

A TRIBUTE TO DEAN ELVIN R. LATTY

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Upon the eve of the retirement of Elvin R., better known as "Jack," Latty, following a long period of distinguished service on the faculty of the Duke University School of Law, I shall be dealing mainly with Dean Latty's words and the ideas into which those words were fashioned. No one knows better than he how dealing with words or ideas once removed from their source may, unwittingly, result in nuances not intended when interpreted through the eyes and mind of the reader. One is reminded that every law teacher who has engaged in the teaching of the course in corporations or securities regulation, as has Dean Latty, has likewise been heavily involved in interpreting numerous corporation laws—those serpentine statutes, enabling and otherwise, operating in these areas. The advice given by one great teacher and later Supreme Court Justice, concerning the interpretation of statutes generally, is pertinent here as you read the ensuing observations of this tribute: "One more caution is relevant when admonished to listen attentively to what a statute says. One must also listen attentively to what it does not say."¹ If nuances there are, I hope that they may be in the right tone cluster. And the second sentence of the quoted passage is as important here as is a rest or grand pause in a Beethoven Symphony.

For several weeks I have been reading and making notes on the major part of the writings of the man we are honoring. I had read most of the pieces as they appeared in the various legal publications over the years, but not with the intensity they deserved nor with a comparative eye. I had not, for example, noticed Dean Latty's beautiful command of English nor his change of pace from paragraph to paragraph which makes interesting for even the lay reader matter

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1. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 536 (1947).

that otherwise might have been pedantic and dull.² If I were to seek the origins of this stylistic mastery, I would point to Dean Latty's schooling at Bowdoin College in Maine at a time when Latin was required by the school or at least elected by the bulk of students, as were the Romance languages. Moreover, Dean Latty's teaching of Romance languages for four years at the University of Vermont, prior to his study of law, must have significantly enhanced both his vocabulary and his structural use of his native tongue. And to a certain extent, I would assign to the same sources his incisively logical mind, so clearly demonstrated by the questions which he poses and the hypothetical problems which he projects in his legal writings.³

LATTY AS TEACHER

I begin by observing that our subject is a fine teacher, for that is, after all, a professor's primary job. A law teacher's task is to instruct his students in such a way that they will do most of the thinking and will arrive at their own conclusions, rather than to feed them intellectual pap in the black print rubric style of a text book. The professor has a self-imposed duty to steer the student through a maze of legal principles during which the student may see one or several possible answers to the problem presented. Instructional emphasis should center upon an analysis of the facts stated in the problem with a tying-in of the related legal principles previously developed and a consideration of whether circumstances have so changed since the principles were enunciated that it is reasonable to conclude that a court may accept a recommended change. The latter prediction, of course, may mean delving into economic or sociological changes—policy matters—which are always relevant to judicial decision-making. Should the problem deal with the area of corpora-

2. Professor Latty's non-legal writings show this same flair. For examples, see his tributes to his deceased colleagues, Professors Charles L.B. Lowndes and Brainerd Currie, in 1967 *DUKE L.J.* 906 and 1966 *DUKE L.J.* 2, respectively. I was happy to find that Robert T. Swaine in his review of Latty's book, *SUBSIDIARIES AND AFFILIATED CORPORATIONS* (1936), was as impressed as I when he wrote: "Even beyond his admiration for the pure legal scholarship of the work, the reader will find the keenest of enjoyment in the author's literary style and facile vocabulary." *Book Review*, 23 *VA. L. REV.* 363, 364 (1937).

3. In Latty, *Uncertainties in Permissive Sources of Dividends Under Present G.S. (N.C.)* 55-116, 34 *N.C.L. REV.* 261 (1956), Dean Latty sets up ten hypothetical cases to demonstrate the uncertainties prior to 1957 under the existing North Carolina corporation law which faced individuals attempting to determine the sources from which a corporation could declare and pay dividends. These situations beautifully illustrate the difficulties courts encounter when interpreting a statute which has not been drafted precisely.

tion law—a subject of particular interest to Dean Latty—it will involve in a major way the interpretation of statutes, some carefully drafted, others not so drawn. The history of what occurred before the statute became effective, whether in the common law or in a prior statute, may point effectively to an accurate solution, and history must not be ignored in most decision making, whether by student or court.

One prime example of what Dean Latty must have expected of his students, and what he gave them in return, is found in a paper which he delivered while Dean at Duke Law School in a panel discussion entitled *The Law School Dean Looks at the Bar Examination and the Examiner*.⁴ The discussion dealt with an actual bar examination problem which had been asked some ten years before and which involved a factual situation taken from the law reports. Although the bar examiner had probably expected an answer similar to the court's resolution in the selected sales case, the facts presented were insufficient to give the student-examinee even a hint of the solution the examiner expected. (Do bar examiners do such things?) The Dean pointed out the impossibility of expecting an examinee to give the type of answer that the examiner probably desired, and then went on to show what a good answer would have been under the circumstances. In his analysis, Dean Latty thoroughly examined the problems presented by the limited statement of facts, treated the several possible approaches, shoved aside those propositions which were somewhat remote, and reached some tentative conclusions which were reasonable under the facts stated. An excerpt from Latty's exposition demonstrates the thoroughness with which the problem was dissected:

As you look at that question you see some nice legal issues there: do the facts (and if so what facts and why) impose upon the seller an implied warranty of quality, either of fitness for the general purpose of such an article ("merchantability") or, of "fitness" for a revealed intended use? Do the implied warranties arise here even though, inferentially, the seller is only a dealer and not the manufacturer and even though, again inferentially, the sale was of a specific identified chattel available for inspection? Or, for any other reason, does this call for application of the caveat emptor rule? Do the facts establish, at least prima facie, defectiveness at the time of sale, as against defects that developed later from misuse and abuse by the plaintiff? If there be doubts as to whether the circumstances of the sale gave rise to an implied warranty of quality, were those clarified by the seller's attempt to repair, as a recognition by him of his obligation as to quality? If a warranty here was breached, is rescission a proper

4. 31 BAR EXAMINER 99, 105 (1962).

remedy or is the complaining buyer left to sue for damages? Does the seriousness of the defect bear on the rescission remedy?⁵

Had this been a classroom situation and a problem treated therein, one can imagine the student in the Dean's class wilting somewhat under this prodding to produce the complete answer.

The thoroughness with which Dean Latty approaches problems is demonstrated time and again in his casebook, *Introduction to Business Associations, Cases and Materials*,⁶ and his later edition, *Basic Business Associations, Cases, Text and Problems*,⁷ for which Professor George T. Frampton was co-editor. In the latter volume, I would point particularly to the use of what the authors call the "Discussion Situation" at the start of several chapters in their book. Pertinent hypothetical cases are posed which, like the exercises performed by an athlete in warming up for a contest, stimulate the student's thinking apparatus prior to his reading of the cases, statutes or notes which follow.⁸ This sort of casebook writing tends to enliven class discussion and, since the exercise precedes the reading of the cases, the approach offers the student an opportunity to predict the reaction of the courts to similar facts in the cases which follow. The *lawyer* in the student is at work performing the job which will have to be done when he becomes a member of the bar. Such an approach to casebook editing and writing too often is followed only by those few authors who, from their teaching experiences, recognize the necessity of involving the student in the type of thinking in which lawyers must become experts.

LATTY AS LEGAL SCHOLAR

There is an old saw at the college level of professing which, succinctly stated, warns one to publish or perish. The proverb functions in the law school area but usually not with the dire results often evidenced in the other branches of university teaching. I suspect that most of us who teach in schools of law do our research and writing because we are interested in learning more about our fields and in passing on to our students and the legal profession what we have

5. *Id.* at 105-06. The Uniform Commercial Code, Art. 2 (Sales) was apparently not in issue. Another excellent example of this thoroughness is contained in Latty's essay, *Article 2, Uniform Commercial Code, A Non-Property Approach to Sales Law*, 1 *BUS. L. REV.* 135, 136-37 (1954), in which he analyzes the Code's de-emphasis on the bulk-title concept.

6. Published by Prentice-Hall in 1951, pp. xxiv, 646.

7. Published by Little, Brown & Co. in 1963, pp. xlvi, 781.

8. *See, e.g., id.* at 108, 139, 201, 394.

learned. As a by-product, we may impress our dean (or someone else's dean) and obtain recognition not so easily available to those colleagues who are too timorous to expose their ideas beyond the classroom or who think such an exercise is futile. Considering both aspects of legal scholarship, a teacher's writing not only makes him a wiser and more valuable teacher but also benefits his school indirectly through whatever scholarly acclaim comes to him.

Dean Latty, I feel sure, needed no inducement to scholarly pursuit other than his own drive to learn as much about his subjects as was possible considering his teaching load and his desire to convey to his students and the profession the results of his research. His largest contribution has been in the field of business associations, particularly corporations, though his casebooks have included substantial treatments of agency, partnerships (general and limited), and other unincorporated associations. Dean Latty's fine work *Subsidiaries and Affiliated Corporations*,⁹ published in 1936, exposed to the legal profession's view the near meaninglessness of the concept of the corporate entity or personality when used as a catchword solution to all corporate legal problems. He emphasized that the broad, popular use of the term had a dangerous tendency to lead some judges into a mechanistic jurisprudential attitude in dealing with problems such as the liability of a parent or affiliated corporation for the debts or tort obligations of the subsidiary or other related corporation.¹⁰ He reasoned as follows:

The objection to resorting to the nature of the corporate entity as the chief instrument in the legal craftsman's tool chest, with the corresponding technique of observing or disregarding the entity, is not that "entity" should be abandoned in favor of some synonymous term One need have no quarrel with use of the term, where the context justifies, so long as one looks to it advisedly as merely a loose and convenient summary of diverse legal phases and not as the source of the factors of judicial law-making, and provided that in the use of the conception of the corporate entity certain logical pitfalls be avoided.¹¹

Dean Latty contended, quite correctly, that "the question whether a corporation is an entity separate and distinct from the stockholders cannot be asked, or answered, in vacuo."¹² Furthermore, while "courts seldom lose sight of the stockholders, in spite of entity con-

9. E. LATTY, *SUBSIDIARIES AND AFFILIATED CORPORATIONS* (1936).

10. *See id.* at 7, 27.

11. *Id.* at 6-7.

12. *Id.* at 10.

cepts," he stated, again correctly, that "[n]o concept of corporate entity . . . will be of itself sufficient to solve an actual problem."¹³

Dean Latty's approach to the corporate entity problem demonstrates that he is a realist and typifies the pragmatism that may be found in his other writings. He tells us that what courts do in the reported entity cases, rather than what they say, is the important thing, for the language of the opinions is frequently unimportant except as a source of confusion for a later judge attempting to decide a case upon some future state of facts. After an exhaustive analysis of the entity-concept case material, Latty concluded:

Until we get judicial expressions about the specific policy-factors which are the underlying considerations involved in a decision allowing or refusing to a claimant of a corporation recovery against the parent or other related corporations, the basis of predictability will continue unsatisfactory.¹⁴

I might add that it has remained "unsatisfactory."

In addition to thoroughly analyzing the problems subjected to his scholarly scrutiny, Dean Latty has always provided constructive citations when pertinent. He is frequently not content merely to cite American decisions and texts, and so he cites Italian, French, German and, of course, English authority. Latty's background in languages gives him a facility usually possessed only by the few law professors who have had continental training or those foreign scholars who, luckily for us, have elected to teach in our law schools. The year Dean Latty graduated from the University of Michigan Law School, an article which he had written appeared in the *Michigan Law Review*.¹⁵ In the preceding year, the Mexican Supreme Court had held that a foreign—that is, non-Mexican—corporation had no existence beyond the borders of the creator state and had no standing to sue in Mexican courts. (Shades of ancient American law!) In his article, Latty cites Mexican, French, Italian, and German authority to bolster his conclusion that the Mexican decision was "violative of the best international usage."¹⁶ Moreover, in one of the choicest but most pertinent paragraphs in this article, he demonstrates his refreshing ability to include in a scholarly legal article a bit of delicious

13. *Id.* at 7, 16. He observed that "[o]ne of the interesting aspects of the decisions that struggle with the issues of the corporate entity is that in spite of conflicting and misleading dicta the judicial hunch usually carries through to a correct decision." *Id.* at 34.

14. *Id.* at 220.

15. Latty, *International Standing in Court of Foreign Corporations*, 29 MICH. L. REV. 28 (1930).

16. *Id.* at 34.

humor, perfectly applicable to the point in issue:

Although it may be rather difficult and even fraught with danger in case error is made, one ought to separate the legal mushrooms from the toadstools in order that the epicure's *joie de vivre* may flourish to its fullest and the sum total of human happiness be thereby presumably increased, rather than to adopt a policy of prohibition toward all fungus growths.¹⁷

Other passages in Dean Latty's writing likewise bring a touch of humor into a picture which otherwise might be dull. Take, for example, his cryptic advice to directors in his article on the *BarChris* case: "At any rate, a lesson from *Escott v. BarChris* is that the best advice to give to one invited to become a director on the eve of new financing is, *don't accept*."¹⁸ Somewhat similar wry statements make deliciously edible what would otherwise be rather heavy fare. The present writer's advice to directors, officers, and other individuals who may incur liability under the federal legislation dealt with in the *BarChris* article is to study Latty's discussion carefully. His treatment holds much practical wisdom.

A final illustration will suffice to make my point that Jack Latty can handle his mushrooms with spice and other condiments as only a master cook can. In writing about close corporations, he poses a situation where two persons, one with skill and the other with capital, are able to accomplish by contract in a partnership objectives which would seem to be unauthorized under the usual corporation statute with its emphasis on the democratic process.¹⁹ Latty employs a master cook's skill in another well-spiced statement: "All this structure of representative government in the typical corporation law is about as appropriate for a two-man get-together as Roberts' Rules of Order."²⁰ And, commenting in favor of allowing individuals in a close corporation to use the corporate form to obtain limited liability and,

17. *Id.* at 33. In *A Non-Property Approach to Sales Law*, 1 BUS. L. REV. 135, 139 (1954) (an English publication under the caption, *American Business Law*), Latty, in accepting the non-title approach of Article 2 of the Uniform Commercial Code, wrote this somewhat striking comment: "[T]itle passing, unlike delivery, is not an overt act that one can see; it is a concept much more at home in the heaven of pure conceptions than in the marts of traders."

18. Latty, *Prospectus Liability—The BarChris Case*, 1970 J. BUS. LAW 65, 72 [*Escott v. BarChris Construction Corp.*, 283 F. Supp. 643 (S.D.N.Y. 1968)].

19. Latty, *The Close Corporation and the New North Carolina Business Corporation Act*, 34 N.C.L. REV. 432 (1956). Dean Latty has been fortunate in having a colleague on the Duke faculty, Professor F. Hodge O'Neal, who is the leading expert in the country on close corporations and whose text, *CLOSE CORPORATIONS: LAW AND PRACTICE* (2d ed. 1971), is the classic in this area.

20. Latty, *supra* note 19, at 433.

at the same time, permitting them to structure their corporation like a partnership, he queries: "Just whom do you protect by holding that to obtain limited liability the two associates must conform their set-up to one more appropriate for General Motors?"²¹ He then proceeds in simple, straightforward language to show how the incorporated partnership can meet the formal requirements for corporate recognition and still provide controls the minority shareholder needs for his own protection.²² This analysis, I suggest, approaches the line of genius in formulating a close corporation structure greatly needed by the small business sector.

LATTY AS DRAFTSMAN

In 1955, the General Assembly of North Carolina enacted a new and modern Business Corporation Act which was to become effective on July 1, 1957.²³ Designed to replace one of the most poorly drawn, ineffective corporation acts then existing in the United States, the new Act was drafted by three law school professors—Breckenridge of the University of North Carolina, Powers of Wake Forest, and Latty of Duke. Now, just what product should have been expected from such a line-up from the "Ivory Tower"? Your response is probably one hundred percent wrong. The scholars' cooperative effort resulted in one of the best and most practical corporation acts of that period and before. One reason for the success, of course, was the lack of salvageable matter in the old corporation act—the draftsmen were able to start at scratch and accepted the best ideas of professors, practitioners, and laymen. Naturally, compromises were necessary here and there, as in the case of other important, controversial statutes. But the compromises were not overly numerous, and, in general, they improved the quality of the statute.

Such extensive statutory revisions require a great deal of sales talk before they can be confidently sent to the legislature for enactment, and in this instance Latty did some of the important selling. In 1954, he joined with the other draftsmen in writing an article which described the contents of the draft and dealt especially with the provisions that differed from the existing statute.²⁴ The draft, the authors

21. *Id.* at 435.

22. *Id.* at 433, 435-36.

23. N.C. GEN. STAT. §§ 55-1 to -175 (1965), *as amended*, (1971 Supp.).

24. Latty, Powers & Breckenridge, *The Proposed North Carolina Business Corporation Act*, 33 N.C.L. REV. 26 (1954).

noted, included provisions protecting dilution of outstanding shares which were particularly interesting (and perhaps are unusual even today); the term "stated capital" replaced the confusing one of "capital stock," thus aligning the Act with other recent corporation acts; reduction of stated capital provisions remedied one of the "most serious defects of the corporation laws of North Carolina;" and the adoption of accounting concepts leading to the determination of earned surplus, capital surplus, reduction surplus, unrealized appreciation, etc. was a novel feature.²⁵ One of the most important changes described in the article concerned dividends. The new provisions allowed dividends to be paid from "earned surplus;" from "net profits earned during the current or preceding accounting period," even though capital was impaired (nimble dividends); and from "capital surplus."²⁶ Another innovation was a provision permitting twenty percent of the shares of an aggrieved class to demand and force payment of a dividend, provided the corporation had been making profits and paying less than one-third of those profits in dividends. As the authors observed, "[t]he provision represents an attempt to avoid playing into the hands either of a high-handed management or of corporate sharpshooters."²⁷

Breckenridge, Powers, and Latty pointed out that the statute contained interesting protective provisions on share dividends, on purchase of its own shares by a corporation (with protective features built-in), on voting trusts (which were illegal in North Carolina prior to this act), and on closely held corporations (the provisions also making clear that such organizations were not illegal). Taken together, the various fundamental changes afforded more protection for the preferred shareholders than do most corporation statutes.

A tremendous amount of work by the professorial draftsmen is evident in the statute. They were faced with replacing an old, outdated corporation act and were required to draw improvements in the new act, selecting from a range of developments in the common and statutory law, some of which were good, some dangerously bad. The professional manner in which these draftsmen executed their commission warrants the conclusion that professors of law, having no axes to grind and no clients to satisfy, can draft a superior, practical act, giving much greater security to shareholders and greater safety to the

25. *Id.* at 35-38.

26. *Id.* at 38-39.

27. *Id.* at 40.

corporate creditors. Whereas the Blue Sky Acts have usually been the locus of protective devices, the North Carolina legislation illustrates the possibility of providing greater protection than is usual in corporate enabling acts.²⁸

CONCLUSION

Proven by his published writings, the man we are honoring deserves this fellow teacher's opinion that he is an excellent teacher, a discriminating and wise scholar, and a draftsman of the finest order. Nothing more praiseworthy need be said of a life well-spent in the teaching of law. Well done Elvin Latty, and may your retirement be as successful as your prior labors!

28. See Latty, *The Close Corporation and the New North Carolina Business Corporation Act*, *supra* note 19. For students and practitioners this article is an excellent exposition of the judicial treatment of close corporations under the traditional corporation statute, the sometimes successful attempts to cope with such judicial treatment by careful drafting of articles of incorporation and bylaws, and the eventual enactment of statutes which are intended to rectify the traditional judicial holdings. Latty's article, *Uncertainties in Permissive Sources of Dividends Under Present G.S. (N.C.) 55-116*, *supra* note 3, and his several articles prior to submitting the new corporation law draft to the North Carolina legislature, no doubt aided greatly the Act's passage.

Also see Latty, *Some Miscellaneous Novelities in the New Corporation Statutes*, 23 LAW & CONTEMP. PROB. 363 (1958), where he discusses the modern corporation statutes enacted in the 1940's and 1950's. Like a good salesman, he gave favorable treatment to the new North Carolina Act which had become law in 1957. The article ably portrays what has been wrong with the statutes and what will remedy the deficiencies.

Another Latty article, *Why Are Business Corporation Laws Largely "Enabling,"* 50 CORNELL L.Q. 599 (1965), showed how the evils of the New Jersey and Delaware statutes (he lists some 22, *id.* at 602-03), which shocked 19th and 20th century laymen and most lawyers, cause nary a ripple today. By frequent citation to the new North Carolina Business Corporation Act, he was engaged in "selling" the North Carolina Act to the country. He also pointed out how the professors-draftsmen were on their guard to make their act a socially just one. In discussing the question, "why not enact 'protective' corporation laws in enabling acts," *id.* at 611-15, he pointed to New York as "the only state that has made a serious fruitful attempt to close the loophole to the nose-thumbing foreign corporations." *Id.* at 613. North Carolina's attempt to deal with the problem, he reminded the reader, was rejected by the North Carolina legislature. *Id.* at 614. He had further explored this subject in *Pseudo-Forcign Corporations*, 65 YALE L.J. 137 (1955).