

Michigan Law Review

Volume 68 | Issue 5

1970

Carrington: Civil Procedure: Cases and Comments on the Process of Adjudication

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Recommended Citation

Jerome A. Barron, *Carrington: Civil Procedure: Cases and Comments on the Process of Adjudication*, 68 MICH. L. REV. 1062 (1970).

Available at: <https://repository.law.umich.edu/mlr/vol68/iss5/8>

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RECENT BOOKS

BOOK REVIEWS

CIVIL PROCEDURE: CASES AND COMMENTS ON THE PROCESS OF ADJUDICATION. By *Paul D. Carrington*. Boston: Little, Brown. 1969. Pp. xxx, 968. \$14.

Law schools have come full circle. Christopher Langdell took us from rule and pleading and court to case and theory and university. But we are tired of that journey. And so we now see another path charted—this time away from university, cases, and theory and back to rule, pleading, and court. Doctrine is in a bad way. The death knell has been sounded for the Langdellian casebook. Those wonderful chapters of over-edited cases, each inserted to prove the precise legal point which its neighbor was inserted to deny, are becoming antiques. Specialists in the ways of legal orchestration and of doctrinal point-counterpoint are no longer the practitioners of an admired art. Doctrine as a framework for a casebook, therefore, has been fairly well, and perhaps justly, repudiated.

If a casebook editor is thoughtful, however, he is put to a hard choice. On the one hand, he is quite willing to break with the doctrinal past. On the other hand, he still wants to write a book with an intellectual framework—a book which will be solid and serviceable. Professor Carrington's resolution of this problem makes a good deal of sense.

At the end of chapter 2, in an interesting section on the effective use of his book, Professor Carrington says that "[i]t is now apparent that the cases contained in this book were not selected for the purpose of communicating doctrine through the language of inductive reasoning" (p. 171). Carrington's chosen framework for his book is not doctrine but process, and he views the process of civil litigation through a lens which is informed and unopinionated.

This book of 951 pages of text is divided into eleven chapters. The first section of the book is designed to require the student to "face almost the whole course at once in a first view" (p. 171). That first view comprises 170 pages and absorbs two chapters. Thus, chapter 1 grapples with problems of enforcing a judgment and attempts as well to expose something of the range in the variety of relief that courts can fashion. Chapter 2 discusses first the meaning of the appellate process and then exceptions to the final-decision rule. There is utility in attempting to teach the arcana of interlocutory-order problems *after* the student has examined the appellate process. Once the student has reflected on what an appeal is, he is in a better position to assess the wisdom of the various exceptions to the general

theme of federal practice that interlocutory orders are not appealable.

Chapter 3, "Persons in Power: The Decision Makers," calls attention to the men who staff the judicial process. The first section of the chapter inquires into qualifications for judicial office. The inclusion of materials on judicial qualifications is a timely but rare undertaking in procedure casebooks. The bewildered response to *l'affaire* Haynesworth is proof enough of that. Chapter 3 also deals with the removal of judges and with disqualification in particular cases—again matters to which we have had, and to which we are likely to have, continuing exposure. The chapter concludes with an introduction to the role of the jury in the judicial process.

In chapter 4, the focus shifts to the trial situation. That chapter discusses the different fact-finding roles of judge and jury. Chapter 5 is concerned with the role that the adversary process plays in making a factual record. Chapter 6 opens with a study of the discovery process and follows with a discussion on pleadings. Thus, the problem of pleading, with which some procedure teachers might begin a book in procedure, comes *after* the material on discovery. Pleading, in other words, is not directly encountered by the student until nearly the middle of the book. Pedagogically, putting discovery before pleading is quite reasonable. Use of the opposite sequence, the more common tack, often does some damage to the hopes of the new world of federal discovery, because students become prematurely fond of the complaint to the disadvantage of subsequent appreciation of the discovery devices. It is at this juncture in the book that the reader begins to comprehend the editor's intention, candidly stated in the introduction, that "proceeding backward" (p. 4) to the study of the judicial process is a conscious design of the book. He argues that some of the difficulties encountered prior to trial are best understood after there has been exposure to the problems of trial. That argument, presumably, explains why the materials on trial precede the materials on discovery and pleading.

The balance of the book covers not only the frequently encountered materials on federal jurisdiction, *res judicata*, and multi-party litigation, but also less traditional subjects, such as professional responsibility and contingent-fee problems, both of which are often scorned or underplayed in procedure courses.

There is little of the how-to-do-it approach in this book: no essays on drafting, no appendices full of stale pleadings. Similarly there is very little concession to the fashions of the moment. Perhaps there is in this regard too little concession. It is interesting that, in the preface to the recent edition of their successful and influential book, Professors Field and Kaplan make the remark that,

although they decided in their new edition to adhere "to the coverage, the method, and the objectives that appealed to us when we began our collaboration,"¹ nevertheless—and to me these are very interesting reflections—their temptation to depart from the first edition was strong:

Certainly one can imagine a worthy and viable course in which a study of the besetting facts of delay and expense of litigation would displace a good deal of preoccupation with procedural doctrine. There are other alternative patterns for the course that would make contemporary sense. But for the present we have stuck to our last.²

Indeed, delay and expense of litigation could well make the theme of a procedure book.

The emphasis in Carrington's volume, however, is institutional; the basic theme is process, and in terms of evoking that theme the book succeeds. Carrington's implicit suggestion is that the judicial process, the rules of procedure, and the problems of federal jurisdiction (on which this book has particularly rich materials) are essentially serviceable to the social needs which litigation is designed to satisfy. But he is realistic enough to point out that use of the process is quite often found to be on a level less than optimal. Chapter 7, "Protection Against Misuse of the Process," is in this regard an especially critical and useful chapter.

In his introduction Professor Carrington writes that his book has a hero: "The hero is the romantic ideal that power can be made to serve principles rather than the men who wield it" (p. 1). He says also that only "the simple minded will believe that power always and unerringly responds to law" (p. 1). I think it clear that these remarks display a liberal and a humanist faith in the courts and their processes—a faith that is quite different from the activist or instrumentalist faith in courts. Ralph Nader has recently pointed out, in that remarkable and non-self-serving honesty which is the despair of his critics, that recent efforts by consumers in the courts have, on the whole, not changed the social landscape as much as the rhetoric expended on the subject might indicate. Carrington's low-keyed approach to the teaching of procedure is not founded on expectations that the judicial process will win very many social revolutions. What he gives us is a competent introduction to the uncertainties of procedure. The book is an effort to acquaint the student with the way courts, particularly the federal courts, manage not only themselves, but also the lawyers and problems that come before

1. R. FIELD & B. KAPLAN, *MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE* xii (temp. 2d ed. 1968).

2. *Id.*

them. The student is encouraged to expect courts to behave fairly, but not, I take it, momentarily.

Looking at the book as a whole, then, it is clear that Professor Carrington is addressing a very particular kind of student. These materials were used by the author and others in unpublished form. Carrington comments on that experience in the book:

Experience reveals that many students are frustrated by the open-ended and speculative character of this presentation. It is to be expected that only individuals with the greatest sense of emotional security can draw solace from the uncertainty that characterizes the judicial process. At some point, however, the educational establishment must admit that it has run out of right answers about which it can be reassuring. [P. 172.]

This frankness and honesty of approach characterize a new and interesting volume in a rapidly growing bookshelf of procedure case-books.

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