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In Memoriam - Jesse W. Carter

Daniel S. Carlton

Leon Green

IN MEMORIAM—JESSE W. CARTER

"He Died As He Lived—Fighting"

Jesse W. Carter died on March 15, 1959, at the age of seventy years. His death was untimely because he was not old. Judge Carter was an ageless man who enjoyed excellent health until stricken with a heart attack in February. He was vigorous and active, both physically and mentally. A few days before the reverse which caused his death, he advised close friends of his intention to return to the supreme court as soon as he convalesced from his heart attack.

On the day of his passing, his son, Judge Oliver J. Carter of the federal court, said to me, "He died as he lived, fighting." This was true.

The background of the Justice reveals a continuous struggle over the years of his life. Basically, Judge Carter was an advocate. This is in part responsible for his great success as a practicing lawyer. It also accounts for his strong decisions as a member of the Supreme Court of California.

Judge Carter was born in the mountains of Trinity County in a remote part of California. His father, a farmer and miner, had migrated to California from Iowa in the traditional covered wagon. The family was large and the means were most modest. At an early age, Judge Carter went to work in the mines. He did not have a formal college education although he was an extremely well read and literate man. He married and went to San Francisco and worked for the street railroad. His sons, Oliver and Harlan, were born in San Francisco, and his daughter, Marian, was born in Redding.

He elected to study law after his marriage. While working for the railroad, he became a student at the Golden Gate School of Law. Judge Carter had tremendous capacity for work; he worked in the day time and attended law school at night time. He committed the United States Constitution to memory while working at a bench in the railroad shop.

It is commonplace to refer to one as a self-made man. Probably no one more deservedly carries this appellation than Judge Carter. He studied law under most adverse circumstances. His goal was achieved by reason of hard work and sacrifice and with the assistance of his wife and family, who all joined in his ambition to become a lawyer and shared in the sacrifices necessary to accomplish his purpose.

After Judge Carter finished law school and was admitted to the bar, he practiced law in San Francisco for a few months. He then moved to Redding in northern California in 1914 and opened a law office. He continuously practiced law in Redding from 1914 until his appointment to the Supreme Court in 1939.

During his distinguished legal career, Judge Carter held various public

offices. He was District Attorney of Shasta County for the two terms from 1918 and 1926. This was during the Prohibition era. While Shasta County was of mining background and liberal in its social attitudes, the District Attorney strictly enforced the unpopular liquor law. In those days the law enforcement policy in small counties was pretty much determined by the District Attorney. Judge Carter took the position that the law should be enforced and it was. There was sharp division of thought on this among the voters, and the "wets" waged a vigorous campaign to defeat him when he ran for re-election. Carter won at the polls, however, by six votes, and weathered an election contest in court when his margin was increased to eleven votes.

As District Attorney, he vigorously enforced other laws pertaining to county government. As advisor to the board of supervisors, he held illegal a printing bill of a newspaper on the basis that one of the members of the board held a chattel mortgage on the paper and that the contract was illegal because of this conflict of interest. After protracted and bitter litigation, the Supreme Court sustained the District Attorney.

Judge Carter always obtained great satisfaction from a remark made by one of his political opponents concerning his conduct of the office of District Attorney. An out-of-town acquaintance asked a local citizen what kind of a job Carter was doing as District Attorney. The reply was: " He is convicting the guilty, and making it damned hot for the innocent."

In 1922 Judge Carter commenced on behalf of a group of farmers a series of lawsuits against the Pacific Gas and Electric Company over water rights on the Pit River in Shasta County. The power company had diverted the waters of the river for power uses. The cases were finally concluded in 1938. They were before the Supreme Court on many occasions and many principles of riparian law were clarified and to some extent developed in these cases. It was a source of great pride to the Judge that during all the years of this litigation the original complaints filed by him never required amendment or revision. With sixteen years of litigation, against the most formidable lawyers in California, this lawyer from a small town was able to sustain his original complaint in a most complex course of litigation. To those who still feel that pleadings have an important office in framing and defining legal issues, the pride of the Judge in his pleadings is quite understandable.

Without doubt Judge Carter was one of the finest trial lawyers in California. And this was so even though he practiced in a small community. He had many cases of great import. As a lawyer he pioneered the way and successfully advocated many new principles before the higher courts.

His knowledge of water law was outstanding. Likewise was his familiarity with the engineering and techniques of the use of water. In examining

engineers he knew their language and could not be diverted by evasive answers or inapplicable generalizations.

For many years Judge Carter served as city attorney for Mount Shasta in Siskiyou County. This city was in great financial distress as a result of an imprudent assessment bond issue. Over the years the Judge successfully assisted in disposing of much of the financial problem, and on his appointment to the Supreme Court, the community was in a healthy condition and has, since then, continued to improve.

As a lawyer, Judge Carter served as special counsel to several public agencies. He conducted litigation on behalf of the City of Redding to sustain its right to own and operate its own water distribution system. Because of certain federal questions involved, this litigation was not ended until the United States Supreme Court denied certiorari. This cause serves as an example of his ability and ingenuity in wholly unrelated fields of law. The water company attacked the city in the state courts on the basis that the bond issue proceedings were irregular; in the federal courts on the grounds that a federal grant contravened the federal constitution; before a federal administrative agency on the charge that the design of the proposed water system was improper and unsound; and, before a state administrative agency on the ground that the city should not be permitted to divert water from the Sacramento River because the riparian rights of lower users would be adversely affected. The capacity and resourcefulness of the Judge was well demonstrated in his successful defense of the city's position before all of the courts and agencies involved.

Among his other legal assignments was that of attorney for the State Dental Board. Much of the early law pertaining to the jurisdiction and authority of this board was developed in cases handled by the Judge as its attorney. Among one attracting great public attention was the famous "Painless Parker" case.

Likewise, he served on the board of governors of the State Bar in its embryo years. He was most active in bar work and continued this interest until his appointment to the court.

He contributed to his own community in many ways. He organized and was the first president of the Redding Rotary Club. He was an honorary member of this club at the time of his death.

He likewise initiated the movement to start the Boy Scouts in Redding. In this work, he not only contributed financially, but he and Mrs. Carter conducted trips to the mountains for the training and pleasure of the boys.

As a private citizen the Judge led a movement in Redding to acquire the distribution system of the power company serving electrical energy to the community. The matter was one of bitter controversy, but the community ultimately took over the facilities and has operated them successfully ever

since. Redding was the first city in California to utilize a special provision of law authorizing the city to exercise a right of eminent domain in such instances. The participation of the Judge in this program was consistent with his belief in the right of people to exercise rights of ownership in the public utility field, particularly where natural resources were used for production purposes.

Justice Carter possessed a fierce loyalty to his friends. This was not a transitory feeling, nor was it dependent on continued close contact. Many of his past associates have been, over the years, the beneficiaries of his devotion. It seemed that he enjoyed the successes of his former associates even more than his own. He was completely unselfish in this respect.

A personal experience perhaps might be permitted. Shortly before his appointment to the bench, the famous Pit River cases were finally completed and the payments in settlement were made. The total involved was in the neighborhood of 350,000 dollars, which in 1938 was a substantial sum of money, and certainly so for a small country office. In celebration, the clients and others connected with the cases joined in a dinner party. The writer had just completed his first jury case and, likewise, his first condemnation case. The jury was deliberating during the dinner and arrived at its verdict while the dinner was under way. The issue in the case was whether the state should pay sixty-two dollars for a right of way in accordance with its contentions, or 900 dollars as contended by the property owner whom we represented, or some amount between these two figures. Youth has its advantages in court, as elsewhere, and the jury brought in a verdict of 850 dollars. On our return to the party the first to meet us at the door was the Judge with an anxious inquiry concerning the result. On learning of the verdict he immediately went into unrestrained and joyous laughter for which he was famous. His praise was lavish, and he proudly announced that the victory compared with the larger case, that only the figures were different. This may seem unreal as written, but it is still accurate and factual. The Judge was not given particularly to direct praise and to a young lawyer his expressions on this occasion were of great significance and pleasure. Twenty-five years later they are of greater importance.

In his earlier life the Judge was a student of literature and poetry. He could quote at length from the works of many of the great poets and philosophers. Frequently, on late trips through the mountain areas of northern California, he would entertain us with recitations from the works of the literary men of the past. One of his favorites was Ingersoll. He could quote almost everything he wrote. His favorite passage was:

Justice is the only worship.
Love is the only priest.
Ignorance is the only slavery.
Happiness is the only good.
The time to be happy is now.
The place to be happy is here.
The way to be happy is to make other people happy.

As a lawyer the Judge had a burning desire to be a member of the Supreme Court of California. He considered this to be his ultimate goal. In 1938 he was elected to the state senate at a special election. He served here only until 1939 when Governor Culbert Olson appointed him to the supreme court.

In keeping with tradition, however, even this was not without obstacles. A provision of the state constitution forbids the appointment of a member of the legislature to a non-elective state office. This provision had been used to dissuade other members of the legislature on past occasions from accepting a court appointment. Some legal minds contended that the Supreme Court was not an elective office because of the California system wherein the voters only passed on whether the incumbent should be retained and there were no other candidates on the ballot. The Judge met the issue and accepted the appointment. By appropriate legal proceedings he established the legal principle that the office was elective and that a member of the legislature was eligible to receive the appointment. The Judge was seated on the Supreme Court in 1939. His son Oliver succeeded him in the senate as a result of another special election in the fifth senatorial district. Oliver remained a member of the senate until his voluntary retirement in 1949. He is now a distinguished judge of the United States District Court in San Francisco. This is one of the few, if perhaps not the only instance in California history, of a father and son holding contemporaneously two of the highest judicial positions in the state. Needless to say, the Judge was most proud of the accomplishments of his son.

To many, Judge Carter, from a personal point of view, went onto the court too soon. He was at the height of his career as a lawyer. Even though he practiced in the country, he possessed a statewide reputation. There were for him broad vistas ahead. He was comparatively young, being only fifty years of age. He was much younger than his years and possessed boundless energy with a great capacity for work.

He wanted to be a judge of the Supreme Court and financial considerations were unimportant to him. He was vigorous on the court and once he determined as a judge how a case should be decided, he again became an advocate to have his views adopted. On occasions, by expressing his disagreement with his associates, his language was strong and perhaps mis-

understood. However, he always maintained a great respect and personal affection for his associates on the court; perhaps even to a greater degree than they realized.

There can be no doubt that the Judge on occasion was a severe victim of nostalgia, and many believed that he yearned to return to the arena of the courtroom. He was a warrior and it was most natural that he would want to return to the battlefield. At the time of his passing he was formulating plans to retire from the court in about two years and re-enter practice on a limited basis.

One of the greatest attributes of the Judge from a professional point of view was his interest in young lawyers. He took great pride in having a part in the development of a young man. Many have benefitted from his guidance. Association with the Judge was no sinecure. As a practitioner he was an extremely hard worker, and he put in many days at his office of twelve hours or longer. He had an aptitude for bringing young men along to their full capacity but without detailed direction. Results were the object, and he did not believe in hand-feeding those working for him. However, he was constantly abreast of the work in his office and he had an unusual faculty of delegating as much responsibility as an apprentice could handle. He expected the work to be done completely and without error. There was no place in his life or office for indolence or mediocrity. The end product must be first class and one that would stand the test in court. The details of performance were left to individual initiative and it irked him to be requested to give constant direction. He was known on occasions to leave in a reasonably conspicuous place the Message to Garcia so that the young men could read or reread it.

For one whose practice was always in a small community, it is believed that the Judge has a fair amount of fruit to show for his work with young men. There are three able judges now serving in various courts who were formerly associated with him, namely, Judge Richard B. Eaton of the Shasta County Superior Court, Judge Samuel F. Finley of the Del Norte Superior Court, and his son Oliver of the United States District Court. In addition, there are at least four reasonably successful lawyers who obtained their original training in practice under his watchful eye.

The Judge possessed a great sense of humor and loved to exchange yarns with his friends. He had a hearty laugh and he almost shook the rafters on occasion in reminiscing of experiences of the past. He always considered that the greatest compliment he ever received as a lawyer was from a justice of the peace in a remote township in Siskiyou. This resulted in a case in which he was defending a man of the mountains for allegedly taking a deer out of season. It was a jury trial. The case of prosecution was weak,

and on its conclusion the defendant's lawyer made a strong argument that the court should dismiss the case without the necessity of the defendant's producing evidence. The argument was concluded near noon time and the motion of dismissal was denied by the court and a recess was taken until afternoon for further evidence. When the justice of the peace left the bench he passed the table of the defendant's lawyer. As he did, he whispered: "I had a good mind to grant your motion, Mr. Carter, but I figured if I did I would be deprived of the opportunity to hear your argument to the jury and I don't want to miss that."

Judge Carter believed deeply in the rights of citizens and jealously resisted any unwarranted infringements of the liberties of people. Many of his decisions on the Supreme Court reflect this philosophy It was not a new one with him, nor was it one from which he ever deviated. He was completely dedicated to the view that governments often tend in the interests of expediency to deprive people of their individual liberties. He was equally dedicated to a constant alertness to and resistance of such practices. Some of these matters perforce are of degree and admit of an honest difference of opinion. The views of the Judge were honest, forthright and unyielding. Those who would justify the means by the end to be accomplished and thus whittle away private rights were consistently met at the threshold by the Judge and resistance continued to the back door if necessary.

All of us are a little more secure in our rights and homes by reason of the devotion of Judge Carter to our cause.

*Daniel S. Carlton**

*A.B., 1931, University of California, LL.B., 1934, University of California. Member of the California bar. Mr. Carlton was formerly associated with Justice Carter in the practice of law in Redding, California.

"He Never Declined to Do Battle for His Convictions"

The writer did not know Judge Carter personally, but a review of his opinions in *tort* cases indicates that he was what is known as a "Jeffersonian liberal," a "common law lawyer," a devout believer in jury trial, a zealous and powerful advocate in behalf of the "underdog" usually identified by him as a plaintiff. These characteristics are quite consistent with each other and are exemplified throughout his judicial career by direct and rugged statement that no one can misunderstand.

A Liberal

The term "liberal" is used in many senses. As applied to Judge Carter it means respect for the rights of the individual, protection under law against injuries inflicted upon him, and full recognition of his political rights. In recent years the courts have been called upon to protect people against oppressive legislation which denied them their political rights. The victims of this legislation found a strong defender in Judge Carter. In *Takahashi v. Fish and Game Comm'n*[1] his dissent would have struck down a statute denying fishing rights to a certain class of aliens. In *Sei Fujii v. California,*[2] concurring with the court in striking down an act denying Japanese aliens the right to own land, he noted that *Takahashi* had been reversed by the United States Supreme Court.[3] In *Gospel Army v. City of Los Angeles,*[4] he dissented from the court's decision upholding an ordinance requiring a religious society to secure a permit and submit to certain regulations in order to collect gifts of goods for distribution to the poor. In *Perez v. Sharp*[5] he concurred with a majority of the court in striking down the state's anti-miscegenation statute. In *Danskin v. San Diego School Dist.*[6] he concurred in the opinion of Judge Traynor denying the power of school authorities to require a loyalty oath as a condition for the use of school buildings for public meetings. Later he dissented in cases upholding loyalty oaths for public employees,[7] and in *Haggerty v. Associated Farmers of California*[8] he dissented from the court's decision upholding an ordinance prohibiting use of sound trucks on highways. Again in *First Unitarian Church v. County of Los Angeles*[9] he dissented from the court's decision sustaining

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[1] 30 Cal.2d 719, 185 P.2d 805 (1947).
[2] 38 Cal.2d 718, 242 P.2d 617 (1952).
[3] Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948).
[4] 27 Cal.2d 232, 163 P.2d 704 (1945), *rev'd,* 331 U.S. 543 (1947).
[5] 32 Cal.2d 711, 198 P.2d 17 (1948).
[6] 28 Cal.2d 536, 171 P.2d 885 (1946).
[7] Pockman v. Leonard, 39 Cal.2d 676, 249 P.2d 267 (1952).
[8] 44 Cal.2d 60, 279 P.2d 734 (1955).
[9] 48 Cal.2d 419, 311 P.2d 508 (1957).

the requirement of a loyalty oath as a basis of tax exemption. A like dissent is found in *Speiser v. Randall.*[10] The decisions in both cases were subsequently reversed by the Supreme Court of the United States.[11] He concurred with the court in holding the Board of Education's action in firing an instructor who took the fifth amendment in an inquiry concerning communist activities as lacking in due process.[12] Judge Carter's dissent was on the ground that the statute was unconstitutional.

His course of liberalism in the protection of other rights is as consistent as in the area of political rights. His uncompromising attitude towards the California "retraction" statute, in cases of libel by newspapers, is indicated by dissents in *Werner v. Southern California Associated Newspapers*[13] and *Pridonoff v. Balokovich.*[14] His opinion in *Orloff v. Los Angeles Turf Club,*[15] giving a person denied his rights under the California civil rights statute a remedy by injunction as well as the penalty provided by statute, plus actual and exemplary damages, has been of great value to other courts and has met overwhelming professional approval.

Likewise his opinion in *Luthringer v. Moore,*[16] holding the user of insecticides for extermination purposes liable to a person in another part of the building for injuries suffered from the escaping poisons, has received wide acclaim, extending as it does the highly commendable doctrine of *Green v. General Petroleum Corp.*[17] No less acceptable, no doubt, would have been his opinion in *Cole v. Rush*[18] holding a liquor dispenser liable for injuries suffered by a wife on account of plying her husband with excess drink, had the court not set its first decision aside and held to the contrary.[19] In this case all the rules of tort law pointed to liability, but the courts generally have denied liability on the basis that the *drinking* and not the *selling* of the liquor was the *proximate* cause of the injury suffered. Of course this is merely judicial camouflage for the undiscussed and important policies which underlie the decision. In some types of cases courts refuse to discuss the controlling policies, and here the policies are such that judges can hardly be criticised for sticking closely to precedent, however weak it may be.

Judge Carter seldom hesitated to extend tort law to meet the emergencies of the case. He thought of legal doctrine as a means by which to accom-

[10] 48 Cal.2d 903, 311 P.2d 546 (1957).

[11] First Unitarian Church v. Los Angeles County, 357 U.S. 545 (1958); Speiser v. Randall, 357 U.S. 513 (1958).

[12] Board of Education v. Mass, 47 Cal.2d 494, 304 P.2d 1015 (1956).

[13] 35 Cal.2d 121, 216 P.2d 825 (1950).

[14] 36 Cal.2d 788, 228 P.2d 6 (1951).

[15] 30 Cal.2d 110, 180 P.8d 321 (1947).

[16] 31 Cal.2d 489, 190 P.2d 1 (1948).

[17] 205 Cal. 328, 270 Pac. 952 (1928).

[18] 271 P.2d 47 (Cal. 1954).

[19] Cole v. Rush, 45 Cal.2d 345, 289 P.2d 450 (1955).

plish justice—protection of the victim against injury wrongfully inflicted upon him. In *Summers v. Tice*[20] he exemplifies his great resourcefulness in finding a way to meet legal doctrine that would have stopped most judges in their tracks. Plaintiff, a companion of two other hunters who fired their guns simultaneously at a bird, was hit in the eye with *one* shot. His companions were concededly negligent in shooting in the direction of plaintiff. But whose shot hit him? Here was a simple but difficult question of causal relation. Judge Carter found more than one way to hold either or both defendants. Nothing other than a reading of the opinion can disclose his masterly craftsmanship which commands the admiration of every torts class in the country.

Summers v. Tice has an echo in subsequent cases. In *Warner v. Santa Catalina Co.*[21] Judge Carter reversed a judgment of nonsuit in favor of the manufacturer of cartridges used in a shooting gallery where plaintiff, a bystander, was struck in the eye by a particle of metal. The evidence was meagre indeed on the issue of causal relation and on negligence, but in firearm cases Judge Carter adhered closely to the common law rule of strict liability with the burden on the defendant to exculpate himself.[22] He fully developed his adherence to this theory in his separate opinion in *Jensen v. Minard*[23] in which the court transferred its early common law basis of liability in firearm cases to a negligence basis supported by res ipsa loquitur. There is not too much difference in the ultimate results under either theory, though Judge Carter's history is probably correct.

In *Stanley v. Columbia Broadcasting System*[24] Judge Carter reduced the test of infringement in the area of literary property to the reactions of the average reasonable man upon the reading or examination of the two productions. But his simple formula did not last,[25] and in *Desny v. Wilder*[26] he was greatly distressed by the "involved and confusing" process, as he thought, the court had developed in dealing with infringement and related problems. His liberal attitude toward the injured victim is demonstrated in numerous other cases. His dissent would have extended a railroad's duty to make search and render aid to an employee who had fallen from a train.[27] He sought the expansion of workmen's compensation to cover wilful mis-

[20] 33 Cal.2d 80, 199 P.2d 1 (1948).

[21] 44 Cal.2d 310, 282 P.2d 12 (1955).

[22] Tucker v. Lombardo, 47 Cal.2d 457, 303 P.2d 1041 (1956).

[23] 44 Cal.2d 325, 282 P.2d 7 (1955).

[24] 35 Cal.2d 653, 221 P.2d 73 (1950).

[25] See Burtis v. Universal Pictures Co., 40 Cal.2d 823, 256 P.2d 933 (1953); Kurlan v. Columbia Broadcasting System, 40 Cal.2d 799, 256 P.2d 962 (1953); Weitzenkorn v. Lesser, 40 Cal.2d 778, 256 P.2d 947 (1953).

[26] 46 Cal.2d 715, 299 P.2d 257 (1956).

[27] Anderson v. A.T.& S.F. Ry., 31 Cal.2d 117, 187 P.2d 729 (1947), *rev'd*, 333 U.S. 821 (1948).

conduct;[28] to extend liability of a county to cover the dangerous abutment of a bridge between ends of private roads;[29] to restrict the immunity of a hospital district;[30] to broaden the right of privacy,[31] and the liability of a general contractor for negligence of a sub-contractor in installing gas fixtures resulting in death of occupants of a home;[32] to strictly construe the guest statute;[33] to reject the doctrine requiring wanton and wilful conduct toward gratuitous licensees;[34] to restrict immunity of an official or citizen making false arrest;[35] to repudiate the defense of contributory negligence of a husband as a bar to a recovery by the wife for personal injuries resulting from negligence of the husband and a third person;[36] and, to permit a wife to maintain a suit for loss of consortium where the husband has been seriously injured by a defendant's negligence.[37]

The constant and insistent efforts of Judge Carter throughout his tenure to expand the law through the judicial process to meet the rapidly changing environment, and to cleanse it of the barnacles of yesterday, marks him as one of the great liberal judges of the century. He did not possess the grace of expression of Judge Cardozo and some of the other liberal judges of his time, but his rugged and forceful expression gives his opinions high place in the liberal literature of the law.

Common Law Lawyer—Jury Trial—Advocate

The opinions of Judge Carter reflect a profound understanding of the common law, its principles, theories, doctrines, formulas and rules. He knew that every principle had a counter principle; every theory a counter theory; every doctrine a counter doctrine; every formula a counter formula; and every rule a counter rule. He knew that for every legal weapon the law placed in the plaintiff's hands, it placed one equally lethal in the hands of the defendant. He knew that the common law had developed over a long period by great efforts as an indestructible argumentative system for laying

[28] Mercer-Fraser Co. v. Industrial Acc. Comm'n, 40 Cal.2d 102, 251 P.2d 955 (1953).

[29] Vater v. County of Glenn, 49 Cal.2d 815, 323 P.2d 85 (1958).

[30] Talley v. Northern San Diego Hosp. Dist., 41 Cal.2d 33, 257 P.2d 22 (1953).

[31] Gill v. Hearst Publishing Co., 40 Cal.2d 224, 253 P.2d 441 (1953); Gill v. Curtis Publishing Co., 38 Cal.2d 273, 239 P.2d 630 (1952).

[32] Dow v. Holly Mfg. Co., 49 Cal.2d 720, 321 P.2d 736 (1958).

[33] Panopulos v. Maderis, 47 Cal.2d 337, 303 P.2d 738 (1956).

[34] Palmquist v. Mercer, 43 Cal.2d 92, 272 P.2d 26 (1954).

[35] Peterson v. Robison, 43 Cal.2d 690, 277 P.2d 19 (1954); Turner v. Mellon, 41 Cal.2d 45, 257 P.2d 15 (1953); Coverstone v. Davies, 38 Cal.2d 315, 239 P.2d 876 (1952).

[36] Bradley v. Chadwick, 45 Cal.2d 183, 288 P.2d 12, 289 P.2d 242 (1955); Kesler v. Pabst, 43 Cal.2d 254, 273 P.2d 257 (1954); Flores v. Brown, 39 Cal.2d 622, 248 P.2d 922 (1952); Zaragosa v. Craven, 33 Cal.2d 315, 202 P.2d 73 (1949).

[37] Deshotel v. A.T.&S.F. Ry., 50 Cal.2d 664, 328 P.2d 449 (1958), discussed in Green, *Protection of the Family Under Tort Law,* 10 HASTINGS L.J. 237 (1959), noted in 10 HASTINGS L.J. 214 (1958).

open every case that comes to court. Moreover he had developed great facility in using the weapons of the law, stroke and counter stroke. This knowledge and facility gave him remarkable powers as an advocate. His advocacy breathes the atmosphere of the trial court, a sense of outrage at the injustice done his client. From no other source could he have acquired the strong words of his dissenting opinions. In the Supreme Court when he had made up his mind as to the justness of the cause, his advocacy for the position he took assumed all the color of his trial experience. Apparently he had no greater joy than springing to the kill of some error he found in the opposing position. He was no mere jabber; he swung with all his might.

Perhaps Judge Carter would be considered a plaintiff's judge, an advocate for the underdog. In part this was no doubt due to his liberal philosophy. But there was a deeper base. As a student of the common law he knew that the early history of tort law was based on the principle that one who hurts another should compensate him for his hurt. He knew that during the great era of the industrial revolution this principle was greatly modified through the development of the law of negligence.[38] He knew and had witnessed the reaction to the weakness of negligence law which set in during the late 1800s and the accelerated speed it has attained in recent years, resulting in the modification of negligence law and, in many instances, in the sweeping away of the numerous immunities under which wrongdoers escaped liability to their victims. This reaction accorded with his liberal philosophy and he himself, as practitioner and judge, labored mightily to remold negligence law to meet the urgencies created by the dangerous activities and machines of modern life.

Judge Carter came to know that the rules of procedure and refinements of negligence law, as is true in equity, are designed to the ends of justice and not to defeat justice. His keen mind made him realize that no rule of tort law could decide any case where the facts were complicated or in dispute. He learned from experience that the facts of a case are of the highest importance and that their alignment and interpretation by trial judge, jury and appellate court are the controlling factors in nearly every case. It was thus that in writing for the court, in concurring and in dissenting opinions, he so patiently and thoroughly regimented the facts of a case and sought to bring his interpretation of the facts under some theory, rule or practice that supported what he considered the just decision. This attitude toward facts made him place great reliance on the verdicts of juries. He was at war with doctrinal refinements which permit a trial judge to control juries by surreptitiously charging on the weight of evidence under guise of stating a rule of law, and which are as frequently used by appellate courts to sap the functions of the trial judge and jury. Perhaps Judge Carter's devotion to

[38] See GREEN, TRAFFIC VICTIMS: TORT LAW AND INSURANCE (1958).

jury trial is the most pronounced phase of his judicial performance. Of his contemporaries doubtless only Mr. Justice Black has a place with him in the top bracket of reverence for jury trial. His loyalty to it as an institution seemingly never faltered or lost its edge.

In scores of cases Judge Carter argues for the rule of "reasonable minds" as one for the jury, and against the trial or appellate court's taking over the jury's functions.[39] His advocacy seems to reach its peak in sustaining a verdict, whether for plaintiff or defendant.[40] His resourcefulness in argument is indeed remarkable.[41] Even though he agreed with the decision of the majority he seldom passed the opportunity to set forth his views if he disagreed with their reasoning.[42] The weight to be given the violation of a traffic statute or ordinance in negligence cases has given courts everywhere much trouble. The California courts are no exception. Judge Carter's common law breeding apparently influenced him to insist that the violation of a statute should be tested by the conduct of a person of ordinary prudence, as determined by a jury.[43] Incidentally, in recent years courts generally are turning in this direction. Judge Carter, concurring in the dissent of Judge Spence, thought this to be the test in the case of leaving the key in the ignition of a car.[44]

Res Ipsa Loquitur

It is doubtful that any other court has accorded res ipsa loquitur so much importance as has the California court. The well known *Ybarra*[45] and *Dierman*[46] cases, together with the more recent attempt to stabilize the doctrine in *Burr v. Sherwin-Williams Co.*,[47] have made the doctrine an im-

[39] Richardson v. Ham, 44 Cal.2d 772, 285 P.2d 269 (1955); Callahan v. Gray, 44 Cal.2d 107, 279 P.2d 963 (1955); Shoemaker v. Wilsey, 43 Cal.2d 686, 277 P.2d 17 (1954); Gray v. Brinkerhoff, 41 Cal.2d 180, 258 P.2d 834 (1953); Goodman v. Harris, 40 Cal.2d 254, 253 P.2d 447 (1953); Pirkle v. Oakdale Union Grammar School Dist., 40 Cal.2d 207, 253 P.2d 1 (1953).

[40] Kircher v. A.T.&S.F. Ry., 32 Cal.2d 176, 195 P.2d 427 (1948); Rice v. California Lutheran Hosp., 27 Cal.2d 296, 163 P.2d 860 (1955); Kirk v. Los Angeles Ry., 26 Cal.2d 833, 161 P.2d 673 (1945); Polk v. City of Los Angeles, 26 Cal.2d 519, 159 P.2d 931 (1945).

[41] Hilyar Union Ice Co., 45 Cal.2d 30, 286 P.2d 21 (1955); Austin v. Riverside Portland Cement Co., 44 Cal.2d 225, 282 P.2d 69 (1955); Barrett v. City of Claremont, 41 Cal.2d 70, 256 P.2d 977 (1953); Brokaw v. Black-Foxe Military Institute, 37 Cal.2d 274, 231 P.2d 816 (1951); Finnegan v. Royalty Realty Co., 35 Cal.2d 409, 218 P.2d 17 (1950); Moore v. Belt, 34 Cal.2d 525, 212 P.2d 509 (1949).

[42] Clement v. State Reclamation Board, 35 Cal.2d 628, 220 P.2d 897 (1950); Sebrell v. Los Angeles Ry., 31 Cal.2d 813, 192 P.2d 898 (1948); Fuentes v. Tucker, 31 Cal.2d 1, 187 P.2d 752 (1947); Combs v. Los Angeles Ry., 29 Cal.2d 606, 177 P.2d 293 (1947).

[43] M & M Livestock Transp. v. California Auto Transp. Co., 43 Cal.2d 847, 279 P.2d 13 (1955); Saterlee v. Orange Glenn School Dist., 29 Cal.2d 581, 177 P.2d 279 (1947).

[44] Richards v. Stanley, 43 Cal.2d 60, 271 P.2d 23 (1954).

[45] Ybarra v. Spangard, 25 Cal.2d 486, 154 P.2d 687 (1944).

[46] Dierman v. Providence Hosp., 31 Cal.2d 290, 188 P.2d 12 (1947).

[47] 42 Cal.2d 682, 268 P.2d 1041 (1954).

portant factor in many cases. It was a favorite with Judge Carter, and with his great ability to analyze the facts he could sustain the plaintiff's case in many instances where the court found the doctrine either not available or else overcome by countervailing evidence. These cases must have raised Judge Carter's blood pressure for his aruments supporting jury determination of the issue were frequently throbbing with outrage.[48] They indicate how difficult it is to give res ipsa loquitur a uniform meaning, even procedurally in every case, and no one thinks it can be given a uniform weight substantively. The attempt to do either requires nice refinements and sooner or later results in confusion.

Circumstantial evidence must necessarily vary in weight in different cases and this applies as well to circumstantial evidence characterized as res ipsa loquitur. The same is true or should be true of its procedural effect. The same phenomena are found in the weight and procedural effect to be given the violation of a statute or ordinance. Calling such violation negligence per se only involves a court in deeper trouble. Res ipsa loquitur and negligence per se are in fact twin doctrines, one operating in the common law field, the other in the statutory field. The violation of a statute also speaks for itself. But what does it say? In one case it may merely whisper while in another it may scream, as is true of res ipsa loquitur. But in every such case of common law or statutory negligence there are other facts which are not spoken by the mere happening. It is becoming quite common to treat statutory violations as res ipsa loquitur cases, and this gives point to Judge Carter's testing of statutory violations by the common law rule of negligence. The law would not lose much if both doctrines were thrown overboard, as the courts could deal with the situations characterized by both doctrines under their common law powers. But there is no likelihood that the doctrines will be thrown into discard. This may be speaking too quickly. The California court, in the recent case of *Brandelius v. City and County of San Francisco*,[49] has discarded the false doctrine of "unavoid-

[48] Trust v. Arden Farms, 50 Cal.2d 217, 324 P.2d 583 (1958) (broken milk bottle); Phillips v. Noble, 50 Cal.2d 163, 323 P.2d 385 (1958) (majority held that "happening of accident no evidence of negligence" instruction not inconsistent with res ipsa loquitur when no instruction requested, but would be inconsistent if res ipsa loquitur arose as a matter of law); Barrera v. De La Torre, 48 Cal.2d 166, 308 P.2d 724 (1957) (car crossed curb into plaintiff's house; P did not request instruction on res ipsa loquitur, and charge of presumption of no negligence given for the defendant); Danner v. Atkins, 47 Cal.2d 327, 303 P.2d 724 (1956) (truck rolled into plaintiff's cafe); Leonard v. Watsonville Community Hosp., 47 Cal.2d 509, 305 P.2d 36 (1956) (inference overcome by testimony of adverse witness under CAL. CODE CIV. PROC. § 2055); Simmons v. Rhodes & Jameison, Ltd., 46 Cal.2d 190, 293 P.2d 26 (1956) (burns resulting from cement); Seneris v. Haas, 45 Cal.2d 811, 291 P.2d 915 (1955); Farber v. Olkon, 40 Cal.2d 503, 254 P.2d 520 (1953) (res ipsa loquitur not available to mental patient injured while under electric shock treatment).

[49] 47 Cal.2d 729, 306 P.2d 432 (1957).

able accident," as was protested by Judge Carter in *Parker v. Womack*.[50] It has also had less and less to say about proximate cause, sole cause and other "causes," equally false issues, since the celebrated case of *Mosley v. Arden Farms*.[51] If some pages could be torn out of the Book of Approved Jury Instructions further progress in this direction might be made, and, with a few more lectures like that of Judge Shinn in *Werkman v. Howard Zinc Corp*.[52] the progress would be accelerated.

The recent case of *Alarid v. Vanier*[53] deserves special attention. There defendant rammed plaintiff's automobile from the rear. The operation of defendant's car was in violation of statute. The collision was characterized as a res ipsa loquitur situation. In the suit brought by plaintiff the trial court gave the discarded "unavoidable accident" instruction, and the "mere-happening-of-the-accident-no-evidence-of-negligence" instruction, even though it is error to give such an instruction in a res ipsa loquitur case. The jury found for defendant. The court reviewed the violation of statutes cases and held the true rule to be:[54]

> In our opinion the correct test is whether the person who has violated a statute has sustained the burden of showing that he did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law.

This test of course does much to moderate the negligence per se doctrine. The court held that the erroneous instructions were non-prejudicial or harmless, despite the strong dissents of Judges Carter and Shenk. The case is a remarkable example of how American appellate courts have succeeded in developing practices that permit them to take the administration of justice in their own hands. It may well be that even though jury trial is not discarded in American courts, in civil cases, as is largely the case in all other common law jurisdictions, we may arrive at the same result through the growth of appellate power to control jury verdicts.

Last Clear Chance

Judge Carter was jealous in protecting the last clear chance doctrine. He was counsel in *Girdner v. Union Oil Co.*,[55] one of the leading cases of the country if its facts be considered and its struggle to make the case rest upon proximate and remote cause be disregarded. It is very strange how clearly the court states the last clear chance rule in the early part of its

[50] 37 Cal.2d 116, 230 P.2d 823 (1951).

[51] 26 Cal.2d 213, 157 P.2d 372 (1945).

[52] 97 Cal. App.2d 418, 218 P.2d 43 (1950).

[53] 50 Cal.2d 617, 327 P.2d 897 (1958); *cf.* Laird v. T.W. Mather, Inc., 51 Cal.2d....., 331 P.2d 617 (1958).

[54] Alarid v. Vanier, 50 Cal.2d 617, 624, 327 P.2d 897, 900 (1958).

[55] 216 Cal. 197, 13 P.2d 915 (1932).

opinion and then again in the concluding part. Says the court: "The rule of the last clear chance means just what the words imply." Truly a doctrine based on time sequence too simple to be misunderstood! But the court was not satisfied with so simple an answer. It says: "The real issue in cases of the character here involved is not whose negligence came *first or last,* but whose negligence, however it came, was the proximate cause of the injury." Then the payoff: "The real question to be determined in considering cases of the chartacter of the one here involved is whether or not the so-called continuing negligence is the proximate or remote cause of the injury, *which question is determined by the application of the principles of the doctrine of the last clear chance itself." Why bother about proximate and remote cause if they in turn have to be determined by the last clear chance?* The court's statement of *last clear chance* leaves nothing to be added. Why were not the court and subsequent courts satisfied with this simple and understandable statement? If we could answer that question we could say with the poet, "we know what God and man is."

Judge Carter seldom had his way about the application of the doctrine.[56] In *Brandelius v. City and County of San Francisco* the court affirmed the trial court's granting of a new trial for minor defects in the instructions. The court thought that the rule as stated in *Girdner,* after being cuffed around for so many years, needed clarification. Judge Carter rejected the clarification as confusing and full of inconsistencies. The pride of craftmanship no doubt had some effect on his judgment, but it may be that the restatement of the rule, as is the case with most restatements, will simply be a point of departure for other refinements of the rule as restated. The more recent case of *Garibaldi v. Borchers Bros.*[57] seems to bear out this observation. There the court says:[58]

> Before concluding this phase of the discussion we should state that it appears that any instruction, such as BAJI 205-A, Third Paragraph, is technical in nature and is of little, if any, assistance to the average jury in applying the last clear chance doctrine. It would be more helpful, in our opinion, if the courts would frankly recognize that the last clear chance doctrine is in reality an exception to, or modification of, the ordinary rules making plaintiff's contributory negligence a bar to plaintiff's recovery.

Then the court proceeds to add to this very sensible statement the confusing talk of proximate cause. Of course there must be causal relation about which there is usually no doubt, but "proximate cause" in this context does not mean causal relation. If there is doubt about causal relation

[56] Doran v. City and County of San Francisco, 44 Cal.2d 477, 283 P.2d 1 (1955); Sparks v. Redinger, 44 Cal.2d 121, 279 P.2d 971 (1955); Daniels v. City and County of San Francisco, 40 Cal.2d 614, 255 P.2d 785 (1953); Rodabaugh v. Tekus, 39 Cal.2d 290, 246 P.2d 663 (1952); Selinsky v. Olsen, 38 Cal.2d 102, 237 P.2d 645 (1951).

[57] 48 Cal.2d 283, 309 P.2d 23 (1957).

[58] *Id.* at 290, 309 P.2d at 27.

it should be submitted to the jury as a separate issue and not be permitted to confuse the simple and easily understood concept of last clear chance. And it must in fairness be said that the court as indicated by the last sentence in the paragraph from which the quotation is taken is so inclined. Both the last clear chance and causal connection are fact inquiries, but for clarity they should be kept separate. Suffice it to say that Judge Carter was very distressed by the continued restrictive process in the applications of the last clear chance doctrine and repeated what he had said in *Brandelius*.

This much may be added: The court put its finger on the significance of the last clear chance doctrine when it said the doctrine is simply a modification of the contributory negligence doctrine, the harshest doctrine of the common law. At times contributory negligence has represented a sort of sanctified harshness. Three rather recent cases of the New York Court of Appeals indicate how that court has swung away from the letter of the last clear chance rule to the spirit of the rule.[59]

Any adequate evaluation of Judge Carter's contribution to tort law would be impossible in so brief a study and at this time. This will have to await the further development of tort law. It may be, as has been true of other great common law judges, that Judge Carter will only gain his full stature after death. As indicated by the volume of his output and its clarity of thought content, he gave all he had to his work. But what he contributed is so much a part of tort law as shaped by the whole court that his full influence in its shaping can never be known. The opinions he wrote were necessarily influenced by his fellow judges as were those they wrote influenced by him. The impression is gained from the development of tort law during his tenure that Judge Carter served as a stimulant to his brother judges to do their best. They knew they had to be prepared to meet his arguments, for no one can say he ever declined to do battle for his convictions. And no doubt the freedom to dissent which he asserted influenced his able associates to do likewise, for the reports of no other state court disclose so many dissents. Moreover, they do not seem to follow any pattern except the individual views of the dissenters. A free court makes for a jurisprudence robust with justice. And this must be added. During Judge Carter's tenure the court has become the leading court of the country in tort law. Being an able and experienced lawyer in this broad field of general law he must have had a large share in bringing the California court to this preeminence.

*Leon Green**

[59] Kunkumian v. City of New York, 305 N.Y. 167, 111 N.E.2d 865 (1953); Chadwick v. City of New York, 301 N.Y. 176, 93 N.E.2d 625 (1950). *Cf.* Panarese v. Union Ry., 261 N.Y. 233, 185 N.E. 84 (1933).

* B.A., 1908, Ouachita College; LL.B., 1915, University of Texas; LL.D., 1938, Louisiana State University. Professor of Law, University of California, Hastings College of Law. Member of the Connecticut, Texas, and Illinois Bars.