1847 was admitted to the bar in the city of New York, where he was engaged in the practice of his profession for about two years. In 1849 he removed to California. The talents and character, which were afterward so conspicuously displayed in the public service, attracted the notice of his fellow-citizens immediately after his arrival here. He was elected a member from Sacramento of the first legislature which met after the adoption of the constitution of 1849. By the next succeeding legislature he was elected adjutant-general, but declined the office. In 1851 he removed to Napa City, and in the fall of 1852, while practicing law there, he was, at the age of twenty-seven years, elected district judge of the seventh judicial district for the term of six years, and was re-elected for another term in 1858. Resigning that office, November 13, 1862, he removed to the state of Nevada, where he practiced his profession for a few years, and during that time received a nomination for justice of the Supreme Court of that state. Having returned to California, he was, in October, 1867, elected county judge

of San Francisco for a term of four years, before the expiration of which he was elected, as an independent candidate, judge of the twelfth district court. While serving in that office, he was, in 1873, elected a justice of the Supreme Court of this state. In 1879 he was re-elected to the supreme bench under the new constitution, and drew a long term of eleven years. He resigned his office October 1, 1888, to accept the professorship of municipal law in the Hastings Law College, which position he resigned in 1890. After that time, so long as his health permitted, he was engaged in the practice of law. He died on the first of November, 1901, near San Jose, where, fifty years before, he began his services to the state.

But your committee feel that something more is expected of them than this brief and meager epitome of the career of our distinguished and beloved brother. The greater part of his life in California was spent in the public service. He served upon the bench thirty-one years, during sixteen of which he was a justice of the Supreme Court. It is peculiarly appropriate that this association, of which for many years he was an honored member, should make some public recognition of his character and service.

Judge MCKINSTAY'S mind and character fitted him pre-eminently for the bench, and it is creditable to the discernment of the people among whom he lived that they were not slow to recognize his peculiar fitness for the judicial office. That fitness was too conspicuous to render necessary any struggle on his part to secure either a nomination or an election. He was not an office-seeker; and for his advancement he was indebted solely to the recognition by the public of his great abilities and high character.

The opinions of Judge MCKINSTAY, while a justice of the Supreme Court, are to be found in thirty volumes of the California Reports (47 to 76, inclusive); his last being a dissenting opinion in *People v. Henshaw*, 76 Cal. 447. Perhaps the opinions which best display his learning and ability as a jurist are those in *Ex parte Wall*, 48 Cal. 279; *People v. Lynch*, 51 Cal. 15; *Estate of Hinckley*, 58 Cal. 457; and *Lux v. Haggin*, 69 Cal. 264.

In the first, generally known as the "local option" case, he decided that the legislature has no power to refer a statute to the people to decide by a popular vote whether it shall go into effect. In *People v. Lynch*, he held that the legislature can-

not by special act deprive the city council or other appropriate local authority of a municipal corporation of all discretion in respect to a local improvement, where by the charter of the city the matter of such improvement is left to the judgment and discretion of such local authority; and that the power of assessment (as distinguished from taxation) cannot be directly exercised by the legislature within the limits of an incorporated city.

In none of Judge MCKINSTRY'S decisions are the qualities of his mind more strikingly displayed than in his opinion in *Estate of Hinckley*, where he held that trusts for perpetual charitable uses are not in conflict with section 16 of article XI of the constitution of 1849; that charities are not forbidden by the provisions of the Civil Code which prohibit perpetuities or by those which limit the purposes for which trusts of real property may be created; that courts of equity in this state have jurisdiction, independent of the Statute 43 Elizabeth, to establish and enforce charities when trustees competent to take the legal estate are named and the class to be benefited and the individuals to be designated by the trustees are capable of ascertainment. He also held that those courts have power *cy pres* to direct trustees, in a deed or will, to carry into effect the general lawful and charitable intent of the trustor, when the particular scheme has become impracticable.

But the most important of Judge MCKINSTRY'S decisions, and one by which his fame as a jurist will be transmitted to posterity, is his masterly opinion in the great case of *Lux v. Haggin*, in which it was held by a divided court that the common law as to riparian rights prevailed in California. Time will not permit any extended review of that opinion. It fills seventy-five pages of the report, and is an imperishable monument to the learning and ability of its author.

Judge MCKINSTRY was a man of absolute mental and moral integrity. We mean not merely the ability to withstand all forms of pecuniary temptation, which is but the characteristic of common honesty, but also that wholeness and uprightness of nature which is proof against the insidious influence of wealth and social position as well as those of passion and prejudice, and seeks only justice by the intelligent and conscientious application of the laws. He scorned every form of falsehood or deceit. He was of rare moral courage, and fear-

less in the discharge of his duty, uninfluenced either by popular clamor or popular applause. He was of a chivalric nature and the highest sense of honor. He was the friend of religious liberty and toleration, and never faltered in maintaining and enforcing the limitations of the constitution by which the liberty and property of the citizens are secured from legislative encroachment.

The predominant quality, the most noticeable feature of the character of Judge MCKINSTRY, was primitive honesty; not the honesty of adopted policy, nor even that growing from a high standard of ethics. It was not the honesty of environment, that bred by precept and example, but was the honesty of nature, which knew no cause for concealment, for sophistry or casuistry, and which sought no end by indirection, nor feared the results of open expression. In these days of worship of the self-made, it may be said that one so endowed is entitled to less admiration than is he who had attained equal virtues by determination and discipline. But, after all, what product of art can equal that of nature? The cast from Nature's mold is unchangeable; that formed by art may be reformed; we trust the permanency of the one, we look for change in the other. And thus it was that the social and professional associates of Judge MCKINSTRY regarded him. He was not subject to change through fear or interest, and he met persuasion open-eyed. Not even his mental processes were concealed. We, of this bar, recall his manner of receiving and considering our arguments. He would recite our proposition, repeat our sequential steps until he reached one which gave no logical foothold, and then, with a troubled and disappointed "Ah!" would by look indicate to the advocate a suggestion of further assurance or explanation. But it was not intended as a rebuff; his own mind was engaged in inquiry, and it seems to be the necessary accompaniment of all honest, logical thought to reach conclusions slowly and hesitatingly. Even when the apparent end appears, the conscientious mind still has lingering doubt of its identity. That trait is noticeable in some of his written opinions to an extent that mars them to the impatient or superficial thinker.

In necessary harmony with that quality of openness was his entire freedom from pretense and affectation. He never showed ruffled dignity, and when off duty was familiar almost to playfulness with his associates. No class or caste was

known to him, for such a nature is essentially democratic in feeling and action, and differentiation of his fellows was never shown save when, impelled by a sense of humor, he made some quaint comment upon incident or personal characteristic. Of course, one so approachable, one so trusted, was especially dear to the younger members of the bar, and among that class no judge of his day had so large and admiring a following.

In the veins of Judge MCKINSTRY were blended the blood of the Puritan and the Revolutionary patriot; and he proved himself worthy of his lineage. He cherished the traditions of the War of Independence and the early days of the republic. He was a true patriot. It was appropriate that he should have been chosen, as he was, president of the San Francisco branch of the Sons of the American Revolution. He was also a prominent member of the Mayflower Descendants, Colonial Government, and the Society of Colonial Wars. It may be added, in this connection, that he was also president of the Society of California Pioneers, and that he received from the University of Michigan the degree of doctor of laws.

In private life, Judge MCKINSTRY was a charming and entertaining companion. There was no member of this association whose presence among us was more welcome. He had a philosophical mind, and his extensive reading both in prose and poetry had been guided by a fine literary taste. He had also a keen sense of humor, which did not desert him in his severest mental labors.

He was a sincere lover of truth, and acquired early the habit of testing every proposition by the processes of reasoning. Upon many of his most intimate friends at one period of his life he produced the impression of a tendency to skepticism. But whatever doubts he may have previously entertained in reference to the mysteries of revealed religion passed from his mind some years before his death, and he became a sincere and devout Christian and member of the Catholic Church.

In all his domestic relations as husband and father his life was beautiful, and he has left to his surviving family the priceless legacy of a pure and stainless name.