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Book Reviews

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BOOK REVIEWS

Some Problems of Proof in the Anglo-American System of Litigation. By Edmund M. Morgan. New York: Columbia University Press. 1956. Pp. viii, 207. $3.50.

This small book consists of the thirteenth series of the James S. Carpenter Lectures delivered at Columbia University by its distinguished author, Edmund Morris Morgan, in 1955. The book is of inestimable value to both bench and bar. It presents in a most engaging and readable style the very essence of the historical, the theoretical, and the practical aspects of many interesting facets of the law of evidence. Although these lectures reflect Mr. Morgan's profound, scholarly, and unexcelled mastery of the subject of evidence, no attempt is made in them to ensnare us into an intricate network of theoretical refinements; they are far removed from pedantry. In them is found a veritable compendium of knowledge throwing light upon some of the most baffling practical problems arising in connection with the subject. In the light of these observations, the reviewer invites careful scrutiny of any position herein presented in which he takes issue with the attitude expressed in the lectures.

The book presents the lectures in six provocative divisions: (1) Relation of Pleading to Preparation for Trial; (2) Judicial Notice; (3) Functions of Judge and Jury; (4) History and Theory of the Hearsay Rule; (5) Hearsay: The Rule in Theory and Practice; and (6) Hearsay: The Rule in Conjunction with Other Exclusionary Rules.

Relation of Pleading to Preparation for Trial

At the outset one is impressed with the clearness of Mr. Morgan's thought and with the logical symmetry he employs. The underlying theory of the adversary system of litigation is first presented. In logical sequence emphasis is laid upon the indispensable role of pleadings in charting the course of litigation.

A historical dissertation ensues that is most helpful to an understanding of rules that have evolved from the process. Within a few pages we are given a complete panorama of the development of pleadings from the reign of Henry III in 1166 up to the modern Federal Rules. This dissertation reflects prodigious research and study on the part of Mr. Morgan; his several interspersed points of difference with the authorities indicate rare perspicuity and sound logic.

This notable amplification makes it extremely difficult to question

his concluding advocacy of the Federal Rules of Civil Procedure as they relate to pleadings and to examination before trial,[1] and of "a complete renovation of the rules of evidence."

Undoubtedly, the Federal Rules of Civil Procedure constitute a milestone in the development of the adjective law; numerous decisions have demonstrated their effectiveness in dispensing justice expeditiously and impartially. Nevertheless, the rule of pleading seems most unsatisfactory because it invites needless expense and time involved in requests for interrogatories, examinations, and other forms of discovery. A literal construction of the Code Pleading is about as informative as the Federal Rule; on the other hand, given a liberal construction, one that recognizes the fact that no sharp line of demarcation can be drawn between ultimate facts, evidentiary facts, and law,[2] the net result of the combined Federal Rules is accomplished without the necessary delay and costs attendant upon the operation of those rules. The polar star of the pleader should be to inform the adversary, the trial judge, and the jury in a clear and unmistakable manner of his position with reference to the subject matter of the litigation. It is one thing to plead evidentiary facts and conclusions of law; it is quite another to set forth a stereotyped bit of formulism that is not informative. A concise narrative of events consisting of ultimate facts with enough evidentiary facts to lend life to the story, punctuated by legal conclusions in order to enable the adversary and the court to encounter no difficulty in determining the precise theory of case, seems most desirable. The cogent and convincing argument advanced by Mr. Morgan for the establishment of a definite course of trial before trial, it is submitted, would thereby be satisfied.

Although occasionally a comment will be directed to Mr. Morgan's advocacy of "a complete renovation of the rules of evidence" when it is encountered in the following lectures wherein he presents his views as a protagonist of the Uniform Rules of Evidence, it is perhaps not amiss here to make an observation. It seems inconceivable that the promulgation of any set of rules of evidence—no matter how meticulously drafted —would solve the problem of the present undesirable state of the law of evidence—if such a problem in fact exists—for the reason that if such rules were couched in specific terms the complexity of unforeseen circumstances would render their application most difficult, to say nothing of the voluminous size that such a compilation would reach; if couched in general terms such rules would be rendered virtually impotent because of their inefficacy to deal with specific problems emerging during the course of a trial. An oversimplification would be encountered.

[1] See excellent article by Brandis, *A Plea for Adoption by North Carolina of Federal Joinder Rules*, 25 N.C.L. REV. 245 (1947).

[2] See CLARK, CODE PLEADING § 38, pp. 231-45 (2d ed. 1947).

Moreover, an attempt to chart a middle course would likewise meet with disaster on account of the myriad situations arising; interpretation of the rules would be substituted for the application of the empirical process upon which the development of the law of evidence heavily relies.[3] Finally, under any set of rules would not the valuable contributions of Mr. Morgan and others in this area of proof become virtually obsolete?[4] Would not the present progressive development of the law of evidence, infinitely affected by such contributions, give way to the apotheosis of interpretation?

JUDICIAL NOTICE

Mr. Morgan's basic propositions are (1) that tribunals for the administration of justice are established for the sole purpose of adjusting as between litigants disputes affecting their legal relationship, and (2) that an essential qualification for membership in such a tribunal is knowledge of certain matters and the capacity of application toward the solution of problems presented. Corollaries of these propositions are (1) that matters then known, *i.e.,* judicially noticed, are indisputable, and (2) that knowledge of them is applicable throughout the judicial process from beginning to end. Both propositions are undoubtedly correct. But does it follow that the first corollary, that matters judicially noticed are indisputable, is deducible therefrom? The second corollary, as stated, is so inextricably bound up with the first that it raises the same question. True it is, as he says, that there is a needed safeguard against misuse of judicial notice. But how can this curb be effected if matters of judicial notice are indisputable?[5]

Next in order are certain elementary propositions. No purpose would be served in restating them here. Suffice it to say that these propositions, stated concisely and in chronological order, are of immeasurable benefit to a clear understanding of a discussion of any aspect of the trial by jury. It is therefore with some hesitancy that the reviewer raises any questions with regard to these hypotheses.

We are told that in the investigation of the facts of a case reliance is placed solely upon the parties. What becomes of the salutary rule that the judge is not a mere arbiter? May he not examine witnesses? In fact, are not the judges empowered to call witnesses, and to do

[3] The futility of a code or a set of rules as a means of administering justice in any sphere of the law is effectively assayed by the late Judge Jerome Frank in two books of matchless intellectual fiber: LAW AND THE MODERN MIND 186-95 (1930); COURT ON TRIAL 290 (1949).

[4] See the well-edited series of articles, FRYER, SELECTED WRITINGS ON EVIDENCE AND TRIAL (Ass'n Am. Law Schools 1957).

[5] See Davis, *Judicial Notice,* 55 COLUM. L. REV. 945, 948-52 (1955), for an illuminating article wherein issue is taken with the thesis that matters judicially noticed are indisputable. A noteworthy discussion of the question is found in MCCORMICK, EVIDENCE 709-12 (1954) (hereinafter cited MCCORMICK).

other things, such as direct a jury view in order to facilitate the dispensing of justice? And although there is an extensive area of matters that the court, including the jury, must judicially notice, is there not also a large zone comprising matters within the borderland of judicial notice?

After expressing disagreement with Thayer and Wigmore,[6] he addresses himself to the task of harmonizing his position with the generally recognized rule that there are some matters of fact which a court may, but need not, judicially notice.

Mr. Morgan says that if a matter is indisputable it is within the domain of judicial notice. He poses the question: "How then can a court be justified in failing or refusing to notice it?" Readily conceding that a court may not refuse to take judicial notice of indisputable matters, does it follow that all other matters must be the subject of proof? Mr. Morgan questions the existence of an intermediate ground. Three universally accepted propositions are stated in support of his contention: (1) a party has no right to complain of an error which he induced or which he failed to take proper measure to present; (2) the personal knowledge of the jurors or counsel may or may not be coextensive with that of the judge; and (3) whether or not a given proposition is disputable may itself be disputed by reasonable men. Illustrations are presented.

(1) A party who did not call the trial judge's attention to an applicable statute was held to have waived his right thereunder, whereas in other cases lower courts were reversed because their decisions were in conflict with statutory provision. Do these cases[7] go further than merely to illustrate the apparently conflicting views of the appellate courts with regard to a procedural question of waiver?

(2) A resident judge of a certain city may know that a particular block in the city is occupied by business structures,[8] whereas if the case were heard in another part of the country, such fact would not be noticed. Again, unquestionably the illustration supports the proposition. But how does it prove that matters of fact in this permissive area of judicial notice are incontrovertible?

(3) Evidence was introduced in a rape case tending to show that the prosecutrix in consequence of the alleged rape gave birth to a child.

[6] THAYER, A PRELIMINARY TREATISE OF EVIDENCE AT THE COMMON LAW 308 (1898) (hereinafter cited THAYER); 9 WIGMORE, EVIDENCE § 2567 (3d ed. 1940) (hereinafter cited WIGMORE).

[7] Great Am. Ins. Co. v. Glenwood Irrigation Co., 265 Fed. 594 (8th Cir. 1920); Boyd v. Geary, 126 Conn. 396, 12 A.2d 644 (1940); Hatch v. Merigold, 119 Conn. 339, 176 Atl. 266 (1935); The Glebe Sugar Refining Co. v. Trustees of Port and Harbours of Greenock, [1921] 2 A.C. 66.

[8] Vancoe v. Lee, 180 Cal. 338, 181 Pac. 223 (1919).

Defendant requested a blood test. The appellate court upheld the trial judge in declining to allow the test. On a rehearing the court stated that although the accuracy of such a test was scientifically established, at the time of trial it had not been generally accepted.[9]

Attention is then called to a case just the converse of the preceding one. That a woman is capable of childbirth during her entire adult life was once established as a rule of property. The United States Supreme Court, taking judicial notice of certain statistics and the development of modern surgery, declined to adhere to the rule of property.[10] Courts are constantly enlarging upon the area of judicial notice to meet advances in science. A fact which the courts may have noticed today becomes imperative tomorrow. Although it is true that courts, in their consideration of whether or not a specific matter of fact should be judicially noticed, take into account its disputability, such disputability is not the sole criterion for the determination.

Mr. Morgan concludes: "A necessary deduction from my position is that if a fact lies within the field of judicial notice, no evidence tending to prove the contrary is admissible." But does this conclusion inevitably follow from the foregoing propositions, with their illustrations, considered severally and then jointly?

Encouragement for his position is derived by Mr. Morgan from his analyses of several cases, some cited by Thayer and some by Wigmore. These analyses reflect the profound scholarship of their author.

An attack is then made upon the citation of recent cases in Wigmore.[11] Here again Mr. Morgan displays his power of discernment. Nevertheless, with due deference to his arguments, it is respectfully submitted that counsel should not have the slightest hesitancy in citing these cases for the position enunciated therein that taking judicial notice of a matter does not in and of itself render such matter indisputable. Manifestly it is one thing for a court to refuse to lend itself to an investigation of whether water runs uphill; it is quite another to hold that any matter, even though within the twilight zone of common knowledge—once noticed—is incapable of refutation by means of the introduction of evidence.

Commenting further upon the cases and authorities, Mr. Morgan says that the effect of the Wigmore doctrine "is that there is no matter of fact not subject to dispute in litigation." Is this conclusion justified? Although within the sphere of judicial notice there are innumerable

[9] State v. Damm, 64 S.D. 309, 266 N.W. 667 (1936).
[10] United States v. Provident Trust Co., 291 U.S. 272 (1934).
[11] 9 WIGMORE § 2567 n. 1 (Supp. 1957); United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945); Macht v. Hecht Co., 191 Md. 98, 59 A.2d 754 (1948); Appeal of Albert, 372 Pa. 13, 92 A.2d 663 (1952); State v. Lawrence, 120 Utah 323, 234 P.2d 600 (1951).

matters incapable of being disputed, at the same time an enumeration of those within the borderland would run into astronomical figures.

Although Mr. Morgan emphatically asserts that no question of mere terminology is involved between his position and that expressed in Wigmore, perhaps, as someone has suggested, the latter thesis placed in juxtaposition with the former's discourse may reveal, fundamentally at least, that their differences are not as formidable as Mr. Morgan conceives them to be.[12] Continuing, Mr. Morgan says that if his analysis is accepted, "Thayer is right in declaring the doctrine applicable, 'Wherever the process of reasoning has a place, and that is everywhere' . . . ."

In support of his position that Wigmore's treatment of judicial notice is fallacious, attention is focused on several situations. Bearing in mind, however, Wigmore's contention that the courts frequently, and at the same time erroneously, refer to certain topics as within the concept of judicial notice,[13] one is not necessarily persuaded that Mr. Morgan's thoughtful analyses of these situations decisively prove Wigmore to be in error.

In conclusion, Mr. Morgan most effectively and convincingly discusses the inherent dangers incident to judicial notice. Pretrial procedure, he tells us, is singularly adaptable for minimizing these dangers.

Functions of Judge and Jury

This topic is treated first by discussing the allocating and discharging the burden of proof. He deplores the trend of the courts to accept Thayer's doctrine, adopted by Wigmore. Under this view, he points out, evidence introduced tending to negative a fact presumed, if believed, warrants a finding contrary to such presumed fact.[14]

A dissertation then follows as to rulings on the admissibility of evidence. Mr. Morgan expresses agreement with Thayer's propositions that nothing logically irrelevant is admissible[15] but that, subject to numerous exceptions and qualifications, data which are logically relevant are admissible.[16] In instances where the "admissibility does not depend upon the truth of a disputed proposition of fact," no problem of distribution between the function of judge and jury, he reminds us, arises. Attention is here focused on the problem arising from two dependent items of evidence, *i.e.*, where neither has any logical relation to a fact to be proved, but where the existence of both does have such relation. Illustrations are presented demonstrating the fallacy in excluding either of the items be-

[12] 9 Wigmore, §§ 2565, 2570. [13] 9 Wigmore § 2566.
[14] 9 Wigmore § 2491; see McCormick 668-72.
[15] Thayer 266. See 1 Wigmore § 9; McCormick 314-21.
[16] See 1 Wigmore § 10.

cause both cannot be offered instantaneously. Mr. Morgan insists that when one item of evidence is offered that the trial judge should be required to pass merely upon the question as to whether the proponent has the intention and the ability to offer the second item. His supporting argument, it is submitted, is incapable of successful refutation.

The interesting and difficult cases, those in which the answer to the preliminary question is identical with an ultimate question to be answered by the trier of fact, are analyzed.[17] Mr. Morgan with characteristic clearness points out many inconsistencies evolved from the decisions by the courts' improper framing of the preliminary question. His review of the cases relating to conspiracies and confessions is particularly noteworthy.[18]

To derive the maximum benefit from this lecture it should be carefully read and reread. Time and thought thus expended are more than adequately compensated thereby.

History and Theory of the Hearsay Rule

Mr. Morgan's many outstanding contributions[19] in this intricate area of proof have received wide acclaim from distinguished scholars of the law of evidence, including many members of bench and of bar. It is not surprising therefore to find exemplified in this lecture and in the concluding one the zenith of his profound scholarship.

Not being content to rely upon the historical development of the hearsay rule as recorded by former distinguished scholars, he has given us the benefit of his own prodigious explorations. His re-examination of the theory of the rule against hearsay also bears witness to his power of analysis. Here again, Mr. Morgan has no reluctance in discarding the theories of others when after prolonged consideration and study he finds them at variance with his own conclusions.

In conclusion, Mr. Morgan here addresses himself to some of the seemingly illogical approaches employed by the courts in dealing with these exceptions to the hearsay rule. "There is no single theory or principle which will lend any element of consistency to the decisions governing hearsay and its exceptions."

[17] Miles v. United States, 103 U.S. 304 (1880); State v. Lee, 127 La. 1077, 54 So. 356 (1911), among others.

[18] Stein v. New York, 346 U.S. 156 (1953); People v. Weiner, 248 N.Y. 118, 161 N.E. 441 (1928); citing also the discerning article, Maguire and Epstein, *Preliminary Questions of Fact in Determining the Admissibility of Evidence,* 40 Harv. L. Rev. 392 (1927).

[19] *Hearsay Dangers and the Application of the Hearsay Concept,* 62 Harv. L. Rev. 177 (1948); *Admissions as an Exception to the Hearsay Rule,* 30 Yale L.J. 355 (1921); *Suggested Classification of Utterances Admissible as Res Gestae,* 31 Yale L.J. 229 (1922); *Hearsay and Non-Hearsay,* 48 Harv. L. Rev. 1138 (1935); *Declarations Against Interest,* 5 Vand. L. Rev. 451 (1952); *Hearsay,* 25 Miss. L.J. 1 (1953).

Not as a complete panacea for all the ills here experienced, but as a possible means of remedying the chaotic condition, he urges a consideration of the Uniform Rules of Evidence.

Readily conceding that numerous rulings involving the hearsay rule and its exceptions reflect logical inconsistencies, does this fact warrant a restatement or revision of the subject? Do not many of the uniform acts eliminate many undesirable aspects in this zone of proof? Do not the rules of evidence evolve principally from an empirical process as distinguished from a purely logical one? Do not the courts in this evolutionary process of making innovations upon precedent time and time again seek guidance from the authorities—particularly from the notable contributions of Mr. Morgan concerning hearsay?[20]

HEARSAY: THE RULE IN THEORY AND PRACTICE

An instructive résumé of the following exceptions to the hearsay rule is presented: 1. *Dying declarations;* 2. *Declarations against interest;* 3. *Official written statements;* 4. *Business entries;* 5. *Spontaneous statements;* and 6. *Pedigree declarations.*

This review, he tells us, demonstrates that courts now dealing with hearsay, while giving lip service to reasons assigned by their predecessors for the existence of the rule, no longer regard them. Oath and an opportunity for cross-examination do not of themselves save the utterance from hearsay; nor, he continues, does the absence of oath require exclusion. The test applied in most instances of hearsay exceptions, he believes, is: " '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?' " He decries the employment of the orthodox statements made by the courts. In this connection Wigmore's thesis is roundly assailed.[21]

The adoption of the Uniform Rules of Evidence with reference to hearsay is advocated as a more realistic solution to the problem.

Undoubtedly, these rules are deserving of the utmost consideration by members of the bench and of the bar. They represent years of scholarly consideration and study by some of the most eminent authorities in the subject of evidence, including distinguished practitioners and members of the bench. At the same time is it not true that these rules have a decided tendency toward over-simplification? Moreover, from Mr. Morgan's argument is it not clear that the law of evidence in this sphere of hearsay is undergoing an evolutionary process of development

[20] See note 19 *supra;* FRYER, SELECTED WRITINGS ON EVIDENCE AND TRIAL (Ass'n Am. Law Schools 1957).

[21] See WIGMORE §§ 1362, 1420.

in the direction he advocates? Is it not true that the adoption of the Uniform Rules would tend greatly to impede such an evolutionary process? Would not the ratification of these rules directly affect the dynamic empirical process which has heretofore characterized the development of the law of evidence, particularly in this hearsay area of proof?

HEARSAY: THE RULE IN CONJUNCTION WITH OTHER EXCLUSIONARY RULES

Rarely is the effect of the exclusionary rules of evidence, he tells us, the subject of judicial discussion. Judicial precedent usually deals with the application of one or more of the rules in isolation. Thus, he continues, the proposition in dispute is confined to whether or not the evidence falls within a given rule; the rationalization of the result goes unnoticed. Nevertheless, a court occasionally invokes some qualification to a rule "where its application would work a startling injustice, or a legislature will grant relief by modifying or repealing an ancient rule," etc. Neither the active practitioner nor the busy trial judge, and seldom the appellate court, confronted with a procedural problem surveys the field as a whole or inquires into "the basis for a particular rule, or whether the application of that reason would explain, strengthen, or destroy another accepted rule." Accordingly, he observes, the specific problem before the court is ordinarily the only one considered. Even great commentators "do not demonstrate the need for reconsideration of the entire subject by contrasting the reasoning in one segment with that in another."

After expressing some hesitancy because of certain anticipated stereotyped criticism, clearly unfounded, we submit, in the light of his profound dialectic discussion, Mr. Morgan surveys a number of specific problems involving a wide range of exclusionary rules. Each problem is treated separately, and then the result of the solution of each one is compared with that of each of the others. A most arresting method of presentation is thus employed.

The attendant facts of a situation evolving from a pedestrian's being struck by an automobile are narrated. Although there is nothing particularly novel about the occurrence or about the course of events that follow, there is no lack of practical evidential questions which frequently arise in the dispatch of the trial cases. Nothing is left to conjecture insofar as the probable solution of each question at the hands of the court is concerned.

Seemingly, many paradoxical results obtained by the courts are elucidated upon in a forceful dialectic manner. In this process of comparison the lucidity of Mr. Morgan's arguments leaves no doubt as to his mean-

ing. Nevertheless the denouement here is often most provocative.

Manifestly, from a purely logical standpoint, as Mr. Morgan convincingly demonstrates, many of the rulings of the court on questions of admissibility growing out of the narrated events cannot be reconciled. Moreover, the overall picture of the incongruous results obtained by the court in the enumerated situations is sufficient to cause one to wonder whether or not the law of evidence generally is in a hopeless state of confusion and inconsistency.

A panoramic review of the cases selected at random from the customary classifications of the subject, it is submitted, will reflect, however, a surprising degree of uniformity. This uniformity is accounted for in part, at least, by numerous legislative enactments, which have no doubt for the most part exerted a salutary influence on the growth and development of the law in this area of proof.

Even in the absence of legislative assistance, the courts, motivated by an analysis of Mr. Morgan or some other distinguished authority, have often experienced no difficulty in breaking away from the shackles of precedent. In doing so, however, as Mr. Morgan positively observes, no effort is made to reconcile the logical differences existent in the application of other rules of evidence.

This heuristic method seems far more realistic than one which would seek logical consistency with other rules even though confined to those within a general sphere as that of hearsay. This does not mean that analyses from other rules should be ignored, but merely that the cynosure is properly centered upon the solution of the specific problem presented. A veritable storehouse of practical experience is made available for the evolutionary process in the development of the rules of evidence. Surely from the standpoint of the meting out of justice this approach seems far more desirable than one based primarily upon an attempt to harmonize the rules even though it is limited to a classification.

Another reason suggests itself as to why this heuristic method of establishing rules of evidence is perhaps preferable to one based upon logical symmetry. A rule evolved from the empirical process is manifestly more likely to give way to meet unforeseen circumstances than one promulgated on logical comparison, for the very essence of the former process is the practical solution of a particular problem encountered—not logical symmetry of exposition.

Perhaps it would be helpful to consider the treatment of the rules of evidence in action.

As Mr. Morgan tells us, the court, ordinarily, during the trial of a

cause has neither the time nor the disposition to make an acute analysis of a rule of evidence upon the interposition of an objection. Nevertheless, frequently counsel will anticipate before trial a particular problem of evidence—perhaps having to do with corroboration or impeachment as distinguished from a substantive aspect of the case. Counsel presents to the court the result of his industry and his research into the question involved. Ordinarily, the presentation of the matter consists of argument based upon a case or series of cases either in support of the admission or exclusion of the offered evidence, or an effort is made to distinguish the situation before the court from that of a given case or line of cases. In either event some authoritative work or treatise is occasionally submitted—often supplemented by a law review article, note, or comment. If an attack is made upon an established precedent, which we will say has merely a historical basis for its existence, the chances of prevailing over such precedent may be slight, because often the trial court takes the position that it is the sole prerogative of the appellate court to adopt a different course. However, as reflected by numerous decisions, the decided trend of the appellate courts is to break away from precedent whenever common sense dictates that justice may be promoted by so doing. It is here again that articles by Mr. Morgan and others have exerted a stabilizing and salubrious influence upon the courts. True it is that in many instances the courts, while taking note of such articles by citation or quotation in the opinions, are not disposed to adopt the rule or rules therein advocated. In other instances, while not going the full length urged in the particular article, the court will modify an existing rule of evidence in consequence of the article. This brings us to the interesting question of whether there is invariably a definite choice to be accorded one rule over another—the one right, the other wrong.

The question is well illustrated by the so-called "Dead Man Statute" that has been enacted in a large number of jurisdictions. It makes no difference for the purpose of discussion that the legislature enacted this rule of exclusion. In fact, we take it that the rules of evidence are within the province of the courts to promulgate and not the legislature to enact. Although the courts have become accustomed to acquiesce in such legislative measures, it is believed that the courts may with impunity disregard statutory rules of evidence because matters of court procedure are inherently vested in the courts. At any rate, Mr. Morgan presents a strong case against this exclusionary rule. His argument supported by the hypothetical case is most persuasive. On the other hand, many trial judges and trial attorneys with years of experience will be equally adamant in their position that but for the statute the

door would be wide open for the miscarriage of justice, citing innumerable instances to demonstrate their position. To borrow from Sir Roger De Coverley, is there not "much to be said on both sides"? Irrespective of the final choice between the exclusion and the admissibility of such testimony, is not the approach to the solution of the problem which is based on the experience of mankind preferable to one which employs logical analogy to some other rule or rules of evidence? Is there anything catastrophic in one jurisdiction's excluding and another's admitting such evidence? Is not such a situation commonplace in other branches of the law?

There is one more facet of the rules of evidence in action that seems worthy of note.

The average capable lawyer with ten to fifteen years' experience in the drafting of briefs would doubtless have difficulty in reciting accurately several rules of grammar. And yet his briefs will reflect to a remarkable degree a meticulous adherence to the rules; few solecisms in them would be found. Similarly the average capable trial lawyer with about the same number of years' experience will have difficulty in reciting accurately even a few of the so-called well-established rules of evidence. Nevertheless, in the trial of a cause, on the spur of the moment—without advanced preparation of the question of evidence raised—he will disclose in his argument before the court an astounding degree of familiarity—not so much with the rules themselves as with fundamental concepts of the subject. With incredible ingenuity he will press his position upon the court.

It is self-evident that without a thorough grasp of the subject of grammar, the lawyer drafting the brief would be materially handicapped in effectively expressing himself; by like token, without a comprehensive knowledge of the subject of evidence, the lawyer presenting the extemporaneous argument would be materially handicapped in making the presentation. This essential knowledge of the respective subjects is derived first from academic instruction and study—indispensable concepts are here obtained. The groundwork is supplemented by application and experience. Extensive reading of grammatically correct essays and books, we are told, is calculated to improve one's form of expression. Examination of opinions of courts, passages from treatises, and law review articles, notes, and comments, coupled with observation and participation in the trial of cases, broadens the lawyer's perspective on the subject of evidence. But what is particularly worthy of note at this point is that knowledge of rules is not indispensable to the proficient application of either subject.

In many instances, the capable trial lawyer in an unprepared argu-

ment on a question of evidence unwittingly states either erroneously a so-called well-established rule of evidence or a generality that is of questionable assistance in the solution of the problem. In spite of these variants, the probabilities are that somewhere along the line of his presentation a logical and persuasive note will be struck resounding from an indeterminate number of long-forgotten sources. Naturally, analogies derived from the determinations of the courts in somewhat similar situations may be employed and will be of assistance to the court. But in the final analysis the court and the lawyers engaged in the disposition of a cause are primarily interested in the solution of the precise question presented—not in the formulation of a rule for future guidance.

This, it is submitted, is as it should be. The very lifeline of the law of evidence is its amenability to meet varying circumstances, and for that matter to change the course of precedent when experience points out the shoals of disaster. It is one thing to promulgate or to enact a rule of evidence with reference to a specific problem commonly acknowledged by bench and bar as essential to the rational development of the law; it is quite another to promulgate or to enact a set of rules designed to revolutionize the subject of evidence. The adoption of the former course has, for the most part, exerted a sound influence in the development of the subject of evidence; the adoption of the latter course, in addition to reasons herein above stated, would be the equivalent of substituting a sound and rational evolutionary process—one which has proved itself to be sound—for one of highly conjectural practicality. Once more the question is raised as to what effect the enactment of such a set of rules would have upon the many excellent articles of Mr. Morgan and other authorities in the field of evidence? Would not the heuristic process give way to one of interpretation? Would not such rules tend to cut short the development of the law in this area of proof?

Does all this mean that Mr. Morgan's advocacy of the adoption of the Uniform Rules of Evidence should be disregarded? Quite the contrary. Bear in mind that Mr. Morgan has a complete mastery of his subject; his keen analytical ability is a matter of common knowledge in all jurisdictions where the Anglo-American law prevails. But even more important, it is well known that his intellectual integrity knows no bounds.

The reviewer has perhaps reached the height of audacity in taking issue with Mr. Morgan on any aspect of this subject of evidence—especially in expressing disagreement with his advocacy of the Uniform Rules of Evidence. Doubtless, seemingly insurmountable difficulties with reference to these rules herein mentioned will be found upon closer inspection to have been improvidently made. Careful attention paid

to the denouement reached by Mr. Morgan may establish the imponderables supposedly affecting these rules adversely as a mere mirage.

Without the slightest reservation the reviewer emphatically reasserts the position he took at the beginning of this review. Mr. Morgan's book gives us the very essence of the lucubrations and research over the years by a master in this area of the law. Moreover, this book is of immeasurable practical value to both bench and bar.

Indulgence is sought for one final word about its author.

No one has exerted a more profound and salutary influence upon the courts in the field of evidence than Mr. Morgan. A host of successful lawyers and able judges who were afforded the privilege of his classroom bear witness to this fact. But a much larger, and ever increasing group outside the pale of the lecture room—especially those of us who have had the privilege of knowing him—share their admiration, love, respect, and esteem for Edmund Morris Morgan.[22]

RICHMOND RUCKER*

Member of the North Carolina Bar

Essentials of Insurance Law. By Edwin W. Patterson. New York: McGraw-Hill Book Company. 1957. Pp. 558.

This is a completely revised edition of a book by the author which was published in 1935. Mr. Patterson is Cardozo Professor of Jurisprudence at Columbia University and former Deputy Superintendent of Insurance of New York. He was largely responsible for the drafting of the complete revision of the New York Insurance Law, 1935-1939, which was followed in many other states by a comprehensive revision of their Insurance Codes.

Many important changes have occurred since the publication of the first edition. In the *South-Eastern Underwriters* case[1] the Supreme Court reversed the opinion held in numerous prior decisions dating back to *Paul v. Virginia*[2] in 1868 and found insurance to be commerce, and therefore subject to regulation by Congress under the commerce clause of the Federal Constitution. The passage of the McCarran Act in 1945 (often referred to as Public Law 15)[3] substantially reduced the effects of this decision and permitted the states to continue to regulate and tax the business of insurance as heretofore. However, unless state

[22] Grateful acknowledgment is made for the helpful consideration of certain aspects of this review by the Honorable J. Russell McElroy, Presiding Judge for the Tenth Judicial Circuit of Alabama.

* Mr. Rucker is the author of the pocket supplements to the current edition of WIGMORE, EVIDENCE. [The editors.]

[1] United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944).
[2] 75 U.S. (8 Wall.) 168 (1868).
[3] 59 STAT. 33 (1945), as amended, 15 U.S.C. §§ 1011-15 (1952).

regulation and supervision comes up to satisfactory standards Congress may intervene, and this situation necessitated substantial changes in the insurance laws of most states in order to comply with the intent of the McCarran Act.

Improvements and changes in the standard provisions of the workmen's compensation policy, of motor vehicle and other forms of liability insurance, and the drastic revision of the standard fire insurance policy in 1943 have deleted many litigious clauses and rendered hundreds of judicial precedents obsolete. These numerous changes in policy provisions, insurance laws, and subsequent court decisions made a thorough revision of the first edition essential, and the author has done a scholarly and workman-like job in bringing this revision up to date.

The aim of the present volume is to present a readable summary of the most important doctrines of insurance law. As Professor Patterson says:

> The general law of contracts has supplied the basic ideas for the law of insurance contracts; yet the general law has been profoundly modified by the needs of the insurance business. On one hand, the insurer has tried to condition and limit the risks that it assumes in making contracts; on the other, the insuring public has needed and obtained protection against both overcautious hedging and unscrupulous overreaching by some insurers and some agents. Insurance law, a product of these conflicting demands, needs to be evaluated in its moral or public-policy, as well as its technical aspects. To extricate these interrelations of law and business, of technique and justice, from the myriad of judicial reports and statutes is a task at which the author has worked for some forty years.[4]

This book presents the essentials of insurance law in its relation to the insurance business and its practices. The scope includes the major legal problems of the insurance contract and explanations of the rights and duties of insurers and insureds under it.

The initial chapter on governmental control furnishes an outline of the types and functions of insurance regulatory legislation and provides the legal and institutional background of the insurance contract. Ensuing chapters are devoted to the making, validity, and enforcement of insurance contracts. Insurable interest, which distinguishes the insurance contract from a gambling or wagering contract, is discussed in careful detail. Because of the aleatory nature of the insurance contract the courts have always held it was a contract involving the utmost of good faith and this justifies the careful treatment the author gives to the subjects of warranties, representation, and concealment. The final

[4] PATTERSON, ESSENTIALS OF INSURANCE LAW p. vii (1957).

chapter is concerned with those oral or informal dealings between the insured and the insurance agent and other insurer's representatives that go under the name of waiver and estoppel. Throughout the book a sustained effort has been made to lay bare the underlying principles and policies, often competing or conflicting, of legal rules and doctrines and to indicate current trends of legislation and case law.

This volume is not limited to any one area of insurance such as fire, marine, casualty, or life insurance, but presents the basic problems and legal principles of all of the principal branches of insurance. This treatment is desirable since the courts in this country have made no sharp distinction between the legal rules relating to one kind of insurance and those relating to another, and many legal doctrines apply to all kinds or to several kinds of insurance. This is further justified by the fact that the law as an instrument of social control for the public good seeks to maintain values that are common to all branches of insurance.

When an earlier edition is revised the reader is often left with a bad taste when he finds that most of the references and cases cited are the same as those in the first edition which now seem considerably out of date. Professor Patterson appears to have done a meticulous job in bringing up to date his references and case citations to the latest laws and court decisions applicable to the subject under discussion and thus has avoided this common fault of so many revised editions.

The first edition, while intended primarily for the needs of laymen, was used to a considerable extent by lawyers, judges, and law students and this revised edition will be found to be an equally authoritative guide.

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