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A Tribute to Professor Leo Carlin

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TO THE bench and bar of West Virginia, for the past forty years, the name of Leo Carlin has been synonymous with remedial law in all its aspects and phases. When, at the age of 32, after receiving his bachelor of laws degree at West Virginia University in 1910 and practicing law at New Martinsville for six years, he returned to the University as an assistant professor of law, (becoming a professor of law only five years later), it was to supply a recognized need in the field of adjective or remedial law. In October of the same year, 1916, at Philippi, West Virginia, Judge Warren B. Kittle, in the author's preface to Kittle's *Modern Law of Assumpsit,* included a paragraph reading:

> "While the general principles of the law of contracts have been examined to a certain extent, the law of procedure has been fully treated with a view of giving the the practitioner the means of maintaining his action from its inception to the final judgment. *This seemed necessary in view of the fact that nearly seventy-five per cent of the cases are reversed on grounds of adjective or remedial law. Attention to this branch of the law has been too meager in late years. Whoever masters this branch of the law carries a weapon which makes him almost invulnerable in the legal arena, and an adversary both to be feared and admired."*[1]

Professor Carlin's assumption of the role of a teacher and writer, if not, indeed, the cause, at least marked the beginning of a new era in West Virginia pleading and procedure. Being, like most great scholars, a modest man, Leo Carlin would have been the last to proclaim an intention to develop from his law students the *"invulnerable adversary"* envisioned by Judge Kittle. Without any such vainglorious prior proclamation, he did just that, and, today, enjoys the wholesome satisfaction of being at least measurably assured of it. Professor Carlin, in retirement since May 31, 1954, surveying the imposing array of brilliant and erudite West Virginia trial lawyers and trial and appellate court judges who sat at his

* Member of the Parkersburg Bar.

[1] Italics supplied.

feet as law students, can, with Whittier's schoolmaster, very appropriately say:

> "And when the world shall link your names
> With gracious lives and manners fine,
> The teacher shall assert his claims,
> And proudly whisper, 'These were mine!'"

Channing is credited with saying that: "The whole worth of a school lies in the teacher. You may accumulate the most expensive apparatus for instruction; but without an intellectual, gifted teacher it is little better than rubbish; *and such a teacher, without apparatus, may effect the happiest results.*" So it was with Professor Carlin. In the performance of his undertaking to instruct embryo lawyers in West Virginia actions, pleading, practice and procedure, there was little or no *"apparatus"* to be had. Yet, because of the inventive genius of an intellectual, gifted teacher, *the happiest results* were achieved. When he wrote the *West Virginia Law Quarterly* article entitled "Original Methods of Teaching Practice and Procedure,"[2] Professor Carlin could not have realized what only subsequent experience could, and did, prove, *viz.*, the almost flawless efficacy of his *"Original Methods"*. Moreover, it was for him to considerably undervalue his own didactic capabilities and potentialities, in the same article, to ascribe greater glamour to substantive law, because theoretically it is rooted in the spontaneous concept of the *"eternal fitness of things"*, than to remedial law, because theoretically it rests on the arbitrary fiat that *"the law is so written"*. On the subjects of *"disquisition and teaching"*, Edmund Burke said:

> "It must be acknowledged that the methods of disquisition and teaching may sometimes be different, and on very good reason undoubtedly; but, for my part, I am convinced that the method of teaching which approaches most nearly to the method of investigation is incomparably the best; since, not content with serving up a few barren and lifeless truths, it leads to the stock on which they grew; it tends to set the reader himself in the track of invention, and to direct him into those paths in which the author has made his own discoveries."

By what ever cause impelled, it is a certainty that Leo Carlin never contented himself with *"serving up"* to his students, as a teacher, or to the bar generally, as a law writer, the mere *"barren and lifeless truths"* of remedial law. Invariably, and with his

[2] 26 W. VA. L.Q. 165 (1920).

characteristic lucidity, he imparted fertility and breathed the breath of life into procedural law rules by pointing out the *"stock on which they grew"*, thereby dispelling their mysteries and relieving their apparent incongruities.[3] It is at least partly because he was able to so vitalize remedial law that many of his students have preferred to brave the perils and hazards of the courtroom rather than to seek the relative quietude and security of an office practice.

As a law instructor, Professor Carlin had what Locke esteemed *"the great skill of the teacher"*, *viz.*, to get and keep *"the attention of his scholar"*, and, as recommended by Locke, he kept in mind that his business was not so much to teach the student *"all that is knowable, as to raise in him a love and esteem of knowledge; and to put him in the right way of knowing and improving himself when he has a mind to it."*

Many of the ablest law teachers and writers impair their usefulness to the practical, busy, work-a-day-world lawyers by subordinating their delineations of what *is* the law to tedious demonstrations of what the law *ought to be.* Of these, Professor Wigmore is, of course, the outstanding exemplar. While Professor Carlin has done his share of crusading for the purification of the law, (with a highly respectable measure of success), his preeminent position with the bench and bar was earned and maintained by his always readily understandable elucidation of *the law as it is,* almost invariably accompanied by an exposition of the ancient and modern evolutionary developments showing how it became so—and why it is so. Judges and lawyers are bound to deal with *the law as it is,* rather than as they would ordain it, and, hence, they will agree, unanimously, with characteristic Carlin utterances such as appear in his valuable article on "Remittiturs and Additurs".

> "The object has been to seek the truth, however unpalatable. All that is necessary is to face the situation with a realism unadulterated with preference and let common sense have full sway."[4]

Because the major efforts of the full life Professor Carlin has lived have been in the field of adjective law—remedies, pleading, practice and procedure—any discussion of his life and works would

[3] As merely illustrative, see Carlin, *A Modern Substitute for Bills of Exceptions,* 25 W. VA. L.Q. 198 (1918): *The Common Law Declaration in West Virginia,* 35 *id.* 1 (1928); *Common Law Pleas and Subsequent Pleadings in West Virginia,* 38 *id.* 14 (1931).

[4] 49 W. VA. L.Q. 1, 36-37 (1942).

be incomplete if the realities of the present day were ignored, *viz.*, the presently projected change from the statutorily modified common law system of pleading and procedure to a system based upon the federal rules adapted to the substantive law of West Virginia. Observe, however, that this is not to say that now or here is either time or place to debate the merits of the projected change. What is intended is to demonstrate that the members of the bar, whether for or against the proposed change, have followed, from long habit, the wise counsel and admonitions of their preceptor, Leo Carlin, in adopting the *modus operandi* for considering the projected change. The gloomy view of the future under the Federal Rules of Civil Procedure *then held* by most West Virginia lawyers was epitomized by the late Judge Frank W. Nesbitt, of Wheeling, a trial lawyer of the widest experience and the greatest ability, who said:

> "Such are the new rules. Such is the New Deal in pleading and practice and procedure in our federal courts. Code pleading glorified. We of the Virginias and of Maryland are about all that are left in defense of our common-law Alcazar. Our turn to surrender has come. The glories of our past are but tales to be told. A new banner waves over our fortress. The revolution is here. On the first of September of next year, the conquerors plan to take charge. *Sic transit gloria mundi.*"[5]

It is a safe assumption that there is no man alive in West Virginia today who has as clear a conception of what is, or may be, involved in the proposed change as does Professor Carlin, because it goes without saying that he is possessed of the most comprehensive and intensive understanding of our present system and its relation to our substantive law. It is to speak euphemistically to say that his writings provide more than inconclusive clues as to his views as to which system is best adapted to *the production of the issue in the case actually to be tried.* It is the common law system. Most proponents of the proposed change agree, but are for the change, nevertheless, on the theory that, because the ones *actually tried* are so small a fraction of the number of actions instituted, *the production of an issue* is not the primary function of pleading. Because Professor Carlin's assigned and conscientiously assumed duty was to prepare the lawyer for the case *actually to be tried,* he was not disagreeing, necessarily, with the proponents of the

[5] Nesbitt, *The Proposed Rules for Changes in Federal Practice,* 43 W. VA. L.Q. 23, 110 (1936-37).

change, when he said of the *"judicial method", i.e.,* the *common law method,* that:

> "It is the accomplishment of this result—the production of some sort of an issue, however general in its scope—which is supposed to deliver the judicial method of defining and settling controversies from the chaos so generally prevalent in lay disputation."[6]

Of course, he was talking of the generally despised code pleading system rather than the federal rules pleading system, (not then in existence), when, in 1927, he said:

> "There is a limit beyond which attempts to eliminate difficulties from pleading will only succeed in transferring them to the trial of the case where they will arrive spontaneously and add to the difficulties of other matters which often must be settled without proper deliberation."[7]

Professor Carlin's sagacious counsel respecting the proper approach to any change in our procedural system and his temperate, tolerant attitude toward any change itself are shown in his article, entitled "Review of Observations upon Civil Procedure in West Virginia."[8] This article related to a paper shortly theretofore presented by Mr. Kemble White, of Clarksburg, at the Wheeling meeting of the West Virginia Bar Association entitled "Observations upon Civil Procedure in West Virginia." In his review of this paper, Mr. Carlin, said, *inter alia:*

> "One finds no difficulty in agreeing with the general commentary that the law of procedure in this state in many respects could profit by reform, although we may disagree as to the extent of the changes which should be made and as to the methods by which they should be accomplished."[9]
>
> ". . . . Although the writer must concede that his training and his contact with our common-law environment has perhaps prejudiced him in favor of the common-law system, he cannot escape a feeling that we should proceed with great caution toward any proposal contemplating adoption of an utterly new statutory system of procedure. *The writer would be far from shouting calamity in the face of any such proposal, but looks upon the question simply as one of weighing expediencies, and is open to conviction. . . .*

[6] 38 W. VA. L.Q. 14, 19 (1931).
[7] 34 *id.* 30, 32 (1927).
[8] 34 *id.* 30.
[9] 34 *id.* 31.

> Adoption of a practice code in a common-law state must necessarily contemplate abandonment of the old system, and, along with it, of *a great body of judicial precedents that act as guide posts along the way of procedure.* Would it be well to abandon a system which, although imperfect, is defined in its details, has received concrete application to innumerable situations, and has inevitably permeated and colored features of our substantive law and its administration, for a skeleton system, however admirable in its concept, which must be filled in and vitalized through new generations of judicial precedents? Of course it has been the dream of the codifiers to produce a system so simple and so perfect that it would not call for judicial construction. *This has been said to have been their greatest fallacy. No system of pleading will ever enable us to dispense with the necessity for skilled pleaders. Pleading, whatever its nature, will continue to be a science, the elements of which must be mastered by the successful practitioner.*"[10]
>
> ". . . . Wherefore the writer, even at the risk of being classed with the immortal procrastinator, who, in the famous soliloquy in which he speaks of the *'law's delay,'* acknowledges that the fear of what may come hereafter is the thing *'That makes calamity of so long life,'* is willing, at least *for the present,* to express a preference for statutory reformation of our existing system of procedure, in lieu of its utter abandonment."[11]

Since 1927, the federal rules system of pleading and procedure has come into use in our federal courts, and, over a period of almost twenty years, there has accumulated a very respectable number and variety of *"judicial precedents to act as guide posts along the way of procedure"* should the projected switch be made. Accordingly, the bar of West Virginia must be viewed as having followed the admonition of Professor Carlin against hasty adoption of a new, untried and judicially undefined system of pleading and procedure. Expressing complete confidence in the full competence of the Supreme Court of Appeals to regulate matters of pleading and procedure in trial courts, Professor Carlin went on, in the same article, to urge that it be invested with full powers in the premises, saying:

> ". . . . The writer does not share any fear with those who believe that our Supreme Court of Appeals could not be trusted with such matters. He is patriotic enough to

[10] 34 *id.* 31-32. Italics supplied.

[11] 34 *id.* 33. Italics supplied.

believe that the personnel of our court has compared favorably with that of the courts of last resort in other states, and that it is now, and will continue to be, thoroughly competent to exercise any powers of regulation that may be conferred upon it by the legislature. To those who may have any fear of inconvenience arising from a radical or meddlesome exercise of such powers, it may be suggested that experience in other states indicates that perhaps the chief obstacle to the success of such a method of regulation is the fact that the courts have manifested the same tendency to inertia in this respect that has been charged to legislators. Those who might be inclined to fear a variation in the size of the 'chancellor's foot' should remember that our court is composed of five members, fairly representative of different sections of the state, and that the composite foot will not likely at any time vary much from the standard size.

"It is believed that there are three principal reasons why the Supreme Court of Appeals is peculiarly competent to promulgate general rules of practice and procedure. First, all its members would be able to bring expert knowledge to bear upon the task; second, its membership, as compared with that of the legislature, is small and homogeneous; and third, the members of the court would be in a peculiarly advantageous position to observe the practical application of any given rule and to determine its efficacy and the desirability of a change. The limited personnel of the court would insure flexibility of action on the contingency of necessary or desirable changes as the occasion might arise. Any correlated system of regulation must necessarily grow by a process of gradual evolution. The foresight of man never has been, and never will be, sufficient to foretell the full and ultimate effects of new rules or regulations, whether prescribed by statute or otherwise. Such effects, and a determination of whether they are desirable or undesirable, can be fully determined only by the results of practical application, and an appellate tribunal would certainly be in a peculiarly advantageous position to observe the results of such an application."[12]

This suggestion of Professor Carlin has been acted upon and carried out. Previously invested only with authority to *"make general regulations"* for the practice before it,[13] in the Code Revision of 1931, the Supreme Court of Appeals was given rule-making power in relation to all courts of record with the restriction that *"such rules and regulations shall not be inconsistent with the Constitu-*

[12] 34 *id.* 35.

[13] W. VA. CODE c. 114, § 3 (Barnes 1923).

tion and statutes of this State".[14] By Chapter 37 of the Acts of 1935, this restriction was qualified so as to subordinate statutes relating to pleading, practice and procedure to rules promulgated by the Supreme Court. Then, too, since 1927, there has been created the West Virginia Judicial Council for the express purpose of having a body specially charged with the duty of "continuous study of organization, rules and methods of procedure and practice of the judicial system of the state" and of making recommendations in relation thereto to the supreme court.[15]

Near the end of this same article, Professor Carlin, gently but forcibly, reminded the bar that its own *"inertia"* was responsible for the recognized lay feeling of hostility toward bar-sponsored reformatory measures, *conceded not to result from any lay spirit of perversity,* and stated the inconsistent position of the lay press and the method of approach by the bar to the solution of the resultant problem as follows:

> "However, such a concession by the profession to the layman could be made with a much more genuine feeling of tolerant generosity, if it were not for the fact that the lay press, and even the legal press, is continually taking *the profession to task for failure to assume the responsibility of setting its own house in order.*
>
> "Certainly, as suggested by Mr. White, it will be a long time, if ever, before even the most obvious and insistent demands for legal reform will have been satisfied, *unless some radical change takes place in the spirit and attitude of those who must be called upon to lend their sanction.* His suggestion of bringing this change about through some process of education may be accepted as the only solution of the problem."[16]

Here, finally, the bar has followed the suggestions of Professor Carlin. The *inertia* of the bar is gone. To the necessary degree, at least, the *hostility* of laymen and the lay press went with it, and a competent and authoritative rule-making agency has been established by the legislature. And, in considering the projected change in our pleading and procedural system, the familiarization program, recommended by him for the laity to insure the establishment of an authoritative rule-making agency, has been pursued within the membership of the profession itself to insure their informed expres-

[14] W. VA. REV. CODE c. 51, art. 1, § 4 (1931).
[15] W. Va. Acts 2d Ex. Sess. 1933, c. 71.
[16] 34 W. VA. L.Q. 30, 50 (1927).

sions of opinion as to the desirability or undesirability of the projected change.

So, whether the reader be for or against the proposed change, he cannot fail to recognize the underlying wholesome influence of Professor Carlin's views as to the time, manner and method of considering a matter of such transcendent importance to the profession and to the general public. On the subject of probable experience under the proposed new system, if adopted, it is in the highest degree likely that the influence of the common law system will live long after it has been superseded, because, as Maitland said of the English practice, long after the common law forms of action had been abolished in England, and as Professor Carlin has reechoed:

"The forms of action we have buried,
but they still rule us from their graves."

To undertake to review, even without detail, what could be classed as major accomplishments of Professor Carlin's life, including such things as Carlin's edition of *Hogg's Equity Procedure,* his crusades for the purification of our law and the weighty effect thereof upon the course of legislation and judicial precedents and his article on "A Decade of Pleading, Practice and Procedure,"[17] an invaluable public service to our returning lawyer-veterans, would unduly extend the scope of this article. The emphasis has been placed where it belongs, *viz.*, on the profound Carlin influence upon the law in the remedial field and the daily experience of trial lawyers in the trial and appellate courts. It is a force that will live after him. Because of the dynamic force of his didactic genius and the aggressive intellectual honesty of his approach to the consideration, solution and exposition of any legal problem, it is but for the writer to crystallize into wholly inadequate words the concord of opinion of a devoted West Virginia bar to say of Professor Carlin, as was said in a widely different connection of Napoleon, that he is: *"A man without a model, and without a shadow".*

[17] 53 W. VA. L. REV. 1 (1950).