



Volume 26 | Issue 3

Article 2

April 1920

Original Methods of Teaching Practice and Procedure

L. Carlin

West Virginia University College of Law

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Civil Procedure Commons](#), and the [Legal Education Commons](#)

Recommended Citation

L. Carlin, *Original Methods of Teaching Practice and Procedure*, 26 W. Va. L. Rev. (1920).

Available at: <https://researchrepository.wvu.edu/wvlr/vol26/iss3/2>

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

WEST VIRGINIA LAW QUARTERLY And THE BAR

VOLUME XXVI

APRIL, 1920

NUMBER 3

ORIGINAL METHODS OF TEACHING PRACTICE AND PROCEDURE

BY L. CARLIN¹

IT may be said with certainty that the subject of practice and procedure, or the group of subjects more or less definitely associated under this or a similar designation, has presented more problems and caused more enduring perplexity among legal educators than any other subject in the law curriculum. The facts that no fully satisfactory method of presenting the subject has been developed and that even the advisability of teaching it at all is questioned, are alone sufficient to explain a discouraging lack of standardization in methods and materials among the various institutions of legal learning. It would be unjust, even scholastic treason, to undertake to disparage the superlative greatness of some of our past and contemporary educators in the field of the substantive law; but it is believed that it may truthfully be said that the eminence of these teachers may in no small measure be ascribed to the fact that they have been trained under, and later are aided and sustained by, a more or less ideal, standardized system of instruction. On the other hand, the subject of practice and procedure, in some of the very institutions which are most admirably equipped with a wealth of personnel, ideals and traditions to produce great teachers, has been, if not expediently at least

¹Assistant Professor of Law, West Virginia University.

conveniently, relegated to the position of a black sheep in the curriculum family. The result has been, and possibly always will be, partly from the inherent, partly from the local, nature of the subject, that efficient teachers of what we may term the dynamic law must generally be recruited from active members of the bar, who must inevitably depend upon their experience as practitioners for a considerable portion of their teaching equipment. It follows that teachers in this particular branch of the law must build their eminence largely upon strength of personality, individual concepts and inherent didactic genius. Instead of being aided by an admirable system which serves as a repository of the composite experience of his particular branch of the teaching profession, the teacher of practice and procedure must rely in no small degree upon the resources of his originality. Therefore, the following rather informal observations, based upon some few years of personal experience, may be ventured upon without fear of encroaching upon orthodox standards.

No argument is necessary to the effect that a man must know *something* about practice and procedure before he can be sent into a court to try cases. Nobody, except some one gifted with the sublime faith of a Darius Green, would think of sending a man up in the air to fly without first having imparted to him some knowledge of the flight mechanism. The extent of this preliminary training which will be sufficient to change a man from a potentially efficient law clerk into a *lawyer* who is ready to sustain his own flight is a matter about which instructors may very well differ. But one thing is certain: Life is too short to undertake to impart to students a working knowledge of even the bare fundamentals of practice and procedure by actual demonstration in practice court trials. The extent to which the trial of cases may be relied upon as a mere means of imparting knowledge will be noticed later. It is sufficient to note here that a student is entitled to a comprehensive (if elementary), coordinated, systematized knowledge of the subject which he can not get from the trial of a necessarily limited number of cases.

THE COURSE IN PRACTICE AND PROCEDURE

In classes at West Virginia University, in pursuit of this preliminary knowledge, recourse has been had to a combination of three different methods of presenting the subject: (1) by selected

cases; (2) by lectures; (3) by text books. These are named, it is believed, in the order of their importance.

The writer is convinced that the primary object of a course in practice and procedure is not, as in courses of the substantive law, to "train students to think," as it is often expressed, but to give them at least a minimum working knowledge of the subject. This knowledge, from its nature, is to a great extent arbitrary, and hence is of little value to the student, and may be even confusing, except to the extent to which it applies in the jurisdiction where he is going to practice. Consequently, since the subject is so peculiarly local in its nature, it will generally be found advisable, although not absolutely essential, to confine the scope, or at least the nucleus, of materials to the field of the local law. This is particularly true of those institutions which undertake to supply the needs of local jurisdictions and hence find it expedient to lend special emphasis to local rules of practice. We have so found it in the local jurisdiction. A limited field, of course, offers a limited variety of cases from which to select teaching material. As a result, one is compelled in some instances to make use of cases which are not entirely satisfactory. Furthermore, of course the demand for a case book compiled and edited from these local cases would not warrant the expense of publication, and it is necessary to refer the students to original reports. This would be a very great inconvenience if it were not for the fact that the University law library is supplied with numerous sets of the local reports, and may have additional sets whenever needed. The fact that these cases are not edited for the use of students detracts to some extent from their value. Sometimes, it is found necessary to omit helpful facts because they are commingled with a mass of immaterial matter; on other occasions, it is necessary to read an unjustifiable amount of irrelevant discussion in order to get salient facts. All this is recognized and accepted as a necessary evil which demands compromise and adjustment. On the whole, however, the details of the subject have been fairly well expounded in the local decisions, and, with very little supplementation, one is able to select from them a series of cases which gives satisfaction. Rather limited use is made of text books, chiefly for purposes of collateral reading, and to a certain extent as supplementary to the cases. Most local texts are written primarily for the benefit of practitioners, and hence in scope and material are not readily adaptable to the use of students. Lectures,

to the extent that they may be so designated, are chiefly in the nature of explanatory supplementation of the class discussion. Free use is made of the blackboard, principally for the purpose of explanatory diagrams. It is surprising how much mental imagery may thus be translated into homely concrete illustrations. It is also surprising how many misconceptions may thus be discovered and rectified. If the student merely undertakes to remember words, he will soon forget them; but a recognition of relationships is self-sustaining in his memory—it leads to a concept which is a part of his mind.

Since the study of selected cases is made to command most of the student's effort outside of the class room, the problem which confronts the instructor is how to handle these cases in the class room so as to get the best results. Of course the cases are stated and discussed in much the same manner as in courses in the substantive law. But this is far from saying that the case method of instruction gives the same measure of satisfaction here which it gives in the substantive law. The truth is that, owing to the nature of the subject, practice and procedure never will be perfectly amenable to the case method. It must be conceded that matters of practice and procedure do not lend themselves to discussion with the same facility as principles of the substantive law. Most principles of the substantive law may be said to be rooted more or less firmly in a spontaneous concept of the "eternal fitness of things." The discussion of substantive cases is to a great extent for the purpose of unmasking legal principles, which *exist*, instead of being created, and of recognizing their true proportions. The process is a search for reasons. Such is true only to a limited extent in the field of practice and procedure. Too frequently *ita lex scripta est* is the only reason found; too frequently memory must partly supply the place of logic. Such being true, a class in practice and procedure often finds itself at a loss to enter into a discussion of a case after it is stated, a clear statement leaving nothing to be supplied by discussion. The function of the instructor often is to make a clear exposition of arbitrary rules, instead of assuming leadership in a promiscuous discussion; and very frequently his efforts must be directed toward discovery and removal of misconceptions which could never have been formed in a field of the law where logic and intuition are more trustworthy guides. Of course it is not intended to assert that logic and reasoning of the highest order are entirely absent from the mental processes

by which a knowledge of any branch of the law is acquired. It can not be too earnestly impressed upon the student that there is a *system* to the structure of practice and procedure. Systematic memory and coordination, connecting each step in the procedure with every related step, and the habit of forming concepts, by the aid of which a principle will always be readily recognized under its different guises, are of prime importance. The whole system may be looked upon as an architect's plan into which the student undertakes to place the structural details in proper juxtaposition. Coordination may be relied upon largely to take the place of the assimilative process in the substantive law. For it may truly be said that the difference between the respective mental processes employed in acquiring knowledge of the substantive law and of practice and procedure is largely the difference between the processes of assimilation and of orderly accretion. Relatively, one is a process of recognition and the other is a process of construction.

Perhaps what has been said in the abstract may be made clearer by an illustration. Early in his investigation of default procedure, the student is referred to a statute which more or less clearly defines those instances wherein a writ of inquiry is, and is not, necessary. If the student is so inclined, this may be made a mere matter of memory. But if the student desires to know the reason back of the statute, in order to form a concept of the proper functions of a writ of inquiry, he will refer to his knowledge of common-law pleading, which makes a distinction between the right to recover and the amount of the recovery. Later, he will inquire into the various stages of the procedure at which a writ of inquiry is proper or necessary. Here, he will find that, in all those cases where the writ is necessary at all, it is prerequisite to a substantial recovery upon judgments by default, by *nil dicit*, and upon demurrer where the defendant does not plead over. Comparison and reflection will indicate that these three different classes of judgments are identical in the respect that each establishes the right to recover, but not the amount. At a still later stage in the procedure, application of the same concept will explain why these classes of judgments, where a writ of inquiry is involved, never can become final until the writ is executed. Obviously, a student who relies upon memory alone would fail to recognize this fundamental principle as it glides in its different guises along the course of default procedure. Worse yet, relying

on memory alone, he would soon know nothing at all about writs of inquiry.

What has been said need give no offense to those who believe in the educational possibilities of the subject under discussion; nor should it lend any comfort to those who are inimical. It is believed that a frank recognition of limitations which require compromise and of difficulties which must be overcome is the first condition to success in one who would undertake the strenuous task of teaching practice and procedure. On the other hand, if those who believe in killing the patient in order to get rid of the disease are able to show that the lawyer can dispense with a knowledge of the dynamics of his profession; or that the student, by some Olympic process, can spring full panoplied at the same time into the court room and into a full-born knowledge of court procedure; or that he can acquire this knowledge as well and as quickly without the aid of an instructor; then, and not till then, such persons may be entitled to plead imperfections and difficulties in bar of the subject.

During the entire first semester of the third year at West Virginia University, four hours each week are given to this preliminary incursion into the field of practice and procedure fundamentals. The student is led, in chronological sequence, through the various stages of an action at law, from the issuing of the original writ to final judgment and through appellate procedure, including some features of equity practice. Special attention is given to the procedural phases of some of the more usual special remedies, such as attachments, garnishment and injunctions. The work is made intensive. Accuracy is insisted upon; and to this end, students are encouraged to interview the instructor in his office after class hours as to matters not clearly understood in class. There is no time nor opportunity for relaxation or indifference. It is frequently found necessary to omit cases in order to cover the ground.

At the end of this first semester of intensive, comprehensive training, the student is ready for the trial of cases in the practice court. He has been taught the functions of the mechanism, the use of the various levers, wheels, controls and other mechanical accessories: he is now ready for practice flights.

THE PRACTICE COURT

Some time before the end of the semester, each student is supplied with brief statements of facts involved in the cases which he is expected to try. In every case in actual practice, there are certain admitted facts and circumstances commonly known to both parties to the litigation. Also, each side usually knows something about the theory of the other side's case. The statements mentioned are intended to supply such facts and circumstances in imaginary cases. Furthermore, they usually contain certain restrictions, varying with the circumstances of the case, upon the evidence which may be offered, the object being to avoid categorical denials and other unrealities which would detract from the consistency and plausibility of the trial. More as to this hereafter.

The first task of the instructor in preparing these statements is to determine the nature of the cases to be tried. In order to do this rationally, he must have clearly in mind a definite concept of the objects to be accomplished. In this connection, it is believed that the primary function of the practice court is *to teach the student to try cases*, and not to teach him law. Incidentally, he will learn a limited measure of law in this manner, and especially he will translate into the concrete, and hence make clearer, many things which he learned in the abstract during the previous semester. The sequence and coordination of practice and procedure details will incidentally become more definite and fixed. But these matters are only incidental. Briefly, in his practice court work, the student should learn *to translate knowledge into expression and action*; he should *acquire facility*; and he should *acquire poise*.

These generalizations may profit by illustration. The student has learned that certain things are presented to the court by motion: he should now learn that in making motions he should rise; how he should address the court; what he should say, and how he should say it. He has learned that pleading facts must be supported by evidentiary facts, and that the latter facts are introduced by the process of interrogating witnesses: he should now acquire facility in quickly recognizing, and weighing the probative value of, evidentiary facts and in framing his questions so as to bring them out clearly and forcibly without leading the witnesses, at the same time bearing in mind the general theory of his case and accurately diagnosing the probative drift of the testimony. He

should learn to face the court and all personalities involved in the trial with self-respect, without fear, yet with courtesy and consideration. He should strive, with the aid of friendly suggestion, to eliminate all mannerisms and inhibitory manifestations which tend to distort or clog his trial activities. In short, he should learn to act and feel the lawyer in a court room. This is poise, which brings confidence, the possession of which, especially on the occasion of the young lawyer's first appearance in court, may send him far on the road to success; but the lack of which certainly will cause him no end of pain and embarrassment, will temporarily retard his progress, and, if he has weak courage, may lead to failure.

Hence it is believed that cases should be selected for trial which will tend to present the broad, fundamental mechanics of trial procedure, so as to give an opportunity for all the concrete demonstration possible, rather than to lead the student astray upon preliminary, or interlocutory, investigations of obscure or technical legal problems. The issues to be tried, while approximating the usual and average litigation, should be simple and clear-cut. The brief period of one semester offers the minimum time within which to drill the student in trial demonstration. Hence, statements of facts should not be framed with obscure points to test the alertness of the student, with the penalty of going out of court on failure properly to diagnose the case. To do so may give a student profound respect for the difficulties of his profession (which in all probability he has already acquired) and may place him somewhat in awe of the instructor's circumspect knowledge of technical possibilities, but it certainly will be lacking in constructive results. The tendency should be to permit the student, with the exercise of ordinary diligence, to remain in court rather than to throw him out. One can't learn to swim without water; and he would be a very useless trial lawyer who confined his skill solely to ability to stay in court. Of course this does not mean that the student is not going to be left entirely to his own pleading and practice resources, and that he must not suffer the consequences of his mistakes. Compel him to diagnose his case properly and to meet with his own resourcefulness all trial emergencies; but do not make problems of diagnosis and an eternal straining of the vision for pitfalls that do not exist in the average case the goal of his trial efforts. Rather, give him cases which will permit him to demonstrate and develop his trial potentialities. Of course it

should be understood that the student at this stage of his career has completed his courses in actions, common-law pleading, equity pleading, drafting of pleadings, evidence, and most of his substantive courses, and hence should be fully competent to rely upon his own resources.

The work of the second semester of the third year, devoted exclusively to the trial of cases, offers three hours of credit. The semester is divided into five or six terms of court, each term being a week in length, excluding Saturdays. Court is held only in the afternoons. Intervening vacations are two weeks in length, but may be varied to suit circumstances. The first term begins approximately two weeks after the opening of the semester. In addition to the regular terms, an hour is designated in each vacation week as a special term for the purpose of hearing motions and demurrers, although these matters may, at the option of the students, be taken up at regular terms when the work is once well under way. Rules are held twice a week, and all statutory time periods are arbitrarily reduced. Court officers are appointed by the instructor from members of the class, with deputies to serve while these officers are engaged in trials. The practice court equipment includes a court room and a clerk and sheriff's office.² It is deemed important to achieve the actual court room atmosphere as much as possible. Two or more counsel (ordinarily two) are assigned to each side of a case. The parties and the various witnesses are impersonated by counsel. The use of first and second year students and others not members of the practice court class as witnesses is practically prohibited. Otherwise, an indifferent and irresponsible element may be introduced. The jury is selected from members of the class. All members of the class are required to give strict attention to the trial, and, to this end, as well as in order to have the benefit of observations which are often valuable, are required to submit verbal or written criticisms of the procedure.

Counsel are expected to prepare their pleadings and plan their evidence relying upon the statements of facts in much the same manner as counsel in actual litigation rely upon information obtained from their clients. But after the pleadings are filed, they alone are permitted to control the issues. Although counsel are still put upon their honor not to offer evidence inconsistent with

²The new law building will contain a fully-equipped and modern court room. Accessory to it will be a clerk and sheriff's office and a jury room.

these statements, a departure therefrom will never be heard as ground for sustaining a demurrer or for excluding a pleading or evidence. They have no standing in court. In addition to limitations which may be embodied in the statements of facts, general arbitrary restrictions are placed upon the use of certain classes of witnesses and kinds of evidence, for the purpose of producing fairness and originality, as well as to direct development of the trial into profitable channels. For instance, ordinarily—and always, except with the consent of the instructor—a party is prohibited from the use of relatives or intimate business associates of his opponent as witnesses. Likewise, the use of alibis, positive eye witnesses, categorical denials, confessions, declarations and admissions, although permitted under reasonable restrictions, is limited. Otherwise, the trial might develop into a juvenile see-saw of contradictory evidence. Counsel are encouraged, although not required in all instances, to meet opposing evidence by admission and avoidance. It is always understood that advantage shall not be taken of the fictitious situation to deny things which from their nature would not be the subject of controversy in actual litigation. Counsel are admonished, and then depended upon, to exercise their ingenuity as well as their common sense to produce a trial both interesting and profitable, and they rarely fail to measure up to expectations. In order to conform substantially to the requirements outlined above, and especially if counsel are in doubt as to the propriety of a contemplated course of procedure, they are required to consult the instructor. But the instructor will never give any advice as to the legal principles involved nor advise deviation from a contemplated course merely to prevent the litigants from falling into legal error and suffering the consequences thereof.

As to the processes of pleading and trial of the issues, nothing need be said further than that an effort is made to make every detail identical with those of the actual procedure. The results obtained in this respect are extremely gratifying, and, coming extemporaneously, are a full justification of the time spent in the previous semester. It should be stated that the close semblance of reality attained is not at all due to superficial dramatic gloss. Counsel are strongly impressed with the idea that they should plan and present their evidence and other trial incidentals with the sole purpose of developing and sustaining their phase of the case, and not for the purpose of display, amusement or entertainment.

Hence the reality comes, not from preconceived posing and studied phraseology, but from a spontaneous, fighting trial spirit and attitude. This attitude itself possibly makes superfluous an admonition, which, however, is always given, to the effect that those engaged in trials must religiously refrain from any show of dramatics or conscious effort to produce situations of levity which would tend to relax the purpose and poise of the trial. A sufficient variety of occasions for risibility, like Banquo's ghost, will come uninvited. Students are warned that their grades will depend, not primarily upon the result of the trial, but upon the sustained daily effort and ability which they display. The entire discipline of the court room is made to depend upon grade penalties, although the occasion for imposing such a penalty is rare.

PRESIDING JUDGES IN PRACTICE COURT

In the second semester of 1916-1917, a feature was introduced into the practice court methods which is believed to be original. The plan was conceived of inviting *nisi prius* judges to preside over the practice court trials. Invitations were extended to a number of judges and an ex-judge among those who were believed to be peculiarly in sympathy with legal education and willing to make a sacrifice in its cause. Three accepted the invitation and presided over the trials in a manner which left nothing to be desired.

These judges knew nothing about the practice court methods and nothing about the cases to be tried, except from brief statements of facts, duplicates of those submitted to the students, mailed to them in advance, and a very brief explanation of a few special trial features made after their arrival. This explanation required, perhaps, ten minutes of time. As to other trial features, it was suggested that the trials be conducted as in actual practice. For purposes of variety, each judge was encouraged to explain and apply any court rules peculiar to his own jurisdiction.

It was thought at first that it might be necessary to have the instructor sit on the bench with the judge until he should become familiar with the situation. Later, it was found that this was not necessary nor advisable. From the opening of court until the discharge of the jury, the trials proceeded smoothly and automatically, with very few suggestions from the instructor. While the instructor occupied the bench on the opening day of the first

trial, it was observed that remarks and arguments of counsel were addressed to him, rather than to the judge. In order to eliminate this temptation, the instructor thereafter occupied a chair some distance from the bench, where he could assume the position of a spectator. The success of the entire experiment in approximating actual trial practice leaves practically nothing unusual to form the subject of comment. But the general value of the work to the students can not be over emphasized.

When an instructor presides over practice court trials, it is difficult for the students and instructor to get away from the class room spirit. There is lack of formality, a tendency to inquire, a tendency to explain, things all very well within themselves, but which in the court room tend to detract from the student's development of self-reliance. The lawyer relies upon his own knowledge and tries to instruct the court. It is not so easy for a student to assume this attitude toward his instructor, and certainly the attitude will come much more easily and perfectly if the student is given an entirely new atmosphere in which to work. Again, it is said that familiarity breeds contempt; and it may very easily breed contempt of court. A high standard of morale is indispensable in this kind of work and is not easy to attain. Indifference will make it worse than useless. With real judges, who at the same time are strangers, sitting on the bench, the students are placed in an atmosphere as real as is possible outside of the actual court room. They are infused with every incentive which ought to urge them on, not only to do their best in trial effort, but to measure up to the highest standards of decorum. When the young lawyer enters the court room to try his first case in actual practice, perhaps among all the formidable assemblage of personalities therein arrayed against his composure, the judge is the one who most commands his apprehension. In these practice court trials, he faces, not one judge, but in succession several judges from different localities and of different personalities. Success or failure before these judges going out to different parts of the state with their wide influence among prominent members of the bar, will mean more to the student than present elation or humiliation. Success will mean that the student already has made some little reputation as a prospective practitioner before he has been admitted to the bar; while the least which he can expect from unmitigated failure is charitable silence. To sum up, from the atmosphere which these judges bring with them into the court

room come inevitably a greater energy, a closer attention, and an attitude which tends to develop true poise. These things are unmistakably shown in the anxious preparations made for trials, in the frequent and interested inquiries as to the coming of the judges, and finally in the results achieved.

In addition to presiding over the practice court, each judge is given an opportunity to meet the class every day of his visit at some hour in the morning. How he shall employ this hour, with certain suggestions as to the general purposes in view, is left to his discretion. Much of the time is devoted to discussion and constructive criticism of the trial on the previous day. In addition, the students at this hour receive many valuable suggestions relating to the subject of practice and procedure in general. Usually the hour is given exclusively to more or less formal lectures upon practice subjects. Typical subjects for such lectures have been, "The Acquisition of a Clientele," "The Young Lawyer's Day in Court," "The Cross-examination of Witnesses," "The Use of the Code." Stereotyped lectures on legal ethics are avoided. Such lectures are always doubly interesting because to a great extent based upon personal observation and tinged with a local hue.

In conclusion, it should be stated that the work of each judge has been unqualifiedly successful. Each one left both students and faculty deeply indebted to him for the aid he had rendered and for his sacrifice of time and convenience. The coming of war and the consequent enlistment of a large majority of the law students in military service interrupted plans for the years 1917-1919. This year the court is conducted again as in 1916-1917. Measured in results, the innovation can no longer be considered an experiment, and the hope is to retain it as a valued and permanent feature of instruction. The only condition to its continuation is the ability to retain the interest and loyalty of unselfish judges who will lend their time and presence at interims when they can be absent from the arduous duties of the bench.