

In Memoriam

HONORABLE MARCUS C. SLOSS

Associate Justice of the Supreme Court
of the State of California, 1906-1919.

The Supreme Court of California met in bank in its courtroom, State Building, San Francisco, at 10 a. m., September 11, 1958. Present: Chief Justice Gibson, presiding, and Associate Justices Shenk, Carter, Traynor, Schauer, Spence and McComb; Sullivan, Clerk; Matteoli, Bailiff.

Chief Justice Gibson announced that before proceeding with its calendar the court would pause to honor the memory of former Associate Justice Marcus C. Sloss. The Chief Justice stated that Mr. Eustace Cullinan, Senior, and Mr. Eugene M. Prince, members of the San Francisco Bar, would present a memorial on behalf of the lawyers of the State.

The proceedings were as follows:

MR. EUSTACE CULLINAN: If it please the court, I start by expressing on behalf of Mr. Prince and myself our joint thanks and high appreciation of the honor of this court's invitation, supported by the approval of the Sloss family, to participate in this memorial session in honor of the late Marcus Cauffman Sloss, our dear and respected friend who was for thirteen years (1906-1919) a distinguished Associate Justice of this court.

To avoid overlapping in our remarks, Mr. Prince, a senior of one of the very great law firms of California, will confine what he has to say mainly to the work and influence of Judge Sloss as a member of this court, while, I, as an older friend of Judge Sloss, will restrict myself mainly to the personal side of a friendship which began a few years prior to the opening of the current century.

Max Sloss was born in New York in February of 1869 and was my senior by seven years, an interval that seemed to grow smaller as we both grew older. In the mid nineties, and before I was admitted to the bar, Max Sloss was an intimate member of a little circle who became my close friends. They, like Max Sloss, were addicted to the then popular sport of bicycle riding

at which Max was very proficient. Our acquaintance thus begun, ripened rapidly into a mutual friendship and regard that never faltered in the passing years. He was a good companion in our little group, grave, witty, wise and sincere. In my earlier days at the bar I had matters, not as many as I wished, in his department of the Superior Court, and I found him, as all others did, then and ever, a very able, just, and impartial Judge. He had a deep understanding of legal principles which he applied with an acute and sagacious mind, coupled with those primary qualities of a good judge, intellectual and moral integrity plus courage, tempered always by common sense. I never heard an ill word spoken of Max Sloss.

Sixty years ago, who of us would then have supposed that in my old age, as the sole survivor of that little group, I would now be standing at this time and in this presence, lamenting, as I do, the loss of Max Sloss, my friend of many years. He was a man. I shall not look upon his like again.

After completing the course of Boys High School in San Francisco, Max entered Harvard in 1886. He was graduated there magna cum laude in 1890. He then continued through Harvard Law School and in 1893 received the LL.B. degree and also was awarded the degree of Master of Arts.

During his seven years at Harvard Max had spent much of his time in the hospitable home of an eminent Boston family, the Hechts. Quite naturally, he fell in love with Hattie Hecht, the daughter of the house, and in due course they were married in June, 1899. They lived happily together until separated by his death. Mrs. Hattie Hecht Sloss was ever a forceful and intellectual personality in her own right and soon became, and has remained, high in the affectionate esteem of San Francisco.

Their two sons, Richard and Frank, long later imitated their father's brilliant career at Harvard Law school and in the practice of the law as partners of their father with Lloyd Ackerman.

Max Sloss was elected to the Superior Court bench in San Francisco in 1901 at the age of 32 years and served there until 1906. He resigned to accept an appointment from Governor Pardee to a vacancy in the Supreme Court. He resigned from this court in 1919 and resumed private practice in order to increase his income because the judicial salary was hardly adequate for the need of his family. All who sat with him as a member of this court have gone from this life.

It is a singular coincidence that another dear and intimate friend of mine, Warren Olney, Jr., was appointed to the

vacancy created by the resignation of Max Sloss and in April of 1939, it became my sad duty to address this court at a memorial session held to honor Judge Olney.

For the remainder of his long career Max Sloss was not only a leader at the bar but one of the foremost and most trusted citizens of California. He served the public in many honorary positions. He was universally regarded as a wise and kindly counselor and, above all, was a man of honor without fear and without reproach. He belonged, if I may borrow a phrase from Balzac, to the "noblesse of the robe."

I cannot summarize the personality of Max Sloss without reference to his forebears and his kinfolk, near and remote, because they were a vital influence on his character and career.

His father was the great and famous Louis Sloss, the elder, who was born in Bavaria, migrated to the United States in 1848 and in 1849 joined a wagon train to cross the plains to California. After many hardships and vicissitudes, including an outbreak of cholera, he and his companions made their way to Sacramento. The rise of Louis Sloss, the elder, to fame and fortune is one of the epics of pioneer California and Alaska. With Lewis Gerstle and Simon Greenwald he founded the business which afterward became the Alaska Commercial Company, first known as Louis Sloss and Company. He and his associates built huge fortunes for those days and established a reputation, still remembered, for fair dealing and as men of honor who treated their employees generously. It was a byword in Alaska, and here, that they never cheated any one, not even an Indian, something that could not be said truthfully of every American business man of those days.

The Sloss family were allied from early days by marriage and business association with a group of the most illustrious California families, all closely knit to one another. I mention the Lilienthals, the Greenebaums, the Gerstles and the Esbergs. No single group of kinfolk have contributed more than that group to the growth and culture of San Francisco. They were, for the most part, doctors, lawyers, rabbis, and honorable and honored heads of large commercial enterprises. They stood together to help one another in fair weather and foul.

It was my happy fortune to know intimately not only Max but some others of his generation of that great group. Max had brothers, all older than Max, each of whom I knew, but not so intimately. His nephew, by marriage, Milton Esberg, was my dear and devoted friend through many years until his untimely death in 1939. His wife was Caroline Sloss Lilienthal,

still among us, the gracious and intellectual niece of Max. I have happy recollections of the Esberg home in Ross Valley.

Few may recall, but I shall never forget that Jesse Lilienthal, that brilliant and public-spirited citizen, fell dead in my arms, as I sat beside him while he made a talk on religious tolerance at a luncheon meeting where I presided.

The ramifications and public services of this group of American families would make interesting reading but there is no time for it here and now. I conclude by referring to an illustrating incident mentioned by Herbert Hoover in his Memoirs.

Mr. Hoover relates that the day after Christmas in 1913, while he had stepped into the Bank of California to cash a check, Frank Anderson, then president of the bank, informed him that the Sloss and Lilienthal families were in financial distress because of the condition of enterprises in which they had become involved through "that prince of optimists," as Mr. Hoover calls him, Eugene de Sabla, and that failure seemed inevitable unless they could gain time immediately from British creditors. Mindful of the fact that Mr. P. M. Lilienthal, as president of the Anglo California Bank had long earlier made him, then a very young man, a loan without security, and mindful also of his high regard for Leon Sloss, whom he had known as a trustee of Stanford University, Mr. Hoover went across the street where the family were in conference over the desperate situation. They welcomed Mr. Hoover as an adviser. Through his London office Mr. Hoover managed to get a postponement of the more urgent of the debts. He then joined with the family in working out an arrangement with the other creditors and spent about 60 days at the task. In the course of the conversation Mr. Hoover learned that the elder Louis Sloss, who had died in 1902, had bequeathed half his large estate to his widow, who had been Sarah Greenebaum, and the remainder to his children. The sons had carefully safeguarded their mother's fortune, which then amounted to about two million dollars in gilt edged securities, and had resolved to undergo bankruptcy rather than appeal to her for help. Mr. Hoover tells that, without permission, he and a friend visited the old lady, then about 90 years of age, and laid the situation before her. Without a moment's hesitation she placed her fortune at the disposal of Mr. Hoover and accepted his proposed arrangement. It worked out successfully, Mr. Hoover says, no creditor lost, and the Sloss family pulled through and were prosperous ever afterward. Mr. Hoover says he refused to accept any remuneration for his effort. It was, he says, a humane rather

than a commercial transaction. It surely reflected credit on everyone concerned.

Such was the stock from which Max Sloss sprang. Such was the stuff of which San Francisco and California were built.

Is it any wonder that Eugene Prince and I are proud of having been designated by this Court, and the Sloss family, to participate in this memorial service?

With the court's permission I now move that when the court adjourns today it do so out of respect to the memory of former Justice Max C. Sloss. Mr. Prince is here to second the motion.

MR. EUGENE M. PRINCE: Mr. Chief Justice and the Associate Justices of the Supreme Court:

With the court's permission I will address myself not only to your honors, but also to Mrs. Sloss, her family and the legion of friends and admirers of Judge Sloss, both in and outside this courtroom.

I join completely in all the sentiments which Mr. Cullinan—himself one of California's great advocates—has so fittingly expressed. I want to add just a word on the personal side. I was fortunate to become acquainted with Judge Sloss at the start of my own practice—38 years ago—and to know him increasingly well as time went on. His friendly, easy graciousness to a beginner, coming from a man on the pinnacle of professional standing, is one of many fine things about Judge Sloss which I will always remember. How much inspiration Judge Sloss has given to lawyers young and old is beyond measure.

As Mr. Cullinan told you, I will speak briefly about Judge Sloss as judge and lawyer. The subject is worthy of a book by a great author, but we can here touch only highlights.

On the lawyer's side, the fame which Judge Sloss won as a member of this court tends to obscure the fact that he spent almost 45 years as a very active, very busy practicing lawyer—from 1893 to 1900 and from 1919 until shortly before his death this year. He was a great counselor and a great advocate. As counselor he advised a large clientele, both individuals and business interests. Illustrating the responsibilities he carried as an advocate, I mention just two of his many important cases—familiar cases to this court—*Tulare Dist. v. Lindsay-Strathmore Dist.* (1935), 3 Cal. 2d 489, a landmark in our water law, and *Meridian, Ltd. v. San Francisco* (1939), 13 Cal. 2d 424, of tremendous importance as determining the extent of San Francisco's rights in connection with the Hetch-Hetchy project.

In the work of the organized bar, Judge Sloss, manifesting

his constant and unwavering devotion to public service, was an active participant. He served on the governing boards of the State Bar and the San Francisco Bar Association, on the Board of Bar Examiners and on the Board of Trustees of the San Francisco Law Library, one of the great law libraries of the country, by the way, a fact which many of our lawyers do not know. He served on almost innumerable working committees of the Bar. Our profession has never had a more devoted member than Judge Sloss, or one whom the profession held in higher esteem. It is hard to speak of him without superlatives, but here is a case where superlatives are not only justified but required.

Judge Sloss took his seat on the Supreme Court on February 1, 1906, by appointment of Governor Pardee. He succeeded Mr. Justice Van Dyke, the last of the 49er justices, and took his place on a court which included Mr. Justice McFarland, who had come to California in 1850. He was just short of 37 years old, but still had behind him 5 years of service as a Superior Judge in San Francisco. In 1919 he resigned from the Supreme Court, leaving it on February 28, 1919—incidentally, his 50th birthday. Thus his service lasted 13 years and 1 month. It is reflected in Volumes 148-180 of the California Reports.

The decisions of this court mirror the history of the State, and Judge Sloss' period of service was both a colorful and a difficult time. In it occurred the destruction and re-creation of San Francisco; the graft prosecutions here; the beginnings of phenomenal growth in Los Angeles and the south; the reform legislation of Hiram Johnson; World War I—each event producing its legal problems.

In those days the Supreme Court did much of its work in departments. The departments had considerable independence so that each associate justice was practically a member of two separate, but interlocking, courts; his own department and the court in bank. From 1906 through 1914 Department One consisted of Justices Shaw, Angellotti and Sloss—a gigantic trio truly.

In 1906, as now, this was a hard-working court, and Judge Sloss was one of its hardest working members. In his 13 years Judge Sloss wrote about 600 opinions—approximately one a week for all 52 weeks in every year. Seven of these 600 opinions were dissents. In cases where opinions were written by other members of the Court, the participation of Judge Sloss is noted in about 1800. In these he cast 20 dissenting votes.

The figures on opinions written and cases participated in are well on the low side because they do not reflect actions on petitions for hearings, per curiam opinions, and department decisions followed by hearings in bank.

The opinions of Judge Sloss reflect fairness and objectivity, tolerance, thoroughness, fine reasoning powers, a profound knowledge of the law and a simple, direct style of judicial writing—hallmarks all of a great judge. He respected precedent, yet was always progressive and forward looking—a point for which I cite only one of a host of possible illustrations: *Western Indemnity Co. v. Pillsbury* (1913), 170 Cal. 686.

The Pillsbury case sustained the constitutionality of the Workmen's Compensation Act. Taking workmen's compensation for granted—as we do today—and realizing what a tremendous contribution it was both to the administration of justice and to the practical working of our society, it is hard to realize how controversial the law was when first enacted. When it came before this Court, the highly respected Court of Appeals of New York had held a compensation statute unconstitutional (*Ives v. South Buffalo Ry. Co.* (1911), 201 N.Y. 271, 94 N.E. 431). For this Court Judge Sloss spoke for three justices, going all the way in upholding our statute. Three other justices concurred on the narrow ground that the Act was saved by its provisions permitting insurance against the liability imposed. The seventh justice dissented. It is the Sloss opinion which reflects the thinking of today.

Time does not permit examination of other great and forward-looking opinions by Judge Sloss, but I mention three or four. *Title etc. Restoration Co. v. Kerrigan* (1906), 150 Cal. 289, sustained the McEnerney Act, which was motivated by the San Francisco fire and provided for establishment of title where records had been destroyed by catastrophe. The statute was far more than a burnt records act, it was a new and highly practical adaptation of legal principles touching actions in rem. *Parkinson Co. v. Bldg. Trades Council* (1908), 154 Cal. 581, is a leading case in California labor law. Judge Sloss had a great interest in labor law. We are all familiar with his great work in 1934-36 long after his retirement from the bench as arbitrator under the award of the National Longshoremen's Board. In *Oro Electric Corp. v. R. R. Commission* (1915), 169 Cal. 466, the opinion of Judge Sloss, in addition to dealing with the particular problem of the Oro Electric case, brought together the several opinions—one of these his own—previously rendered in *Pacific Telephone etc. Co. v. Eshleman* (1913),

166 Cal. 640, one of the great cases in public utility law. In a wholly different field—but certainly one of the highest public importance—was *People v. O'Bryan* (1913), 165 Cal. 55. This case was the first under section 41½ of Article VI of the Constitution—"What is a miscarriage of justice?"

Anyone who knew Judge Sloss recognized at once his fine sense of humor and keen wit. It was a kindly wit and a cultured one, quite individual to Judge Sloss, yet completely down to earth. I remember what he called a lawyer's definition of a technicality—"an unanswerable legal point raised by the other side."

Judge Sloss, however, did not carry epigrams, figures of speech or literary allusions into his judicial writings. His expression was pleasing because it was fair, temperate and sensible; his judicial style had no artificial adornments. His sound, classical education; his learning and his sensitive taste for words gave him mastery of language, but it was a mastery without ostentation. His concern was with sense, not sound; his first object was clarity and preciseness. He used simple and direct forms of expression and chose, when there was a choice, the simpler and more familiar word.

Leaving much unsaid, I must conclude. With profound appreciation, Mr. Chief Justice, for the privilege of addressing the Court in memory of a kind and generous man, a man whose passion was for fair, open and honorable dealing, a great lawyer, a great judge and a great American, I respectfully second Mr. Cullinan's motion.

At the conclusion of Mr. Prince's remarks, Mr. Burnham Enersen, a member of the Board of Governors of The State Bar of California, upon designation by Edwin A. Heafey, President of The State Bar of California, stated on behalf of The State Bar of California he joined in the remarks of Mr. Cullinan and Mr. Prince and in the motion made and seconded by them.

Chief Justice Gibson thanked the representatives of the Bar for their presentations, stated that the motion was granted and ordered that the memorials be spread in full upon the minutes of the court and published in the official reports. The court thereupon recessed.