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Morgan: Basic Problems of Evidence

Alfred L. Gausewitz
University of New Mexico

RECENT BOOKS

BASIC PROBLEMS OF EVIDENCE. By *Edmund M. Morgan.* Philadelphia: Committee on Continuing Legal Education of the American Law Institute collaborating with the American Bar Association. 1954. 2 vols., pp. x, 369. $5.

"This brief treatise is intended for members of the bar. Much that would be essential for its use by an undergraduate law student has been omitted. Every lawyer is aware that some persons are incompetent to be witnesses, that some are privileged not to testify, and that some communications between persons in specified relationships with each other are privileged."[1]

Every lawyer also knows that the law of evidence is concerned with the trial of an issue of fact; that each such issue and each item of evidence thereto is more or less unique; that each such issue is decided upon all of the evidence and not upon each separate item; that rules of law are general; and that issues of fact are not decided by rules of law.

[1] Introduction, p. 1.

Every lawyer also has discerned that the law of Evidence is mainly negative, denying the use of relevant information; that it tries an issue of fact by rule of law; that it thereby treats things that are unique as though they were not unique; that arguments for or against a particular formulation of a rule (especially the rigid rules defining the exceptions to the hearsay rule) are really arguments for or against the use of a specific item of information on a specific issue in a specific case, the arguments being made, however, as though applicable to some imaginary typical case, too often imagined to be one very different from the instant case and one in which the evidence should not be, and probably would not be, admitted or given weight if admitted; and that too often for comfort courts or legislatures of different jurisdictions, or even the judges of the same court, cannot agree on whether these general arguments are sound. All of this is, of course, to establish the "rule of law" as to matters that are essentially matters of logic, experience, and common sense, matters for the discretion of individual judges or juries on individual items of evidence considered with all the other evidence in individual cases.

Every lawyer will also consider the significance of the exclusionary rules as an implied expression of opinion of the competence of judges. He should think about this and about whether the competence of judges is affected by the rules of evidence and rules about the sufficiency of evidence to sustain a finding or verdict. Perhaps a judge is given responsibility without authority, held responsible for the result of rules he did not make. Does an unimpressive bit of evidence acquire additional merit because it has managed to scramble over a technical rule? Must a judge ignore evidence, perhaps in the same case, that seems to him to be impressive, although it could not quite get over or around a rule? Is there any sense to a suggestion that the rules of Evidence should not apply to an undisputed matter? What has called for such a suggestion? Can it be that the law of Evidence has been treated as an end in itself? Every lawyer knows how the rules are neutralized in trials to the judge and by the treatment of assignments of error on evidence points on appeal. But what is gained and lost by evasions?

The foregoing thoughts might be said to raise sub-basic problems of evidence. But to say them is not to say that there should be no rules of Evidence, that admissibility should be left entirely to the discretion of the judge, although one sometimes feels that there are things worse than that. Actually, much is now left to the judge. The privileges may be more substantive than procedural (of course a judge should not commit an act of injustice by perpetuating judicial error under the doctrine of stare decisis or by refusing to recognize a distinction under substantive any more or less than under procedural law; perhaps the latter demands the more uniformity and predictability), but discretion is being utilized as the solution for some of the difficult problems of privilege. It is more and more recognized that the opinion "rule" states a principle for common sense administration by the judge. The problems of remoteness and prejudice have always been handled as an individual, case by case, method although some lawyers and judges have thought that they can be and are handled by rule.

Not even the "rule" against admitting evidence of other crimes has stood up as a rule, unless the rule against other acts of negligence, to prove specific negligence, and rules about proof of character to impeach and some other rules about evidence to impeach have. The best evidence rule is but a principle of preference to be wisely administered and so is that aspect of the hearsay rule that requires the hearsay declarant to be produced for cross-examination. But the exceptions to the hearsay rule are rigidly stated and inflexibly administered as rules. Ought they to be?

It is mainly with the hearsay rule and its exceptions that lawyers have been asked to consider just what the law of Evidence is and does. But the doctrine of judicial notice has been too much administered as a matter of rule and precedent. A general rule about presumptions has been more often stated than adhered to. Probably the judges should be put in strait jackets to prevent experimentation leading to reversals for errors in instructions on burden of proof. There is no "parol evidence rule," because a rule that if the parties have agreed, the parties have agreed and this agreement will be given legal effect can scarcely be a rule, procedural or substantive, or anything but a truism,[2] although it may serve covertly to assign to the judges for final decision the question of whether the parties have agreed. The judges have long decided parol evidence questions on the evidence in the particular case and it is only rarely that one can say that an injustice has been done by the judge's assuming that he was bound by a rule or objective standard and compelled to do formal rather than concrete justice.[3]

The judges have done best when frankly given both responsibility and authority under a power to exercise their discretion, even when kept on such short leash by appellate courts that they are tempted if not forced to go back to reliance upon precedent. When bound by rigid rules, chiefly the hearsay rule, judges (and lawyers and the law of Evidence) are affronted by legislation to the effect that hearing officials in administrative proceedings are more to be trusted. The law of Evidence, especially the hearsay rule, needs a general overhauling.[4]

To this point the book under review has scarcely been mentioned. A reader may expect that I am going on to say that it treats of the law as it ought to be, that it is a polemic for reform. That is not the case. It states the law as it is. It is a genuine though brief treatise. It cites cases and statutes. It gives history as well as analysis. It recognizes the values of precedent and stare decisis. It is short enough to enable the lawyer to orient himself in the whole field and

[2] Cf. p. 343.

[3] Mitchell v. Lath, 247 N.Y. 377, 160 N.E. 646 (1928), is such a case.

[4] Slough, "Res Gestae," 2 KAN. L. REV. 41 at 64 (1954): "Too frequently courts are given to generalizing when considering the merit or lack of merit contained in this [statement of patient to physician as to cause of injury] type of testimony; as a result one sweeping bit of rationalization may hinder progressive thinking and postpone careful analysis for decades to follow." Also at p. 71: "[T]his rule [testimony of a physician as to subjective symptoms] so simple to state, has been twisted by tons of legal literature ground out by a searching but groping judiciary."

sufficiently detailed for him to orient himself on a particular problem. Suggestions for reforms are made only indirectly by reference to choices made between conflicting doctrines by Wigmore and other scholars, by bar committees and by drafts such as that proposed as a nationwide model, the Model Code of Evidence promulgated by the American Law Institute in 1952 and given a quick brush-off by a California committee in 1954.[5] The author was the reporter. Although courts utilized it to support their opinions, it was used but slightly if at all in legislation.

But the subject of reform is not dead. The National Conference of Commissioners on Uniform State Laws used the Model Code as the basis for its Uniform Rules of Evidence promulgated in 1953 and endorsed by the American Bar Association that year and by the American Law Institute in 1954. The author does not refer to the Uniform Rules in this book because they had not been promulgated when he wrote, although he had promoted and assisted their drafting and promulgation.

It may or may not be true that "The Institute Code has now been superseded by the Uniform Rules of Evidence and it is a pretty safe guess that henceforth the interest of the profession and debate in its forums will be concerned with the Uniform Rules rather than with the Institute Code."[6]

Whether promoters of change should ignore the Model Act and concentrate on the Uniform Rules, seek to generate interest by creating a contest over the two codes, or aim for a study of both and perhaps an amalgam code or piecemeal reform, are questions of strategy. It is probably too difficult to get one code studied. For thoroughness both should be. Certainly the Uniform Rules did not supersede the Model Act by a process of integration. Nor does the fact that two codes have been left to compete mean that the law should be left as it is. On the contrary, the Uniform Rules suggest that the law should be reformed *at least* to the extent that they would change it. And there is an intimation that the bar is not fully up to date by the assertion in the Prefatory Note to the Uniform Rules that the Model Code's "departures from traditional and generally prevailing common law and statutory rules of evidence are too far-reaching and drastic for *present day* acceptance." (Italics added.)

But the above talk about reform is as much out of place in a review of Morgan's *Basic Problems of Evidence* as it would be in a review of any other book on Evidence. His book does not expostulate or exhort. It is not a brief for the Model Act. It is an exposition of the law, and the Model Code is cited just as are the Missouri Committee, other state bar committees, the American Bar Association committees and other reports. Many statutes, cases, treatises and

[5] Chadbourn, "The 'Uniform Rules' and the California Law of Evidence," 2 U.C.L.A. L. REV. 1 (1954).

[6] Id. at 4. See also Levin, "Pennsylvania and the Uniform Rules of Evidence: Presumptions and Dead Man Statutes," 103 UNIV. PA. L. REV. 1 at 4 (1954), who says that "the two proposals must be carefully distinguished and . . . no plea of res judicata should be allowed to effect ready dismissal of the Uniform Rules."

articles are cited. A.L.R. annotations are heavily relied upon for more detailed and exhaustive citation.

This book is one in a series on the preparation and trial of a civil action published by the Committee on Continuing Legal Education of the American Law Institute collaborating with the American Bar Association, "as a concise, basic guide for the general practitioner."[7] The author attempted "to make the book practical without overloading it with detail" and "useful in all states."[8] He has succeeded. It is comprehensive yet sufficiently detailed. There is no index or table of cases. The table of contents serves adequately as an index.

The title, "Basic Problems," suggests that the book deals only with unsettled points. It could be so limited and still be comprehensive. One of the objects of the Uniform Rules is, of course, to achieve uniformity and that indicates present lack of settlement. But the book no more deals with problems than any book on Evidence does and should. The emphasis should be on the word "Basic" in the title. But any treatise should deal with fundamentals. The trick for a short book is to do this and yet not sacrifice detail and illustration. The trick is successfully brought off.

The book is for lawyers. Law students will find it useful despite the author's warning that much that is considered essential for them has been omitted. A recent graduate preparing for a bar examination should find it very useful. And, to repeat, so should a lawyer who wishes to re-orient himself for practice or to take his part in proposed reforms, whether of particular rules or by adoption of a code.

The reader should wonder why I have said so much about reform, which the book does not stress, devoted so much space to my own views about trying issues of fact by rules of law, etc., and said so little about the contents of the book—nothing in fact beyond a hint of amazement that the Parol Evidence Rule is treated so fully as a matter of substantive law, so little as a procedural device to give the judge the say on a question of fact. (In truth, the author has expounded the Parol Evidence Rule and Interpretation in less than thirty pages. One's amazement should be, and is, that it can be done so briefly and yet so adequately and clearly. The points to which I have alluded are all discussed: that the rule states something in the nature of a truism at p. 343, and the substantive versus procedural aspects at pp. 344 and 353.)

I had a reason beyond a suspicion that any criticisms of content that I might make would not interest or instruct. I find that lawyers who think they have forgotten their Evidence know more than they think do. Such a lawyer is likely to say to himself as he reads, "Oh, I know this. I know that." Such an attitude leads to skimming and boredom. My hope is that my personal observations (they are not to be charged to the author), whether sound or unsound, will stimulate a more critical and, therefore, a more interested and profitable reading, such as the book deserves.

[7] P. iv.
[8] Ibid.

Although not offered as a "how to do it" book, a thoughtful reading will help to evaluate evidence as well as to predict what evidence will be admitted or excluded. Although largely negative, the reasons for exclusion argued generally give an insight into the weight of particular items of evidence. The book might well have begun, even for lawyers, with a description of real, testimonial, and circumstantial evidence and their relationships, similarities, and differences. These matters are reached at page 160 in the chapter on Relevancy. There one will learn what an inference is and how to compute, or why one cannot compute, its probative force. As said by Professors Morgan and Maguire in their casebook on Evidence, at pages 121-122, ". . . it has been necessary to suggest the process of inference to span gaps in explicit proof. This process demands more explicit and careful attention than it is usually accorded." This process has been accorded attention in this little book. I select it as a sample of the book's thoroughness and basicness.

Lawyers are fortunate to have this book written by a man frequently and justly referred to as one of the masters of the law of Evidence. Too many mature scholars have never reduced their writings to one, to say nothing of one succinct, book such as this.

Alfred L. Gausewitz,
Dean, College of Law,
University of New Mexico