

In Memoriam

HONORABLE WARREN OLNEY, Jr.

Associate Justice of the Supreme Court—1919—1921.

At a regular session of the Supreme Court, held on April 4, 1939, the following proceedings were had in honor of the memory of the late Honorable Warren Olney, Jr.

Upon convening of court, Mr. Hartley F. Peart, president of the San Francisco Bar Association, requested opportunity for presentation of a memorial to Mr. Warren Olney, Jr., once a member of the court, whose sudden death occurred March 25, 1939.

With approval and consent of the court, Mr. Eustace Cullinan and Hon. Curtis D. Wilbur addressed the court, the former at the close of his address, moving that when the court adjourn this day, it do so out of respect to the memory of former Justice Olney; Judge Wilbur, in closing seconded the motion. Chief Justice Waste, replying briefly to the addresses, thanked the representatives of the bar for their presentation, and ordered that the motion as to adjournment be granted, and that the memorials be spread in full upon the court's records and that a copy be forwarded to the family of Judge Olney.

The addresses presented follow:

By Mr. Cullinan: May it please the court: When Mr. Hartley F. Peart, president of the San Francisco Bar Association, asked me to prepare and present here on behalf of the association, this memorial address concerning the late Warren Olney, Jr., sometime an associate justice of this court, he said he had selected me because of the long and intimate friendship between Judge Olney and myself. And just because I knew Judge Olney so well I am sure that he would wish anything here said about him to picture him simply as he really was and to avoid the superlatives and the cant that so often mar eulogy of the dead.

For his friends of long ago and yesterday who fill this courtroom today nothing need be said to keep his memory alive. But for the inspiration and example of those who knew him not, and those who will come here when we are gone, it is fitting that we should attest and in this fashion perpetuate the record of Judge Olney's useful and honorable career at the bar, on the bench, and as a citizen of his country and his state always at call for devoted and unrequited public service.

Recital of the bare facts of his life will fail, I fear, to convey a complete impression of his simplicity, his personal charm, his keen sense of duty and of justice, his broad tolerance, his eager desire to understand points of view alien to his own. But such a recital, by showing the environment into which Warren Olney was born and in which he spent his life, will perhaps help to point and illumine his character and his career.

Warren Olney, Jr., was born in San Francisco, October 15, 1870, into a family of culture, distinction, and moderate affluence. His father, Warren Olney, the elder, was one of the foremost practitioners at the California Bar and was in after years Mayor of the City of Oakland. His mother was Mary Craven Olney, a gracious and intelligent lady. The younger Warren Olney went naturally to the University of California. There he played on the football team and was prominent in fraternity activities and in undergraduate social life. Notwithstanding such distractions he was, as he remained through life, a diligent and very able student. He was graduated at Berkeley with scholastic honors in the class of 1891. Thence he went to Harvard for a postgraduate year and in 1892 Harvard also gave him a bachelor's degree. On his return to California he entered Hastings College, which was then the only law school of the university. He received his diploma from Hastings and was admitted to the bar in 1894 and entered into practice with his father. He also from 1895 to 1904 taught law classes at Hastings and when, later, the School of Jurisprudence was opened on the Berkeley campus, he lectured there from 1904 to 1907.

It was my privilege to have entered Hastings in Warren Olney's first year as a teacher, and to have been a student in the first law class he ever taught; and from that late summer of 1895 our friendship, then begun, strengthened and ripened

and became more intimate as the advancing measure of our years narrowed the slight disparity in our ages.

Let me pause here to speak of his close and life long association with the University of California. That was one of the dominant aspects of his life. He loved the university. He took pride in its marvelous development into one of the great schools of all time. For eight years, from 1911 to 1919, he was counsel for the regents. Long later, for two years, beginning July 1, 1932, he served as a regent by virtue of his being president of the alumni association. His home through all the period of his manhood was in Berkeley. Many of the faculty were his familiar friends and companions. In a word, that noble campus, where Warren Olney played and worked in youth, was a background of his many-sided life; and to those who knew him in that background something of his fine spirit will linger always in every path and glade.

By 1907 the ability of the rising younger Olney had attracted the attention of Edward J. McCutchen on whose request in that year Warren Olney, Jr., went into the famous firm of which he became the senior member when Mr. McCutchen died. His membership in that firm was interrupted only by a short interlude from March 1, 1919, to July 1, 1921, in which he sat as an associate justice of this high court by virtue of an appointment to fill the place vacated by the resignation of Justice Sloss.

All who sat with Judge Olney on the bench of this court are gone from life, save one. Judge Curtis D. Wilbur, now of the United States Circuit Court of Appeals, is happily with us here today. He will tell, (and for that reason I will not) of Judge Olney's judicial work when they were colleagues in the court.

Of Warren Olney's work and ability as a practitioner your honors have had much evidence. He represented vast interests. Important causes were confided to him. He prepared them with the infinite pains that mark the work of every great pleader and counselor. He knew his case thoroughly when he came into court or conference. He had a rare talent for simple, concise, clarifying statement, making the point and the principle stand out from a maze of evidence and circumstances.

As an advocate he did his full duty to his clients, and had the will to win, but he strove always to be just and courteous

to his opponent and fair and helpful to the court. He sought no victory to which he did not deem his cause entitled. No one could talk to Warren Olney, or even look at him, without soon perceiving that here was a just man; just intellectually; just in every thought, word, and meditated action.

For these qualities so commonly recognized by all who dealt with him he merited and received the respect of bench and bar to a degree seldom equaled in the recollection of living lawyers.

Busy as he always was, he never shirked a civic duty, however onerous, however irksome. He served the San Francisco Bar Association as president. When the United States entered the war in 1917 Judge Olney had charge of registration for the draft in California and he was chairman of the district exemption board for division number one, a position that demanded all his fortitude when, as so often occurred, duty clashed with sympathy.

By appointment of Governor Young he served on the California Joint Federal-State Water Services Commission in 1929 and 1930, and by appointment of Governor Rolph as a member of the Honorary Advisory Committee of the California Water Resources Commission in 1931. He was a special assistant to the attorney-general of the United States representing the government in important litigation in 1930 to 1932. His last public service to his profession was his work as a member of the United States Supreme Court's advisory committee on rules of civil procedure for United States District Courts; a committee which made a valuable contribution.

Although success came to him early and honors were thrust upon him, there was nothing smug or self-righteous about Warren Olney. For with the gifts of talent, fortune, and opportunity that came to him at birth, he inherited an abiding devotion to the American ideal of life and the American ideal of government. He had a great admiration and respect for men and women who rose through their own efforts to honorable success despite poverty and other handicaps in early life.

Warren Olney was a truly humble man. In his mode of living, in his manner, in his approach to people, he was simple, direct, informal. That simplicity was not assumed. It was

inveterate in his personality. He disliked show and sham. He faced facts. He sought truth.

But of all the qualities that made up Warren Olney's character and explain and justify his success at the bar, and his position in the community, the greatest was his moral courage. In court and on the rostrum, in conference, and in public, he was never afraid to speak out bluntly and to fight hard for what he deemed to be the right. The fact that he represented great interests, and stood to lose more than most, never held him back. That is what made him a real leader, and not merely an able and successful practitioner.

So much for his public and professional life. I turn now to the more intimate and personal side of Warren Olney. In 1899 he married Mary M. McLean, the daughter of a well known, able and much respected and beloved clergyman, still well remembered in Alameda County. For forty years of happy married life the home of Judge and Mrs. Olney was the abode of an ideal American family. Three children came to them, a daughter and two sons, and he lived to see them grow to womanhood and manhood, and take their places in life. One of his sons, the third in line bearing the honored name of Warren Olney, is associated with his father's firm, standing at the threshold of his professional career, just where his father stood when I first knew him, so many years ago.

Warren Olney played as he worked with a concentration and vigor that never spared himself. He was an out-of-doors man; a tireless walker, a good fisherman, a good golfer. He loved to win at games, not for the stakes but for the victory. He took great pleasure in little intimate gatherings of a few close friends—those were ambrosial nights—when good talk ranged over a wide field, and nothing or nobody—not even those present—was taken too seriously or without a smile.

All that ended for him on March 25th, when death called him after a brief illness. He died quietly in his sleep in his sixty-ninth year. So ended the life that Warren Olney lived and loved so well. But his influence will not die while those who knew him abide. It will not die in the great law firm which he guided through nearly thirty changing years. It will not die in those little groups of his close friends where his name will be often on their lips. It will not die in that gracious home sheltering those who loved him and whom he loved so well. And let us hope it will not die in this Ameri-

can life of ours, founded and held together on principles which Warren Olney fought with so much courage to maintain for the generations treading on our heels.

By Judge Wilbur: Warren Olney was appointed associate justice of the Supreme Court of California by Governor W. D. Stephens March 1, 1919. The appointment was a notable one because of the outstanding legal ability of Mr. Olney, and of his well established and well known character of high integrity and fine public spirit. He had had no judicial experience, but twenty-five years practice at the bar had won for him the universal esteem of his fellow members of the bar and of the bench.

His appointment was significant because it made plain that Governor Stephens had the highest regard for the bench and fully recognized the importance of filling positions in the highest court by men of demonstrated character and ability and without regard to politics. It was significant from the standpoint of the people of the state in that it gave assurance that their disputes, if carried to the courts, would receive careful and industrious consideration by a man of great legal learning and keen power of discrimination. The appointment was of great significance to the members of the court who were faced with an accumulation of business which required the application of great knowledge, as well as facility for the dispatch of the business.

To Warren Olney the appointment was of even greater significance because it meant the fulfillment of his life long ambition to devote his talents to the public by service on the bench. He had, he thought, accumulated a competency so that with his salary he could meet all the reasonable demands of himself and family. It was a peculiarly happy time for him as he now saw his way clear to a span of service equal to that of Chief Justice Beatty and of others, who had served long on the bench. His associates welcomed him to the new duties with unqualified pleasure, and, I may say, unfeigned delight.

Justice Olney did not disappoint his new associates, nor the lawyers, the litigants, nor the public. His work met with unequaled approval. In quickness of apprehension, in positiveness of conviction, in clarity and promptness of decision, he met and fulfilled every expectation. The public soon had an opportunity to express its opinion of his selection and his

work on the bench, at the election in the fall of 1920, when he was elected by an overwhelming vote. He was not a politician and was holding his first elective office, but so uniform was the approval of his work that he had no difficulty in the election, and did not find it necessary to organize an extensive campaign. He was true to his convictions regarding the non-intervention of the bench in politics.

When Justice Olney served on the bench the greater part of the work was done in departments. He was assigned to department one, with Justices Lucien Shaw and Wm. P. Lawler. He was thus thrown into more intimate relationship with them than with the justices of department two,—Justices Melvin, Wilbur and Lennon, but in the conferences of every Monday and Thursday, and in the matters heard in bank, we all had ample opportunity to test the personality, the clearness of vision, the depth of learning, the thoroughness of research of Justice Olney, and he did not fall short in any of these qualities. He was quick to grasp and clearly state the decisive points of a case. He was sure of the validity of his conclusions, and although ready and willing to give courteous and full consideration to the arguments and opinions advanced by his associates, he did not readily yield in his conclusions, particularly after he had had opportunity for careful research, and based his conclusions upon full consideration. He was not timid in expressing his views in a dissenting opinion. Less than three months after his appointment he said of an opinion in which all of his associates joined: "The main opinion in its discussion is beside the mark and touches upon the real point involved only in the most casual fashion. (*Stock v. Plunkett*, 181 Cal. 193 [183 Pac. 657]). Nor was he deterred from the expression of a conviction by a charge of inconsistency such as was made in the dissenting opinion of Justice Melvin in *Estate of McNamara* (181 Cal. 82, 101 [183 Pac. 552]). Nor by previous opinions of the court which he deemed erroneous and prejudicial to the administration of justice. For in his concurring opinion in *Porter v. City of Los Angeles*, 182 Cal. 515, at 522 [189 Pac. 105], Justice Olney emphasizes his belief that the decision in *Hicks v. Drew*, 117 Cal. 305 [49 Pac. 189], should be overruled and protests against the perpetuation of artificial rules of practice, 'with the refined and frequently illusory distinctions of the common law between forms of action. . . . No reason can be assigned why such distinctions should be preserved. They are an an-

achronism in our law alien to its fundamental theory. They make the rights of persons turn, as in this case, not upon the merits, but upon refined and subtle distinctions, whose perpetuation makes the rights of the parties in many cases, as here, difficult of ascertainment without any necessity for such difficulty. . . . I think it should be overruled in the interest of the administration of justice by as plain and simple rules as possible.' ”

A cursory examination of the volumes of the California Reports in which Justice Olney's opinions are reported (180 to 186, inclusive) confirms my impression and recollection, that Justice Olney in the main agreed with his associates in department and in bank. His best work, like that of any efficient judge, was in convincing his associates of the validity of his conclusions, and thus securing a just and righteous judgment of the court. He did not line up with any group. If it be found that he was more frequently in agreement with his departmental associates, in bank as well as in department, it should be noted that only by unanimous agreement could an opinion be rendered in department, and that when a rehearing was granted in such cases that it was to be expected that the opinion of the department would be supported by the judges who had participated therein unless there had been some oversight.

A study of the opinions written by Justice Olney, and participated in by him, will confirm the expectations reasonably to be held of such a man, that is, that each case stood on its own peculiar merits, and that he had no special theories of the law to promote.

It has been frequently asserted that a judge who has been an attorney for special interests will lean unconsciously toward such interests in his opinions as judge. If this is true in any degree as to others it cannot be said of Justice Olney, who had been an attorney for the Western Pacific Railway Company. This is made manifest by his dissent in *Young v. Southern Pacific Co.*, 182 Cal. 369, 384 [190 Pac. 36].

In clear judgment, in industry, in a high conception of his duties and responsibilities and in the requisite learning, he met every qualification of a justice of this high court.

It was indeed surprising that, with this fine outlook, this life long ambition to serve so well met, that Justice Olney concluded that he should resign and return to the practice of

the law. I felt, and I think, that all the members of the court felt a distinct personal loss,—not only the loss of the services of a great man and a great judge, but a loss of the intimate and affectionate relationship that springs up between worthy men who are doing a great work together. Men who realize that although their work, arduous as it is, is not and cannot be understandingly appreciated by others, is nevertheless thoroughly understood and appreciated by their coworkers.

Justice Olney, after careful deliberation, concluded that he could not do justice to his obligations to his family and remain. I am happy here to add that since that time the state has recognized the need for greater compensation to the members of this court. The state thus lost twenty years of devoted service by Justice Olney.

He had a high conception of the duties and responsibilities of a lawyer, which he had occasion to state in his dissenting opinion *In re Riccardi*, 182 Cal. 675, 687, 688 [189 Pac. 694].

“An attorney who has been actually convicted in the criminal courts of a crime involving moral turpitude should not be permitted to exercise the high privileges of his profession as long as that conviction stands against him unreversed. There is no relation in life outside the family which is more confidential in its nature than that of an attorney. There is no one in whom more implicit confidence must of necessity be placed. There is no profession in which the strictest probity is more necessary. There is no profession of which it is more true that the only safeguard possible to the public against imposition and wrong-dealing is the character of those pursuing it. The fact that a member of the profession has been actually convicted of a crime involving moral turpitude should alone be sufficient to disqualify him from pursuing his profession while such conviction stands. To permit him, nevertheless, to continue to hold himself out as a worthy member of the profession and to invite the public to intrust him with their confidences and their affairs while he pursues an appeal, and not unlikely a dilatory one, is to break down the standard of professional character which is the public's chief safeguard.”

But life is so organized that we cannot tell when and how a man will make his greatest contribution to the welfare of his fellow man.

Justice Olney's resignation did not alter his conception of the duty of a good citizen, and he kept alive his interests in the problems of justice faced by legislators, executives, and by the bench and bar. After nearly fifteen years, he was selected as a member of a committee chosen by the Supreme Court of the United States to formulate rules of practice and procedure in law and equity to supersede the legislation of Congress on that subject. The legislation empowered the Supreme Court to adopt a complete system of practice unembarrassed by any legislative restrictions, and circumscribed only by constitutional limitations, such as those requiring a jury trial of issues at law, and a recognition of equity jurisprudence.

The task thus confided to the Supreme Court by the Constitution and by Congress was fully performed. The rules went into effect last September. The rules of practice developed in California and other western states were taken as a pattern. The rules have been made applicable to bankruptcy proceedings so far as may be. Thus the efforts of Justice Olney and his associates on the committee will not only be of controlling force in every case excepting criminal and admiralty matters in the Federal Courts from now on, but it is altogether likely that state legislatures will step out of the domain of practice and procedure in our courts and leave the making of such rules to the courts. If this follows it is altogether likely that the Rules of Federal Procedure will be adopted in the main in the state courts, thus bringing about the uniformity in practice so greatly needed. It is highly desirable that lawyers should be able to tread their way through the courts without too great apprehension that somewhere along the way there are pitfalls for the unwary practitioner.

So it may well be that Justice Olney's recent efforts in the cause of justice may well over-balance the years he might have spent on the bench of this court.

He had the spirit of service and the opportunity to serve did not desert him when he so abruptly changed his course. But after all, the real question to which on this occasion we should direct ourselves is the man. As to that it need only be said that contact with Justice Olney always made a man better, and never worse. His ideas, his aims, his outlook on life, all helped upward. We, therefore, take note here now

that it has been good for us to have known him. More than this I need not add to what has been said. Is it too much to hope that his determined and forceful personality not only still lives, but also that it continues to serve man as well as God, or perhaps I should say, serve God by serving man?

By Chief Justice Waste: I speak from a very happy and a very long association with Justice Olney. In another month and a half it would have been fifty-two years since he and I stood together in the recorder's office at the University of California and registered as freshmen. Four years of college life passed very happily. We received our degrees together in the old gymnasium which served as the auditorium for the Berkeley campus. Our ways then parted, but only for a short time. Judge Olney, in furtherance of his desire for more knowledge, went on to Harvard University. The present Chief Justice, pursuing his plan to become a lawyer, entered Hastings College of the Law. There he was joined by Warren Olney, who had received his other bachelor's degree at Harvard, and had returned to study law from the California point of view. Two years later we received our law degrees, and what Warren Olney accomplished has been splendidly told by Mr. Cullinan.

It was with pleasure that we accepted the offer of members of the Bar of San Francisco to represent that great body, in which Mr. Justice Olney was such an outstanding figure, in this memorial tribute to him. It would be a very difficult task for me to reply as I should like, on behalf of the court, to what has been so very well stated by the representatives of the bar. Emotion would not permit me to speak intelligibly, I fear, and so I am not going to try.

When I read in the morning paper a few days ago that Mr. Justice Olney had passed away, my first thought was: "What shall I say to those at the home he loved and with whom I am so well acquainted?" I said to my secretary: "I have such a feeling of loneliness in my heart today. One could not have been so closely and so happily associated with another person for fifty-two years, as I have been with Justice Olney, and not be completely overcome by one's own feelings." So I merely wrote: "I personally feel as though a brother of mine had passed away," and sent that message with but a very few added words of sympathy.

Mr. Cullinan has so splendidly portrayed our feelings that it would be a mistake for me to try to speak further of that joyous and intimate association of more than half a century. I therefore shall not attempt it.

As representing the courts, Mr. Justice Wilbur has spoken of what Warren Olney meant to the people of this state, of his courage and independence when a member of this court, as well as his high ideals. Mr. Cullinan also stressed what he meant to the young lawyers with whom he became associated. Many are the young men who have paid glorious tribute to Justice Olney as their instructor—one who inspired them to strive for the higher things in the law. I doubt not that almost everyone within the sound of my voice has heard beautiful expressions, particularly since the Angel of Death has removed our friend from our midst, from young men, mingled with those of older men, as to Warren Olney's place as a practitioner in this wonderful bar of ours.

Speaking as the representative of this court, I say that we thank the bar of San Francisco, through its president; the judge of the highest Federal Court of this district; and Mr. Cullinan, who represents the highest of all associations, that of friendship. We thank you for the message you have brought to us, and may we say, as members of this court and before whom it is a distinct pleasure to have men like Mr. Justice Olney practice, that we, too, feel that we shall be better because we knew him. We can say no more than that the world, the citizens of this state and the legal fraternity have been better because Warren Olney lived among us.

The motion made by Mr. Cullinan, seconded by Mr. Justice Wilbur, is granted, and it is ordered that a full report of this meeting be spread upon the minutes of the court. I take it that a copy of our proceedings today will be sent to the beloved family of Mr. Justice Olney.