

IN MEMORIAM

HONORABLE OTTO M. KAUS

(1920-1996)

Judge of the Superior Court of Los Angeles County
1961-1964

Associate Justice of the Court of Appeal,
Second Appellate District, Division Three
1964-1966

Presiding Justice of the Court of Appeal,
Second Appellate District, Division Five
1966-1981

Associate Justice of the Supreme Court
of the State of California
1981-1985

The Supreme Court of California convened in its courtroom in the Ronald Reagan State Office Building, Third Floor, South Tower, 300 South Spring Street, Los Angeles, California, on April 8, 1997, at 9:00 a.m.

Present: Chief Justice Ronald M. George, presiding, and Associate Justices Mosk, Kennard, Baxter, Werdegar, Chin, and Brown.

Officers present: Robert F. Wandruff, Clerk; George Rodgers, Harry Kinney, and Walter Grabowski, Bailiffs.

CHIEF JUSTICE GEORGE: Good morning. We meet today to honor Justice Otto Kaus, who served with great distinction as an Associate Justice of this court from July 20, 1981, through October 16, 1985. I would first like to introduce the members of the court. Starting at my far left, Justice Brown, Justice Werdegar, and Justice Kennard. To my immediate right is Justice Mosk and to his right is Justice Baxter and then Justice Chin. On behalf of the court, I wish to welcome Justice Kaus's wife, Peggy, one of his sons, Mickey, and other friends.

I did not have the honor of serving with Justice Kaus during his tenure on the Supreme Court. I did, however, have the great pleasure of first encountering him during oral arguments when he was an Associate and Presiding

Justice on the Second District Court of Appeal in Los Angeles, and I was a somewhat “green” and inexperienced deputy attorney general, fresh out of law school.

Arguing before Justice Kaus was always a wonderful challenge and an in-depth learning experience. He invariably asked probing questions that went to the heart of the issues, sometimes to my dismay as an advocate. It was excellent training for a new appellate practitioner.

His intellect and grasp of the law may have seemed intimidating, but the man was anything but. Justice Kaus was always approachable. He would invite deputy attorneys general to his chambers or join us for coffee at the snack shop. In those conversations his dry but very lively wit, his love of the law, and his tremendous knowledge and sense of judicial and judicious balance was always evident. His background as a teacher and his obvious personal pleasure in sharing his enthusiasm about the law made these interactions very special. And I say that even though I can recall at least one occasion on which he did not see an appeal quite the same way as I did.

As a trial court judge, and later as a Court of Appeal and Supreme Court justice, I have always been pleased to encounter an opinion by Justice Kaus when I am engaged in research. I know that it will be very well reasoned and very well written, two qualities that are examples for any judge or justice to emulate.

It is now my pleasure to introduce my colleague, Justice Stanley Mosk, who served with Justice Kaus, and who will speak on behalf of our court. Justice Mosk.

JUSTICE MOSK: Thank you, Chief Justice George. My colleagues, family, and friends of Justice Otto Kaus.

I had the privilege of serving on the California Supreme Court with Otto Kaus for nearly five years. They were memorable years in every respect.

As a result of the period Justice Kaus and I served together, I was recently asked to prepare an article about him for the Loyola University Law Review. Much of what I am about to say will appear in that publication.

It was a little over a decade ago that Otto Kaus wrote a flattering article about me for the Hastings Law Review. In it he generously suggested that my activities, on and off the bench, were so numerous and varied that “there

are at least three of him." I hasten to point out this was long before the recent developments on cloning.

I seldom quarreled with any conclusion of Otto Kaus. Thus if there are really three of me, then all three of us have been consistent admirers of Otto—the lawyer, judge, writer, husband, father, and warm human being. I had long anticipated having an opportunity to write a laudatory piece about him, not merely as literary reciprocation, but to let him and the bar know of my heartfelt respect and admiration. Unfortunately the Grim Reaper beat me to it. I am pleased to have this opportunity.

Otto Kaus was not a one-dimensional man. His interests were varied. He was a truly cultured person who knew and enjoyed music, the opera, symphonies, art, and literature. And he respected others who had similar interests. He was also a competitive tennis player, an attribute I particularly appreciated.

In the area of the law I would rate Otto Kaus as one of the finest California legal minds produced in modern times. He was a fine lawyer, a splendid Court of Appeal justice, and a most distinguished member of the California Supreme Court for much too short a time.

I took this opportunity to glance over a number of his numerous opinions for the Court of Appeal and the Supreme Court. His warmth, his human outlook, yes and his gentle humor, all stand out. I offer a few, a very few, examples.

Otto Kaus achieved a certain immortality with his often-quoted remark about the crocodile in the bathtub. On several occasions he declared that "ignoring the political consequences of judicial decisions is 'like ignoring a crocodile in your bathtub.'" But that was only the tip of the iceberg. He frequently expressed his views with a dramatic flair, one that could easily be understood not only by the bench and bar, but even by any layperson who might stumble over a lawbook.

For example, in *Kisbey v. State of California* in 1984 (36 Cal.3d 415, 418) he felt he had to rule for municipal immunity in a suit by a plaintiff who claimed injury by a police officer. Oliver Wendell Holmes wrote in *The Common Law* that the "life of the law has not been logic: it has been experience." Showing distaste for the result Justice Kaus felt impelled to reach in this case, he declared "that the life of the law is not logic, but expedience."

In another public officer immunity case he explained the result simply: “[T]he immunity cart has been placed before the duty horse.” (*Williams v. State of California* (1983) 34 Cal.3d 18, 22.)

Justice Kaus obviously liked Shakespeare and quoted him as an authority a number of times. For example, in *Mardikian v. Commission on Judicial Performance* (40 Cal.3d 473, 485) he defended the accused judge in this manner: “Petitioner is being made the scapegoat for the twin plagues of judicial overload and backlog—evils that were apparently well entrenched when Shakespeare had Hamlet deplore ‘the law’s delay.’”

Shakespeare was again called upon in a paternity suit. (*Estate of Cornelius v. Taylor* (1984) 35 Cal.3d 461, 464.) To advance the presumption of a child’s legitimacy, Kaus noted “that Shakespeare was familiar with the rule, for he made reference to it in King John, act I, scene 1: ‘*King John*.—Sirrah, your brother is legitimate; Your father’s wife did after wedlock bear him; And, if she did play false, the fault was hers; Which fault lies on the hazards of all husbands That marry wives.’”

In the Court of Appeal case of *People v. Superior Court (Cope)* (103 Cal.App.3d 186, 189, 190) Justice Kaus dealt with police arresting a man in his home, thus leaving wholly unattended his huge St. Bernard dog. The officers, he wrote, “did not plan to take the dog into custody.” He then enumerated all the firearms, kerosene, and other inflammatory chemicals lying around the house and mused that “[i]t does not require the ingenuity of a Rube Goldberg to imagine the unattended dog knocking over a can of volatile liquid or knocking over and discharging the shotgun and causing either a fire or an explosion. . . . [¶] . . . The prospect of a St. Bernard left to his own devices in this environment, in the dark, is enough to send shudders through any reasonable man.”

Though it was later reversed by the Supreme Court, when the Court of Appeal in 1977 upheld a city’s right to display a cross in the windows of its city hall (*Fox v. Los Angeles*, 70 Cal.App.3d 885), Otto Kaus wryly commented in public that the Court of Appeal produced “the finest opinion he had ever read that said a religious symbol had nothing to do with religion.”

Turpin v. Sortini, a 1982 case (31 Cal.3d 220), was a sad case in which Justice Kaus and I did not exactly see eye to eye. A child, born with a serious defect, sued the medical doctors for not preventing her birth. Her basic contention was that she would be better off not born rather than to suffer a lifetime of disability. Justice Kaus could find no persuasive authority for that cause of action but he did show compassion by allowing damages

for future costs of the extraordinary efforts to treat the hereditary ailment. For the court's majority he reversed lower courts that did find there could be an action for wrongful life as well as for wrongful death.

In a 1982 case, *People v. Superior Court (Engert)* (31 Cal.3d 797, 802), Justice Kaus tried to analyze, under the provisions of a statute, what constitutes conduct "unnecessarily torturous to the victim" and found it difficult, if not impossible, to suggest the obverse: what would be "necessary torture." I am reminded of John Mortimer's fictional Horace Rumpole of Old Bailey: Someone spoke of an unsavory scandal; he wondered what a savory scandal would be like.

In *People v. Bledsoe* (1984) (361 Cal.3d 236) Justice Kaus discussed at some length the so-called rape trauma syndrome. While it may be admissible under some circumstances, he held the testimony of an expert on that subject cannot substitute for proof that a rape in fact occurred.

Justice Kaus liked not only rationality but consistency in the law. In a 1983 case, *Delta Farms Reclamation Dist. v. Superior Court* (33 Cal.3d 699, 707), he held a public agency liable regardless of the nature of the person injured. As he said, the contrary would be a rule that "an improved but dangerously rutted street would expose a city to liability to a bicyclist who commutes to work, even though it was under 'no duty' to keep the same street safe for the recreational rider right behind him. We doubt that there is a single city attorney in this state who would submit such an absurdity to a court of law."

He had little patience with obvious evasions of the law. In *Shuey v. Superior Court* (1973) 30 Cal.App.3d 535, 541, police officers invaded a home to make an arrest without a warrant. There was an emergency, they contended. Wrote Justice Kaus: "The emergency was strictly of the 'do-it-yourself' variety."

Justice Kaus had great respect for the legal profession. But he also maintained lawyers had professional responsibilities that could not be disregarded or evaded. He often contended that inexcusable neglect should never be condoned by courts lest the courts unwittingly become instruments undermining the orderly process of the law. In *Carroll v. Abbott Laboratories, Inc.* (1982) 32 Cal.3d 892, 900, he cautioned that any exception "should be narrowly applied, lest negligent attorneys find that the simplest way to gain the twin goals of rescuing clients from defaults and themselves from malpractice liability, is to rise to ever greater heights of incompetence and

professional irresponsibility while, nonetheless, maintaining a beatific attorney-client relationship.”

Justice Kaus was not a slave to the doctrine of “harmless error” in capital cases. In *People v. Ramos* (1984) 37 Cal.3d 136, he exhibited the insight and courage to write the court’s opinion reversing a death penalty conviction because of trial errors. In that case he convincingly supported use of the California Constitution even when the result conflicted with a United States Supreme Court decision. He believed in true federalism.

In citing a very few of the opinions he wrote I certainly do not mean to be flippant or to suggest that on occasion humor replaced rationality in Justice Kaus opinions. Not so. I merely intend to emphasize that Justice Kaus was not only a brilliant legal scholar but that he had the ability to see issues and write about them in a human manner.

I miss Otto Kaus. My colleagues on the bench miss Otto Kaus. More significantly, society and the law miss Otto Kaus.

CHIEF JUSTICE GEORGE: Thank you, Justice Mosk. I would now like to introduce Warren Ettinger, former partner and long-time friend of Justice Kaus. Mr. Ettinger.

MR. WARREN ETTINGER: Mr. Chief Justice George, distinguished associate justices of the court, family, friends and admirers of Otto Kaus:

I thank you for affording me the privilege of coming before you to share some of my thoughts about a friend and a partner and one of the greatest human beings who has ever graced the California appellate courts.

When one thinks of Otto Kaus the legal scholar, one thinks of the body of his written work and its massive contribution to the bench and bar. As an appellate jurist his opinions are known for common sense, fairness, elegance of language, brevity and wit. An example of his ability to find a grain of humor in even the most sordid of events is found in a 1967 opinion, *People v. Hoxie* (252 Cal.App.2d 901, 904 & fn. 1).

In that case Justice Kaus wrote, the “defendant had several weapons in the house, by the use of which he prevented his arrest for several hours.” “A . . . telephone conversation took place between defendant and one Howard Spector, a neighbor. At the request of one of the officers Spector telephoned defendant and said: ‘Jack you are making quite a disturbance;

I'm having a hard time studying.' Defendant replied: 'Howard, I'd like to talk to you, but I'm real busy right now.' "

Then Justice Kaus dropped the following footnote: "The house was being besieged by 40 to 50 officers. Between 300 and 500 rounds of ammunition were expended. Eventually 26 rounds of tear gas ammunition were fired."

Many years ago, Justice Kaus, always ready to help struggling lawyers, was contacted by a young attorney who had been appointed by the court to write a brief for a convicted felon. The young lawyer confessed he did not have any idea what issue could be raised on behalf of his client. Justice Kaus suggested an issue that the lawyer had overlooked. The lawyer thanked the justice and proceeded to brief and argue the issue. When the court rendered its opinion, written by Justice Kaus, the conviction was affirmed.

The next time the lawyer ran into Justice Kaus, he reminded the justice that the very argument he made had been suggested to him by Otto Kaus, himself. Otto agreed that he suggested the issue, but added, "I never said I thought it was a winning argument." That young lawyer is Superior Court Judge Irving Feffer.

Everything from opera to baseball to Brahms to Monet shared a part in Otto's life. Conversations with him would cover a wide canvas. With Otto you had to be prepared to discuss the style of Los Angeles' latest diva and the batting average of the Dodgers' hottest rookie or the latest showing at the art museum. In short, Otto's span of interest covered the entire world and all its wisdom and culture.

Retired Court of Appeal Justice Robert Thompson, one of Otto's closest friends, describes Otto as "enjoying all facets of life, but not always able to cope with them all." When Otto was appointed to the Supreme Court he took an apartment in Northern California. He resided there during the week and would return to his beloved wife Peggy and Los Angeles on weekends. Soon after Otto's appointment Justice Thompson had to be in the Bay Area and was invited to visit Otto's apartment. Bob says, when he arrived, he saw a kitchen sink with dishes piled to the ceiling. Otto apparently saw the look on Bob's face and said, "I haven't figured out how to get them down to Peggy to be washed."

A man of great humor, Otto would make himself the brunt of his own stories. He passed off his World War II military exploits as an officer in the

Corps of Engineers as “a career in the military devoted mostly to getting lost.”

His favorite story was when his wife, Peggy, was called for jury duty on a murder case. The lawyers, recognizing her, went to the judge to point out that the case might go to the Supreme Court and Otto would have to disqualify himself. The judge, agreeing, excused Peggy. As she went out of the courtroom she paused and said, “Well, if you would rather have him than me”

Among the things in my life for which I am most grateful is the time I spent as Otto’s partner, friend, lunch companion, and occasional chauffeur. Spending time with Otto exposed one to a man who was the personification of honesty, thoughtfulness, honor, and graciousness. It was an opportunity to have one’s ideas challenged in a friendly way; to be exposed to new and different approaches to problems and to learn the meaning of the phrase “a man for all seasons.”

When one of Otto’s former law clerks was appointed to the superior court, Otto called to congratulate him. The newly anointed judge thanked Otto for the call, and told him he was at that moment reviewing the rules of contempt in preparation for his new judicial career. Otto told him to put away the rules. “You don’t need to know the rules of contempt to be a good judge,” he said, “just be charming.” Those words help personify Otto Kaus: brilliant, witty, kind, collegial, and always charming.

CHIEF JUSTICE GEORGE: Thank you Mr. Ettinger.

Justice Kaus’s older son, Mickey, served for a year as Justice Mosk’s law clerk, but he has gone on to another calling, as a political journalist and writer. It originally was unclear whether he would be able to make it here today because of the demands of a summons to jury duty. I found a touch of what I can only call poetic irony—because it is not quite poetic justice—in the notion that he might have to miss today’s occasion because of the demands of the court system that his father served so long and honorably.

Throughout Justice Kaus’s service on the Supreme Court, he took frequent advantage of his proximity to his younger son, Stephen, and could often be found discussing the law or sports over dinner with Stephen. We were going to hear from Stephen at this point in the proceedings. However, a medical problem in his family has prevented him from attending. Nevertheless, the

written remarks that he prepared will be included in the record of the proceedings.

[The following comments were contributed by Justice Kaus's son, Stephen Kaus, who was unable to be present.]

STEPHEN KAUS: On behalf of my family, I would like to thank Chief Justice George and this Court for providing this opportunity for me to say a few words of remembrance about my father Otto.

Most importantly to me, Otto was a loving father who is no longer here to share my life. I miss him.

As generations go by, it increasingly appears that law is our family business. Certainly, my father Otto was perfectly suited for it. My brother and I are both attorneys, but the proof is that lately my three-year-old son, Otto's grandson, Jason, has taken to ending his list of justifications for staying up for another half hour to watch "Tom and Jerry" with the phrase, "I rest my case." Worse things could happen than Jason being another attorney.

It was not so obvious for Otto, who came here as an immigrant from Austria, the son of two German-speaking writers. Certainly the idea of functioning at a high level as an attorney in a second language was, as Otto put it in an interview, "preposterous." Once here, Otto's career did not immediately head toward law. Instead he was drafted into the United States Army to help fight World War II. Given Otto's qualifications—intellectual ability and knowledge of German and French—and his complete lack of mechanical ability, it is interesting that the Army put him to work as an amphibious engineer in the Pacific theater.

After the war, Otto, who had married my mother Peggy on January 12, 1943, while stationed at Cape Cod, Massachusetts, came back with vague plans about law school, but more immediate plans of working as a translator. Peggy would have none of that and pushed him into immediate enrollment at Loyola Law School, where he graduated first in his class in 1949. For that encouragement, and for her continued support throughout Otto's career, Peggy deserves much credit. Having seen Otto try to feed himself while in Berkeley, I can fairly say that Peggy's domestic assistance was essential.

Otto had success as a trial attorney, although he hardly fit the stereotype of a courtroom warrior. Many of his cases involved earth movement from

poor construction on Southern California hillsides. After each downpour of rain, we would travel around to see whose backyard had slid down the hill. My favorite story, which I did not appreciate until I found the case in Prosser's tort casebook, involved *Beck v. Bel Air Properties, Inc.* (1955) 134 Cal.App.2d 834, where Otto won a decision that grading on a hillside did not entail strict liability for damage as an ultrahazardous activity because, unlike storage of dynamite or whatever, such grading was safe if done properly. This left a negligence case, which Otto defended. Were I the plaintiff, I would be quite puzzled at how my house was under six feet of mud from an activity that was safe if performed properly and which, a jury had ruled, had not been performed negligently!

In 1961, Otto was appointed to the Los Angeles Superior Court by Governor Edmund G. "Pat" Brown. Otto was only 41, but he properly realized that he was suited for the bench and given that Governor Brown was about to be opposed for reelection by Richard Nixon, it was not clear that the chance would come again soon. After three years, Governor Brown, who had won reelection, appointed Otto to the Second District Court of Appeal, first as an Associate Justice in Division Three and two years later as Presiding Justice for the newly formed Division Five. Otto's qualifications were professional and not political. His activities for the Democratic Party had consisted of walking our precinct with me in tow, but legally, he had worked on the drafting of the Evidence Code and had made a good impression on people with the Governor's ear.

Otto's work on the Court of Appeal, and later on the Supreme Court after his appointment by Governor Jerry Brown in 1981, is available for all to see. Several times since his death, I have been researching issues and have come across one of his opinions which served to clarify what to me had previously been a hopelessly muddled area of law. The older opinions are more tentative, but the clarity of thought and expression are always there, if not always helpful to the particular point I am trying to make in my case.

For me, Otto's appointment to the Supreme Court was a happy event. He stayed during the week in a studio apartment in Berkeley and once a week, on Wednesdays, we went out—to dinner or a movie or whatever. It was a chance to spend time with him that I had not had since leaving Los Angeles in 1970. As usual, Otto would not talk about any of his cases, so we found other topics, such as baseball, opera or our family.

One of the most admirable things about Otto was the relish with which he returned to practicing law. I had thought he would teach or write, but instead

he joined his friends in a law firm, writing briefs and arguing cases. The classic for me was the weekend I spent in Los Angeles while Otto was frantically preparing to defend an *ex parte* contempt motion the following Monday in Ventura County Superior Court in a case involving rival garbage collectors in the San Fernando Valley. Otto's theory was too complicated to recount here, or to remember exactly, but it was a clever, if questionable, hodgepodge of criminal and civil law. Aside from his enthusiasm, Otto even was successful in preventing a finding of contempt. It probably helped that he used to be a judge.

Throughout it all, Otto was unassuming and modest. While the local municipal court judges would be known by everyone in a restaurant, Otto would be unrecognized. On occasion, he would be questioned by police wondering what he was doing moving garbage cans in the alley behind our Beverly Hills home.

Every day, something happens that I wish I could share with Otto. Although his written words still assist me, they are a poor substitute for his presence and his love. I hope that he would be proud of the way my wife Melissa and I raise Jason, but I wish he were here to join us.

Again, it is very kind of the Court to honor Otto in this manner and to give me a chance publicly to thank my father and to preserve a little of what I remember about him. If Jason does practice law, he will join me in having a tough act to follow.

CHIEF JUSTICE GEORGE: I want to thank again those who have contributed their eloquent remarks to today's special session.

In accordance with our custom, it is ordered that this memorial be spread in full upon the minutes of the Supreme Court and published in the Official Reports of the opinions of this court, and that a copy of these proceedings be sent to Mrs. Kaus.