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Morgan: Some Problems of Proof Under the Anglo-American System of Litigation

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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. xii, 207. $3.50.

The volume contains six lectures given by Professor Morgan at Columbia University Law School in the Spring of 1955. They are the thirteenth series of the James S. Carpentier Lectures established more than a half century ago. The roster of the lectures begins with James Bryce in 1904 and includes such distinguished men of the law as John Chipman Gray, Sir Frederick Pollock, Sir William Holdsworth and Benjamin Cardozo. Professor Morgan's lectures are designed to direct the attention of lawyers and judges to some procedural rules which tend to interfere with a rational investigation of questions of fact in jury trials.

The first lecture traces the development of pleading from the days of the Year Books through common law pleading, and the Hilary Rules and Code pleading down to the Federal Rules of Civil Procedure. The author demonstrates how the orthodox rules of pleading obstruct adequate preparation for trial and suggests that the first step toward making a lawsuit a rational proceeding for discovering the factual basis of a controversy is the acceptance of the provisions of the federal rules concerning pleading and discovery.

In the second lecture Professor Morgan deals with the basis of judicial notice and its place in the judicial process. As in his earlier writings he takes issue with the two great masters of evidence, James Bradley Thayer and John Henry Wigmore as to the basis of the doctrine. Contrary to the expressed views of both he convincingly argues that matters properly judicially noticed are not disputable by evidence. In this position he is supported by the weight of judicial authority despite the fact that learned jurists such as Hand and Cardozo had approved the Wigmore view in statements unnecessary to decisions at hand. There is a further disagreement with Wigmore, who felt that judicial notice should be confined to the evidence stage of the trial and other explanations given for other situations in which the language of judicial notice is used by the courts. Morgan insists that the doctrine is applicable throughout the judicial process. A proper use of it will greatly expedite trials, but it should be emphasized that pretrial proceedings also offer peculiar opportunities for a judicious application of the doctrine. And a most salutary function is its use by an

appellate court to sustain a judgment in favor of the right party. To protect against the risk of abuse of the device by opinionated judges several safeguards have been proposed by both the American Law Institute and the Uniform Rules of Evidence. These are set forth by the author who states, "With such guaranties against abuse courts may, to the great benefit of the public and of litigants, be liberal in the use of judicial notice." (p. 69)

The third lecture is devoted to functions of judge and jury. Most discussions of this subject are confined to their respective functions in determining issues of fact upon which the admissibility of the offered evidence depends. By means of a number of illustrative cases Professor Morgan points up the uncertainty and confusion which have been created by the use of loose and inaccurate terminology in dealing with preliminary questions affecting the admissibility of evidence. The other and seldom discussed function has to do with the extent to which the judge decides questions of fact in allocating the burden of proof and giving the jury binding instructions as to the essentials for its discharge. Mr. Morgan devotes several pages to an attempted elucidation of the matter. It is now axiomatic that there are two burdens. At the beginning of the trial the judge must allocate the burden of evidence as to each issue and from time to time during the trial he may have to determine whether it rests upon the one party or the other. When this burden no longer rests upon either party and the evidence has been closed, the judge must rule upon the burden of persuasion and be prepared to charge the jury concerning it. His instruction should clearly inform the jury of the state of mind which will justify their finding. The usual instruction in civil cases conveys no intelligible ideas to the jury. The problem is further complicated by including in jury charges statements concerning presumptions and their effect upon the burden of persuasion. As I have stated elsewhere,[1] until this practice is stopped I am convinced that there is little chance of the jury understanding the judge's instructions.

The last three lectures, almost half of the volume, deal with the history, theory and application of the hearsay rule. In the fourth lecture the author has a rather tedious analysis of the process of proof under our system and the precedents in an attempt to set forth the theory or theories they purport to apply. In other words, why did the courts purport to exclude hearsay and under what circumstances did they permit its use? He concludes, "There is, therefore, no single theory or principle which will lend any element of consistency to the decisions governing hearsay and its exceptions. The whole subject needs reconsideration. The Uniform Law Commissioners have issued a proposed set of rules, which have been approved by the American Bar Association and the American Law Insti-

1 Ray, "Presumptions and the Uniform Rules of Evidence," 33 TEX. L. REV. 588 at 602 (1955).

tute. They do much toward making the rule and its exceptions more nearly consistent and more effective as means for a practical rational solution of issues of fact. They deserve study with a view to action by both Bench and Bar." (p. 140)

The fifth lecture is designed to ascertain how the actual practice in applying the rules of hearsay comport with the theory set forth in the preceding lecture. A reader may be a little annoyed by the repetition at the beginning of the chapter but this was probably desirable in the case of oral presentation at various intervals to different audiences. Again after a somewhat tiresome review of the authorities the author concludes: " . . . our modern courts in dealing with hearsay, while giving lip service to the reasons which impelled their predecessors to create the rule, have in fact entirely disregarded them. 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. The decisions indicate a realization that emphasis upon the theoretical value of oath and cross-examination as instruments for the discovery of truth (a) has obscured the limits of their value in day-to-day practice in ordinary litigation, and (b) has created an entirely unrealistic assumption of naive credulity of jurors and their incapacity to evaluate hearsay as distinguished from firsthand testimony. The test of admissibility which seems to me to be applied in most of the exceptions 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?' " (pp. 166-167) Professor Morgan again calls for a serious consideration by the profession of the proposals of the Uniform Rules of Evidence.

The final lecture is concerned with the effect of the hearsay rule in conjunction with other exclusionary rules. Usually courts are concerned only with whether the particular evidence falls within a certain rule. There is seldom any consideration of the question whether the application of the rule will or will not produce a sensible result, or whether the evidence has more probative force or more indicia of verity than other evidence unquestionably admissible and possibly already admitted in the case. In this lecture the author has very effectively used a hypothetical personal injury case, carrying it through the trial with the introduction of numerous pieces of evidence. He is able to demonstrate that in this particular situation of all the available evidence from eye witnesses only certain hearsay statements made under the weakest substitute for cross-examination were admissible. The most reliable and persuasive items were inadmissible under the accepted rules, a result which would shock most laymen and a large part of the legal profession if it really understood the operation of the rules.

No living scholar is better qualified than Professor Morgan to point

up and dramatize the deficiencies of the present rules of evidence to contribute to an efficient and just disposition of lawsuits. He brings to the task a lifetime of experience gained in practice, teaching, investigation, and writing in this field. This small volume deserves a much wider audience among the legal profession than it will probably receive. Far too often lawyers have shown too little interest in serious effort toward improvement of rules of evidence, and unless an unforeseen miracle is in the offing Professor Morgan's words will have fallen on barren soil.

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