Missouri Law Review

Volume 21
Issue 3 *June 1956*

Article 6

1956

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

This book consists of a series of lectures which the author was invited to give as the 13th series of the James S. Carpentier Lectures sponsored by the Columbia University School of Law. It was 53 years ago that General Horace W. Carpentier of the Class of 1848 established this lecture fund in honor of his brother.

The purpose of the Fund was to make possible a series of lectures which would shed significant and penetrating light on the subject of jurisdiction which General Carpentier believed to be of pre-eminent importance to society. In his letter of grant addressed to President Nicholas Murray Butler, General Carpentier expressed the desire that the lecturers be "Chosen for pre-eminent fitness and ability" and that "This lectureship will be made so honorable that nobody, however great, or distinguished will willingly choose to decline your invitation." To this writer, the author clearly comes up to the standard of lecturers suggested by the General.

Further, the content of this book clearly sets forth the attitude of Professor Morgan toward the law of evidence. He has lived with it, studied it carefully, and has brilliantly applied an exceptional mind to the study of that subject. As I have long known, he has been dissatisfied with much of the law of that subject and in this book he discusses some of those dissatisfactions.

The first chapter of this book deals with the relation of pleading to the preparation for trial. In it he gives an historical review of the place that pleading has had in the preparation for trial. He believes that at some times in the history of pleading in England and in the United States the rules of pleading have not served their purpose in presenting the problems that must be tackled during a trial, but he apparently believes that the present Federal Rules of Civil Procedure do a very good job.

In chapter two of this book Professor Morgan deals with the question of judicial notice. He states the general rule that there are some matters of fact of which a court may, but need not, judicially notice. He then speaks of the idea that a matter which is indisputable is within the domain of judicial notice and asks the question as to how it can be within that field if it is disputable. How, he asks, can there be any intermediate ground? In other words, should we not have a definite rule that the court must take judicial notice of matters which are indisputable and cannot take judicial notice of any other matters? He also disagrees with the idea that judicial notice should apply only to evidentiary matters and appears to believe that it should apply to all phases of a trial.

Further, he states his belief in the Model Code of Evidence and in the Uniform Rules of Evidence and indicates various ways in which those documents set up essential safeguards to the use of judicial notice.

The third chapter of this book, on its face, deals with functions of the judge and jury. However, it relates largely to the problems of presumptions and the burden of proof. Those who are familiar with Mr. Morgan's writings know that for a long while he has believed that the usual rule relating to the burden of proof, to the effect that it is determined largely by the pleadings and that it never changes, is incorrect. In this chapter he says that the allocation of the burden of persuasion has no legal significance until the case is in the hands of the jury. The judge need not decide which party must bear it until he formulates his charge after the close of the evidence, and knowledge of the judge's decision upon this matter is of slight importance to counsel until the preparation of his final argument. Such a stand does not seem to present the problem as to whether the burden of persuasion may change during the trial, though Mr. Morgan has written on that problem and has concluded that it may. The author deals with the matter of the court's charge on the burden of persuasion as far as it relates to the degree of persuasion required for the person having that burden to be successful. He calls attention to the difficulty of using proper terms as to this matter in a charge and points out that some of the explanations in charges are misleading. He suggests a few which he thinks are more accurate than those sometimes used.

In connection with the duty of the judge and jury in relation to the finding of preliminary facts necessary to determine the competency of a witness or evidence, he states that there are three positions which may be taken. The choice is between a decision by the judge alone, a decision by the judge subject to a later decision by the jury when the evidence is admitted, and a decision by the jury alone during their deliberation upon the merits. In the end, he concludes that any departure from the orthodox view, that is, the first choice of having the judge determine preliminary questions, is likely to make the exclusionary rule degenerate into one concerning the value of the evidence, for, to expect a jury to go through the process of separating the inadmissible evidence from the admissible and to eliminate its effect from their conscious minds and to base their decision upon the admissible evidence alone, is to expect the impossible.

At the close of this chapter he says: "If this process should eventuate in the abolition of the remaining incompetency of witnesses and the admissibility of all hearsay having appreciable probative value, it would accomplish at long last what should be accomplished speedily by legislation." In saying this, he gives expression to an idea which he has long believed in. Notwithstanding this broad statement, he does exclude confessions obtained by physical or mental coercion and admits that due process of law requires that a coerced confession should be excluded from consideration by the jury.

The last two chapters of this book relate to the hearsay rule. He goes into the history of the rule thoroughly and concludes that the reasons for the rejection of

hearsay given by judges and commentators, when the rule was becoming established, have to do with the credulity not of the jurors but of witnesses. He recognizes, however, that, from a comparatively early date in the development of the jury trial, both counsel and judges manifested increasing distrust of jurors in dealing with materials for decision, including evidence. Mr. Morgan speaks of the grounds for admitting or excluding several types of hearsay and shows, to the writer's satisfaction, that in several instances the grounds are inadequate and inconsistent. In the end he asks these questions: "Why should laymen tolerate a system of proof in litigation which in application is so surcharged with irrelational inconsistencies? . . . Then why should judges and lawyers, members of the ancient and honorable profession which is charged with the duty of adjusting between members of society disputes involving their property, and liberty, and their lives be content with rules which in application so often shock common sense?"

Much of what is included in this book the writer has believed for a long time, but he has not yet become a disciple of Mr. Morgan as to all of his ideas concerning burden of proof and hearsay. However, this book should be not only on the list of those which should be read by every judge and teacher of law, but it is a book which every lawyer could well afford to read, for it would set him to thinking and might lead to an improvement in the law of evidence.

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