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James Patterson McBaine

Roger J. Traynor*

If one had never known James Patterson McBaine and only read him—the day-to-day life work on evidence and procedure—one would surely ask: Whence comes this earthy quality, this deep-running devotion to the law akin to the love of the soil that is found in men who are close to it and have learned to use it well? If one has also known him—a man as quietly chivalrous as one is likely to meet in a lifetime—one would ask further: Whence comes this gentleness, this stability, this serenity?

It is not surprising that Professor McBaine is from the land of Mark Twain, an outpost of New England and a highroad to the West. His first ancestors in this country came from Scotland, and his great-grandfather settled in Missouri in 1815 after having lived in Maryland and Kentucky. His father, a farmer and banker, graduated from the University of Missouri in 1872. Thirty years later the son received his LL.B. at the same university. (He was to return to it in 1937 to receive its LL.D.) In 1904 he received another LL.B. from Columbia University, and there began a lifetime friendship with Chief Justice Stone, then Associate Professor Stone, who later as Dean called him three times to summer session teaching at Columbia.

He went immediately into private practice with the leading St. Louis firm of McKeighan and Watts, with whom he was associated until 1909. In that year he went to Columbia, Missouri, to administer his father’s estate, and remained to teach part-time at the University of Missouri Law School and to establish the law firm of McBaine and Clark in Columbia. His partner later became president of the Missouri Bar Association, as did McBaine himself in 1926.

The years were active ones. He became Dean of the Law School in 1919, and although he withdrew from regular practice, he continued as counsel in his law firm, specializing in appellate court work. He served from 1920 to 1925 as Chairman of the Commission on Uniform State Laws from Missouri. He served as Special Commissioner of the Supreme Court of Missouri, making findings of fact and recommending conclusions of law in matters in which the Court had original jurisdiction. He served as Special Judge on that court—it was the practice of the court to appoint a special judge when the justices were evenly divided. During these years he taught summer sessions at the Universities of Chicago and Wisconsin as well as at Columbia.

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In 1927 he came to Boalt Hall as a visiting lecturer and soon perma-
nently joined a faculty of great scholars. Each professor thrived in this
company; each had his special qualities of scholarship and temperament,
and somehow this group of individualistic scholars was a highly unified one.
McBaine found the group congenial and stimulating. In turn he brought
to it his rich experience in scholarship and practice in a region situated in
the heart of the country. In an environment popularly characterized as fos-
tering a disposition to ask precise questions, most particularly of those who
appear to have all the answers, McBaine had learned to ask them, to ponder
them, and to answer them brilliantly, as his bibliography bears witness.
Many centuries earlier Socrates demonstrated that there was no better
discipline for the development of ideas.

McBaine bears allegiance to that discipline, but characteristically
makes no ceremony about it. He believes in and practices precision work;
his creed is as simple as that. He believes that one cannot view a problem
from great heights intelligently unless one has arrived at those heights on
foot and knows the distance to them step by step; his creed is as exacting
as that. It is not easy to hold fast to such a creed when problems are as
various and complicated as now. There is a tendency in unsettled times to
indulge in diffuse concern over large problems; it is always simpler in the
face of complications to express concern than to express thought.

McBaine's objectives have not been dramatic ones. He has sought only
to know his subject well, to teach it well, to present its problems clearly
in his writing. In the process he has become a great teacher and scholar.
Law school graduates learn quickly that the practice of the law mercilessly
puts to the test whether they have learned well basic principles of law. An
immensely wise and practical man, McBaine has always understood that
the skills of practice cannot be perfected without a groundwork of theory,
an education that enables a lawyer to have a sixth sense of what his prob-
lem is, so that he will not flounder in its analysis or fumble in its presenta-
tion. In his courses he has educated his students thoroughly in the prin-
ciples and rules of evidence and procedure. It is a challenging education.
The students come to understand the reasons for or against a principle or
rule and to determine its applicability to a given situation. They do not
in the classroom try cases or examine witnesses. It is McBaine's conviction
that they cannot do so competently in a contrived environment, that they
cannot simulate the know-how of actual practice until they are well versed
in its whys and wherefores.

The whys and wherefores of the rules of procedure are not easily taught.
Even the most perceptive student ordinarily has little experience to enable
him to perceive the relation of procedural rules to everyday living, as he
can the relation of the rules of substantive law. Students can readily sense
the reality in the rules governing trespass, arson, bigamy, negligence, titles
to land, breach of trust, that evoke the everyday world. But they come on
the mysteries of the lawyers' craft when they come on venue, jurisdiction,
the province of court and jury, new trials, certiorari, appealable orders.
They come on the finely worked rules of the game devised to give order to the administration of justice.

He who would teach those rules must know their complex patterns and also their complex sources. Then somehow he must make others knowledgeable, by signalizing to them the patterns; and then he must make them wise, by tapping something in their very inexperience that will enable them to understand the rules in terms of their own time.

In matter of fact manner, McBaine has carried on this high task. It is not his temperament to dazzle or confound the uninitiated. Let us see what the rule is about, is his point of departure, and arrive at the reasons therefore—for special appearances, for counter-claims, for res judicata, for pleading fraud specifically. Let us look at it backward and forward—has it withered or grown with the years? How were its roots to begin with? What were the storms it weathered?

So the student comes to understand that procedure, too, evolves from experience, and that as substantive rules are the living stuff of the law, it is the living form. So they come to understand its omnipresence, and then something else, its direct effect on the administration of justice. So they become alert to the need for flexibility in procedural rules, so that they do not become mummy-wrappers, and also to the need of stability, so that they do not become errant rags. And then comes the understanding that he who knows procedure well knows the law whole.

McBaine knows it whole in writing as in teaching. His casebooks are in use throughout the country. They are skillfully assembled cases; they are rich in collateral references, notes, and problems; and the succeeding editions have kept pace with the times. They are books to which the practicing lawyer turns for help in difficult cases. McBaine's California Evidence Manual and his California Trial and Appellate Practice Manual are invaluable at the lawyer's desk, even at the counsel table in court, where decisions must often be made quickly.

On the flyleaf of his casebook on trial practice, Professor McBaine quoted from Chief Justice Taft:

I am especially interested in the matter of procedure, because procedure stands between the abuse of the principles of law and their use for the benefit of mankind. You can have as high and as sound principles of law as possible, but if you have not the procedure by which you can apply them to the ordinary affairs of men, then it does not make any difference what the principles are or how erroneous they may be.

McBaine knows well that sound procedure is basic to justice, and has been quick to condemn misuse of the rules. A case built upon convincing, but inadmissible evidence, a case instituted too late, a case presented to the wrong court—these are disasters that skillful attorneys avoid. He believes that sound procedure is the collective responsibility of the bar. In his writing, as in his teaching, he has shared that responsibility with distinction.

The qualities of a human being that touch the hearts of others defy
analysis; yet always there is some special signature to his way of living that enables his friends to say: This is our friend, who is not quite like any other, not quite like any other person in the world. Is it the delightful inter-mixture of urbanity and gentleness, explained perhaps by heritage, or geography, or the particular experiences of a life, or by all these things and something more, that characterize him as a friend? Is it the ability to look at everything with eyes that see justly and yet sympathetically? Is it the extraordinary freedom from cant or pose, even the harmless pose of erudition that a learned man might well affect? Is it, perhaps most impressive of all, the quality of wholehearted devotion, never expressed except by deed, to the ideas one has come to believe in, to the work one knows must be well done, to those who rely on one's sturdy friendship?

All of these qualities come to mind when one thinks of Pat McBaine. But we can already hear him saying: Stuff and nonsense. I've just been leading my life as best I can, that's all. No more than that.

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...to whom these pages are dedicated in recognition of his enduring contribution as a Writer and as a Teacher in the field of adjective law.