

REVIEWS

SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION. By Edmund Morris Morgan. New York: Columbia University Press, 1956. Pp. xii, 207. \$3.50.

THIS excellent little book contains the Carpentier lectures delivered by Professor Morgan at Columbia University in January and April of 1955. It is a real contribution to clarity of thought in the field of judicial proof and to the cause of sensible and practical law reform, some of it already forecast in isolated articles by the same author. Of course no book is flawless, and the greatest flaw I find in Professor Morgan's writings is that they make hard reading. This is not due to any confusion of thought or to any failure to think things through, on Mr. Morgan's part. Quite the contrary. He thinks his material through very thoroughly and quite without confusion, but the result in writing is so compact and concise that it takes the very closest attention to follow and get the most out of it.

This book will reward the effort of close attention. Seldom is so much to be found in so small a package. The first chapter (called "Relation of Pleading to Preparation for Trial") contains a neat, short history of pleading, of jury trial and of the notion that jurors must decide cases on the evidence before them, with its implications in terms of the preparation of materials for trial in an adversary system. Mr. Morgan notes how the common law system of pleading became more complex as time went on, how the ill-starred Hilary Rules tried to tackle the problem created by the complexity and how the American Codes tried to make pleading do too big a job in solving the problem. There follows an admirable treatment of the solution sought by the Federal Rules, and of the relationship between pleading and other pre-trial steps. These, he thinks, come as near as they may to equalizing the parties' access to all the facts in advance of trial, and this is necessary for the proper functioning of our adversary system. The next step toward making a law suit "a rational proceeding for discovering the factual basis of a controversy . . . is a complete renovation of the rules of evidence."¹

The second chapter treats judicial notice. Mr. Morgan sees in this doctrine an instrument for excluding evidence offered to controvert the incontrovertible, and so for economy in litigation. This view is opposed to that of Thayer and Wigmore, and the battle is not entirely one in semantics. There are propositions so widely accepted at any given stage in our culture that as a practical matter they should be treated as indisputable and evidence concerning them excluded. That June 3, 1906, was a Sunday, and that Missouri is east of the Rocky Mountains would furnish examples. Other propositions are readily

1. P. 35.

demonstrable by "resort to . . . sources of indisputable accuracy."² And no doubt Wigmore is wrong in saying that exclusion of evidence to controvert a point always involves the laying down of a rule of substantive law. But as Mr. Morgan himself says, there will be many a dispute as to whether a given proposition is disputable. He would have courts settle such threshold questions by resort to all sources of information, without limiting the search by the rules of evidence, and then exclude evidence upon any proposition found incontrovertible. This is all very well, but as a practical matter a trial court will always exclude such evidence at peril of having the appellate court conclude that the proposition is indisputable. And in making up its mind the appellate court will consider the offer of proof as well as other sources of information. So trial courts will be tempted always to hear and weigh the evidence except in cases so clear that evidence is not likely to be offered, and not much economy in litigious effort is likely to result from adopting Mr. Morgan's view.

Mr. Morgan clearly sees the danger of judicial notice, as a device for shutting off dispute, in the hands of an "opinionated or conceited"³ judge. This danger he would avoid

"by making it mandatory that the judge inform the parties of the tenor of any matter to be judicially noticed by him and afford each of them reasonable opportunity to present to him information relevant to the propriety of taking such judicial notice or to the tenor of the matter to be noticed."⁴

But this would be difficult. Surely, as Mr. Morgan says, the operation of judicial notice is ubiquitous—it has a place wherever there is a place for reasoning. Many rules of substantive law, many rulings on evidence, many of the notions about human behavior employed in weighing testimony, and most rulings concerning the sufficiency of evidence to prove a point depend on spoken or unspoken postulates of fact which in turn depend on judicial notice. In many of these instances the postulates, if clearly revealed and closely analyzed, might provoke reasonable controversy. If the recommended procedure were literally followed throughout a trial what would happen to the economy in litigation so properly prized by Mr. Morgan?⁵

On the whole the chapter on judicial notice is more valuable for its analysis

2. P. 61.

3. P. 67.

4. Pp. 68-69. Cf. MODEL CODE OF EVIDENCE rule 804 (1942).

5. One can imagine, for instance, a judge as trier of a disputed issue of fact saying to counsel:

"I have the following notions about the credibility of witnesses: Those who do not look me in the eye are apt to be generally deceitful, as are those who rub their hands; those who are over-quick in answering questions are apt to be inaccurate observers; those who readily concede that they have talked to counsel about the case are apt to have been coached. I think, but am not sure, that I assume those who look like my scalawag uncle X to be facile and unreliable. If either of you gentlemen wish to furnish me with information bearing on these

and its insights than for its practical suggestions. This is not so, however, of the rest of the book, which is abundantly valuable in both ways.

The third chapter deals with the allocation of function between judge and jury, in two parts. The first part concerns burden of proof and presumptions. The second treats the determination of questions of fact upon which the admissibility of evidence depends. Both are illuminating and helpful.

The treatment of the hearsay rule and its exceptions will shake any remaining complacency there may be over the good sense and the consistency of the present system. This is done graphically and rather dramatically in the final chapter, which takes as its point of departure a perfectly ordinary negligence situation, then assumes various vicissitudes in the lives (and deaths) of the potential witnesses. By manipulating these events in ways well within the bounds of possibility, Mr. Morgan shows how the present rules will often exclude evidence which the intelligent and responsible layman would consider worthy of serious consideration, yet will often admit evidence which most of us would consider almost worthless—at least if we could get away from the influence of our legal training.

This final chapter could readily be adapted for popular presentation in the Post or the Readers' Digest—probably without too much change. It would be a good idea to do this, but the result would not be even a poor substitute for the present work. It is characteristic of Mr. Morgan that the fireworks do not come until after there has been the most careful and thoughtful preparation. The last three chapters taken together are the best over-all critique of the hearsay rule and its exceptions that I have found. They begin with a history of the rule showing how the earliest reasons given for it had to do with the lack of oath and the lack of opportunity for cross-examination. Later, in the nineteenth century, courts and commentators added a third reason—"the incapacity of jurors to assign to hearsay its proper probative value."⁶ Yet, Mr. Morgan goes on to point out, the exceptions to the rule do not involve a rational or consistent application of principles derived from these reasons. To show this, six situations are chosen and analyzed. These include the offer of a prior statement made by a witness presently on the stand who still recalls the events in issue. Here all the safeguards which the rule is designed to afford are present, yet the prior statement (whether consistent or inconsistent with the witness' testimony on the stand) is generally treated as hearsay and therefore accorded no substantive weight as evidence (though prior *inconsistent* statements may be introduced for the purpose of *impeachment only*). If, however, the prior statement was a spontaneous exclamation, it would be admitted and be given probative weight.

notions, please do so within ten days or I shall employ them in resolving the conflict in testimony here."

Surely the gain in helpful self-analysis would be greater than that in administrative efficiency. And suppose the conflict in testimony developed in connection with a preliminary ruling on the admissibility of evidence!

6. P. 141.

even if the declarant was not a witness under oath and subject to cross-examination. But again, if the prior statement occurred in the course of a former trial as testimony under oath and subject to actual cross-examination, it would nevertheless be excluded in many situations and admitted for probative purpose only where the witness himself is now unavailable and where the party against whom the statement is offered or his privy is the one who conducted the former cross-examination. Admissions and past recollections recorded are other situations chosen for analysis. An admission will be taken as probative evidence against an admitter even if he is incompetent to testify or if he made the statement on the faith of the merest hearsay. Past recollection recorded is received in evidence though the lack of present recollection by the witness would frustrate effective cross-examination. Mr. Morgan concludes: "The oath and opportunity for cross-examination, and even oath and actual cross-examination do not save the utterance from exclusion as hearsay; the absence of both does not require its exclusion."⁷

Modern courts, Mr. Morgan believes, actually apply a different, unspoken test in working out exceptions to the hearsay rule. It is this: "Is the evidence offered of such a quality that a trier of fact, and particularly a modern jury, could put upon it a reasonably accurate value as tending to prove the truth of the proposition which it is offered to prove?"⁸ But the courts have tried to fit their rulings into the more rigid system, praised by Wigmore, which seeks logical symmetry by artificially eliminating from the hearsay category admissions and former testimony,⁹ then by finding in each exception to the rule a so-called guaranty of trustworthiness and "some necessity for not insisting upon direct testimony by the declarant."¹⁰ The cases, however, show "no guaranty which would be even a weak substitute for cross-examination and in many instances the so-called substitute for the oath is merely an absence of a motive to falsify, not a stimulus to tell the truth."¹¹

In short, I take it, no consistent thread is seen to run through the hearsay rule and its exceptions either in terms of the layman's common sense or in terms of the safeguards which the rule is supposed to afford. The end result of this is the series of paradoxical situations skillfully juxtaposed in the last chapter to highlight glaring discrepancies and defects which the present system produces. Laymen tolerate this largely because they don't know about it. Lawyers tolerate it partly for the same reason, partly because they ignore the rules when important issues are at stake, and partly because they have been beguiled by Wigmore's persuasive analysis. But the system should go, and its place taken by a rule "which would make admissible all hearsay that a court considers as having appreciable value,"¹² or at least (if the pro-

7. Pp. 166-67.

8. P. 167.

9. P. 167.

10. P. 167.

11. P. 168.

12. P. 168.

fession is not ready for so radical a reform) by the Uniform Rules of Evidence lately approved by the American Law Institute and the American Bar Association.

The excellence of Mr. Morgan's treatment of the problems of evidence does not lie altogether in the proposals he makes for reform. Even if one should disagree with every one of such proposals, he would find the book valuable for the keen and well thought out analyses to be found at every turn. Examples which appealed to me particularly would include his examination of the precise nature of the proposition that is the subject of judicial notice; of Thayer's familiar proposition that the risk of persuasion never shifts; of the problem of communication between witness and the trier of fact; and of the adversary theory of litigation, its justification and its relationship to the protection of the hearsay rule.

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MOORE'S FEDERAL PRACTICE, Volume 7, 2d ed. By James William Moore. Albany: Matthew Bender & Co., 1955. Pp. xxiv, 912 (unused pages reserved). \$18.50.

THE publication of Volume 7 of the second edition of Professor Moore's *Federal Practice* brings to a conclusion his revised treatment of the Federal Rules of Civil Procedure. The profession now awaits only Volume 1, to deal with federal jurisdictional matters, for completion of this monumental work. The review of a second edition, especially an advanced volume of a second edition, is essentially supererogatory—particularly when the volume is Professor Moore's. His profound scholarship, his comprehensive and exhaustive coverage, his fine analysis, his courageous willingness to be definite and specific, his sense of prophesy as well as of history, and above all his eagerness to plunge into difficult waters and swim in strong currents, are too well known to bench and bar to require repetition. Justice Holmes thought the word "valour" a little strained as used in the title of Pollock's lecture "Judicial Caution and Valour,"¹ but the word is an accurate one to characterize Professor Moore's work in federal practice.

This volume covers rules 60(b) through 86, thereby including some of the intrinsically, universally and perennially most difficult problems of judicial administration: reconciliation of the law's often opposing goals of finality and more complete justice (rule 60(b)); the procedural law of the entire injunctive process (rule 65); condemnation (rule 71(a)); the whole gamut of appellate practice (rules 72-76); besides such peculiar offspring of a complicated federalism as the enigma of a quasi-in rem action precluded as a matter of original federal jurisdiction but allowed when the case has been removed to federal

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1. 2 HOLMES-POLLOCK LETTERS 239 (Howe ed. 1941).