

GARRET MCENERNEY:

California's Greatest Lawyer?

By John Briscoe

When a San Francisco lawyer died sixty-two years ago, the city mourned him as it has no other lawyer. He was not a politician, but he counseled San Francisco's politicians and represented the city in litigation, including cases before the United States Supreme Court, for fifty years, never charging a fee. Though he never attended class there, he served as a regent of the University of California for more than forty years, and when he died at the age of seventy-seven, was the chairman of the Board of Regents. Before he had attained the age of forty, he had represented the Roman Catholic Church in litigation before the World Court. He was, arguably, more than any other person, responsible for the planning of order and reconstruction in San Francisco after the earthquake and fire of 1906. He was that rare commodity in the legal profession—a lawyer who brought it credit. And he was, very possibly, the greatest lawyer in California history.

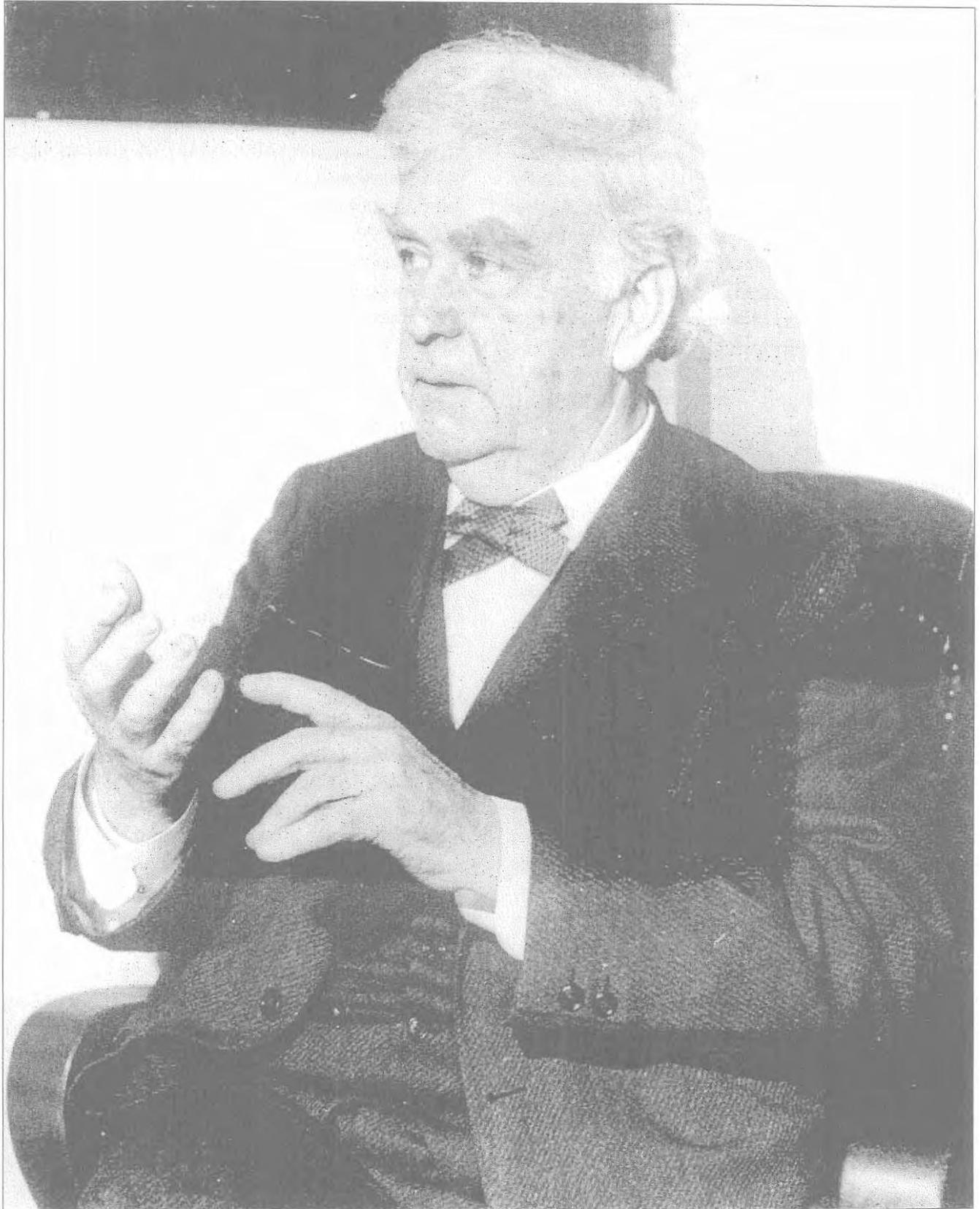
He was Garret W. McEnerney. He was born in 1865 in Napa and was admitted to the California Bar in 1886 at the age of twenty-one. He practiced law in San Francisco from 1889 until the Saturday before the day he died, an early Monday morning, August 3, 1942.

The reports of his death in the four San Francisco daily newspapers of the day could not exaggerate the city's and state's sense of loss at his passing. The lead in the *Call Bulletin's* front page article on August 3 was typical: "One of the most

distinguished legal careers in the history of California ended today when Garret W. McEnerney, eminent San Francisco attorney and chairman of the Board of Regents of the University of California, died from a heart attack in his home at 1998 Broadway." The *News* reported on the same day, "The sudden death of a heart attack of Garrett [sic] W. McEnerney today brought to a close a life that was, in a sense, the life of San Francisco."

In the *Examiner*, a front-page article the following morning began, "Garret W. McEnerney, dominant figure in California legal circles for four decades and leader in San Francisco's civic affairs since before the turn of the century, died yesterday." The *Chronicle's* article that morning led, "California lost part of its glamour, its pioneer courage, its unflagging strength yesterday with the death of Garret W. McEnerney...."

His death was mourned by the local bar and by the political and religious leaders of San Francisco and the nation. John Francis Neylan, long a prominent San Francisco attorney and a frequent courtroom adversary of McEnerney, was quoted in the *Examiner* on August 5: "A real giant has fallen. Garrett [sic] McEnerney was more than just an amazing man. Insofar as San Francisco and California were concerned, he was an institution. In the legal profession, he enjoyed, by common consent, an eminence that will not be achieved by or accorded to any other member in our lifetime. If I dared, I would say something of his wonderful human qualities, but I know how he



Garret W. McEnerney (1865-1942). ca. 1940.
Photo courtesy of The Bancroft Library, University of California, Berkeley

would have scowled at any such utterance."

Mayor Angelo Rossi was quoted in the Examiner's August 4 article: "In the passing of Garret McEnerney, San Francisco lost one of its outstanding public spirited citizens. A native son of California, he worked unceasingly for this State and particularly for the City of San Francisco. The drafting of the McEnerney Act, which enabled our people to establish title to real property in this city after all records were destroyed *in* the fire of 1906, is a monument to him that will endure forever."

In the same article, University of California President Robert Gordon Sproul was quoted: "With the death of Garret McEnerney, the University of California has lost one of the foremost pillars of its strength, a human asset more valuable than any of its material possessions.... His place on the hoard can be filled, but he can never be replaced."

An Examiner story of August 5, headlined "Nation's Leaders Mourn McEnerney," reported that a flood of telegrams and messages had arrived in San Francisco from across the country, "messages seeking to appraise the loss brought to City, State and Nation by the death of the eminent attorney and civic leader." The messages came from such disparate personages as justices of the United States Supreme Court (to which McEnerney had nearly been appointed) and San Francisco Archbishop John J. Mitty, who said, "The city is deprived of a devoted citizen, the legal profession of California of a leading attorney, and the Archdiocese of San Francisco of a most prominent layman."

Forty and fifty years after his death, McEnerney's memory would still be invoked for inspiration. The late Robert S. Daggett was long one of San Francisco's finest trial lawyers, and a partner in the venerable but now demised law firm Brobeck, Phleger & Harrison. On many occasions, Daggett was called on to address the incoming class of new lawyers at Brobeck. When he was, he brought with him into the firm's auditorium a large oil portrait of McEnerney, painted by Arthur James Cahill. As Daggett would recall, William Brobeck and Herman Phleger left the

San Francisco law firm of Morrison, Dunne & Brobeck in the 1920s to begin Brobeck, Phleger & Harrison. (The remains of the old firm are today known as Morrison & Foerster, the largest or second-largest law firm in San Francisco, depending on how you count.) A few years later, Brobeck was killed in an accident in Alaska, leaving Phleger and Harrison, still in their thirties, to run the fledgling law firm. As Phleger, who lived to his nineties, passed on the story, the firm's survival owed much to the friendship and support of McEnerney. McEnerney liberally referred clients to Brobeck, Phleger & Harrison, and counseled young Herman Phleger in the ways of the practice of law in San Francisco.

Appointment to the United States Supreme Court is, in any informed account, more a matter of fortuitousness than merit. (Fortuitousness in large respect accounts for the Court's several brilliant jurists, such as the namesake son of the great American poet Oliver Wendell Holmes, as well as its several fools.) And it was fortuitousness that prevented McEnerney from succeeding Oliver Wendell Holmes, Jr., on the Court. The Examiner's August 4, 1942, article reported that McEnerney had been considered the "logical successor" to Holmes when the great Justice retired in 1932 after thirty years on the high court. But President Herbert Hoover instead appointed Benjamin Cardozo of New York to Holmes's seat. When Holmes retired, McEnerney was serving as a special master of the Supreme Court, in a lengthy and complex case brought by the federal government against the State of Oregon. That fact no doubt made it easier for Hoover to overlook McEnerney and appoint the Court's first Jew. Cardozo became one of the Court's abiding intellectual and moral jewels.

Brilliance, diligence, and an abiding sense of duty carried McEnerney through his great career. Early in it he was appointed attorney for the estate of the former California Senator James G. Fair, and was subsequently named attorney for the William Sharon and James Flood estates as well. He represented the Flood heirs in the famous 1931 trial of the claims of Constance May Gavin.

In 1902, while in his thirties, McEnerney

acted as agent for the United States, representing the Roman Catholic bishops of California in litigation before the World Court (the Permanent Court of Arbitration, as it was then called) in The Hague. In one of the first cases tried before that international tribunal, McEnerney won, and the Mexican government was required to pay the long-controverted "Pious Fund" to the Archbishop of San Francisco. The fund had been established in 1697 by the Society of Jesus (the Jesuits) and the King of Spain, to finance the conversion of the Indians of the "Californias." The Mexican government later succeeded to the fund and its trust obligations. The judgment of the court, in favor of the Catholic bishops, was for the sum of \$1.42 million, plus the payment of \$43,000 annually in perpetuity.

The earthquake and fire of 1906 provided another occasion for McEnerney to exert his abilities. As the *Call-Bulletin* reported on the day of his death, McEnerney was named by Mayor Eugene Schmitz to head the Committee of Fifty, which, in the words of the *Catholic Bulletin* on August 3, 1942, "guided San Francisco's destinies during those tragic days." McEnerney was author of the proclamation that allowed soldiers to shoot looters at sight. Later he wrote and defended in court an innovative piece of legislation that allowed property owners, whose land records had been destroyed in the fire that gutted City Hall and its Recorder's Office, to reestablish their titles in simple court proceedings. The McEnerney Act is still used by San Francisco lawyers today.

In 1931 the United States Supreme Court appointed McEnerney special master in a complex lawsuit brought by the United States against the State of Oregon to quiet title to 82,000 acres of land—nearly three times the land area of San Francisco. In that role McEnerney presided over a lengthy trial of the case, and in 1934 he reported his findings and recommendations to the Court. The following year the Court, after receiving briefs and hearing oral arguments from the parties, decided the case in nearly total conformance with the reasoning and recommendations McEnerney had made. The case is reported as *United States v. Oregon*, 295 U.S.1 (1935).

The week before his death, McEnerney successfully defended The Hibernia Savings and Loan Association in a trial in which the plaintiffs, early depositors of the bank, claimed \$8 million in damages.

McEnerney was the son of John and Margaret (Gunoude) McEnerney. He studied two years at Sacramento Institute, then at St. Mary's College of San Francisco (now Moraga), where he graduated in 1881 at the age of sixteen with a Bachelor of Science degree. His legal education consisted of "reading law"ⁿ—that is, apprenticing to practicing lawyers—in Napa law offices from 1882 to 1886. He practiced law in Napa from 1886 until 1889, when he settled in San Francisco. In the following six years, McEnerney was a member of three law partnerships (Spencer & McEnerney; Maxwell & McEnerney; and Stanley, Hayes, McEnerney & Bradley). In 1895 he established his own firm, named simply The Law Offices of Garret W. McEnerney, and never again took a law partner.

In 1896 McEnerney married Elizabeth Hogan of Napa, but the first Mrs. McEnerney died on September 25, 1900. In 1903 he married Genevieve Green, whose father was a prominent Colusa newspaper publisher; she predeceased McEnerney, by very little, in June 1941. McEnerney had no children by either wife. His closest surviving relative was Garret W. McEnerney II, son of McEnerney's late brother John P. McEnerney. Tall Garret McEnerney II (he was perhaps 6 feet 7 inches tall) later became a prominent San Francisco attorney in his own right.

McEnerney's success as a lawyer was a product of extraordinary ability and a deeply scholarly approach to the law. Lawyers who worked with him, such as prominent San Francisco attorney Robert S. Cathcart, remember his habits of study and his prodigious memory of case opinions read long ago. McEnerney frequently startled young lawyers in his office (not to mention adversaries and judges) with his ability to recall the page within a lengthy law case at which the legal proposition he was asserting could be found. When his extensive law library was destroyed in the 1906 fire, he—fortunately for himself and for

the local judiciary—had the financial wherewithal to promptly purchase new sets of books from a New York dealer. For months afterward the justices of the California Supreme Court researched their cases in McEnerney's law library, their own library having been destroyed in the fire as well.

When McEnerney died, his will left nearly \$800,000 to the University of California, which used much of the funds to construct a new law library at Boalt Hall, the law school at the Berkeley campus. Boalt Hall's law library has since been known as the Garret W. McEnerney Library.

His scholarliness extended beyond the law to literature. With his second wife, Genevieve, McEnerney collected and edited a volume of 1,500 English and American poems. (Genevieve also collaborated with Wallace Alvin Briggs on another anthology of English poems.) Among McEnerney's closest personal friends was the English writer Gilbert K. Chesterton. McEnerney enjoyed the literary companionship and Chesterton, as often as not down on his luck financially, enjoyed McEnerney's generosity with the checkbook.

A tall, leonine figure, McEnerney's reputation for scholarliness and generosity was nearly matched by his reputation for firm opinions. In 1918, during a luncheon honoring a visiting Irish dignitary (this being three years before Ireland gained independence from Great Britain), McEnerney declared his belief that young Irishmen who had fled to America to escape the British draft should be drafted for service in the United States Army. The remark was not promptly forgotten, or forgiven, by some of his fellow Irish Americans.

In the early 1930s McEnerney wrote and argued tirelessly against President Roosevelt's plan to pack the Supreme Court. The President, frustrated with the Court's finding his New Deal programs unconstitutional, proposed to add to the number of sitting justices, and to require retirement. (The President dropped his proposal when, in 1934, Justice Roberts changed his views and became one of a new five-to-four majority on the Court that found Roosevelt's programs constitu-

tional. The Supreme Court was thus left with its original number of nine justices, each appointed for life.)

Six hundred mourners attended the solemn requiem mass for McEnerney in St. Brigid's Catholic Church at Broadway and Van Ness on August 5, 1942. Archbishop Mitty delivered what must be called a eulogy, notwithstanding that McEnerney had insisted that none be given at his funeral. Mayor Rossi, virtually all elected officials of San Francisco, and Presidents Sproul of the University of California and Ray Lyman Wilbur of Stanford University attended the service. No fewer than ten members of the clergy conducted the funeral mass, led by Archbishop Mitty. McEnerney was buried in Holy Cross Cemetery.

One of the more respected members of the San Francisco Bar, Grover O'Connor, wrote after McEnerney's death, "In my humble judgment, there has not been during the lifetime of Mr. McEnerney, a member of the Supreme Court of the United States or a leader of the American bar who was or is Mr. McEnerney's equal as a profound, effective and meticulously honest lawyer... [T]wo former members of the Supreme Court of the United States stated that they considered Mr. McEnerney to be the ablest man who had argued at the bar of that court while they were members of it."

McEnerney's wit was as renowned as his intellect and legal ability. Following his death, a fellow member of the bar told a reporter, "He was always a man of his word. I remember once he had contracted to try a case for a large fee. The case turned out to be more complicated than was first thought, and at the end of a year's litigation the client offered to double the fee. Mr. McEnerney refused to accept it. 'If I had won the case in five minutes, I would have expected full payment,' he said. 'If it takes ten years, I shall accept no more.'" When the case finally ended disadvantageously for his client, McEnerney submitted his final bill with the postscript, "Doubtless you will say the case could have been lost for less."

His wit could be less than lofty. A young attorney in McEnerney's office, privileged to spend a Sunday evening at the elder lawyer's longtime

home on Broadway, found himself after dinner in McEnerney's study. The young lawyer pointed to a door nearly hidden behind piles of books and papers and asked where it led. McEnerney, looking puzzled, opened the door, peered out, and exclaimed, "Why, it leads to the garden; how about that."

The *Call-Bulletin's* lead editorial on August 4, 1942, probably captured best the sentiment of those who knew and mourned McEnerney: "The death of Garret W. McEnerney has deprived San Francisco of another of the leaders of that select and brilliant company of men who literally grew up with their city, and by their wisdom and patience and learning and strength of character shaped her destiny. Garret McEnerney died as the undisputed leader of the California bar. Many call his the most brilliant legal mind that has appeared in California. And he was tireless as he was able. He had practiced more than half a century, yet when he was stricken his career still was in full flood."

This brief look at Garret McEnerney's life, it is hoped, will provoke a however-fleeting examination of the question of why the legal profession today does not produce more citizens like him. Have the values of citizenship eroded? Has the law profession, perhaps in step with much of the rest of society, become too consumed with matters of money, at the expense of public service? Or is it simply that lawyers like McEnerney, like Lincoln, have always been rare?

EDITOR'S NOTE:

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