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

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BOOK REVIEW

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

It is the opinion of the writer that a book review, to be read and remembered, should be brief almost to a fault. Moreover, if a book is worthy of a review, the review should be written to generate an interest in the book and not to lengthily applaud the author. Sometimes, however, the substance of an author's thinking is so provocative that it is extremely difficult to be brief and still more difficult not to applaud. Such is the thirteenth series of the James S. Carpentier Lectures by Professor Edmund Morris Morgan, published under the title *Some Problems of Proof Under the Anglo-American System of Litigation.*

This is not at all surprising, in view of the professional background of Professor Morgan. Although categorized in "Who's Who" as a professor of law, he is a lawyer as well. He approaches the *problems of proof* with a lawyer's viewpoint and a good teacher's patience with imperfection. In his busy career, he has found time to contribute as a writer to the betterment of his profession and to serve in other capacities when called upon to do so. Among other things, he served as Assistant to the Judge Advocate General of the United States Army during World War I; on the Advisory Committee to the United States Supreme Court on the Rules of Civil Procedure; as Reporter for the Code of Evidence of the American Law Institute; and on the Committee that drafted the Uniform Code of Military Justice after World War II.

In passing, it is interesting to note that the Carpentier Lectures have been given at Columbia University since 1904 and were established by General Horace W. Carpentier in honor of his brother, James S. Carpentier. Among the prominent Carpentier lecturers over the years we find the names of such men as Benjamin Cardozo, John Chipman Gray and Sir Frederick Pollock. Professor Morgan delivered the six lectures contained in his book before the faculty and students of the Columbia Law School and members of the New York bar in 1955. They are in complete harmony with the high purpose of the Carpentier Lecture Fund and shed significant and penetrating light on the subject of jurisprudence.

The Morgan lectures are so analytically dissective of the Anglo-American trial system that some of us who engage to a considerable extent in the actual trial of cases are somewhat embarrassed with the long continuance of certain courtroom practices and procedures which arose in an era vastly different in social and economic structure and for reasons not now pertinent to our own. No better statement of the objectives of his lectures can be given than the one contained in the preface, written by the author himself, in these words:

> ". . . Their objective is to direct the attention of judges and lawyers (1) to the obstructions to adequate preparation for trial created by orthodox rules of pleading and discovery, (2) to the unnecessary confusion caused by conflicts of opinion as to the basis of the doctrine of judicial notice and the potential dangers of confusing it with presumptions, (3) to the needless uncertainty as to the distribution of functions between judge and jury by the use of loose and inaccurate language in dealing with the decisions of questions preliminary to the admissibility of evidence, (4) to the practical impossibility of conveying to the jury an intelligent concept of the consequences of the allocation of the burden of persuasion by the use of the currently accepted instructions, and (5) to the barriers to a rational presentation to the jury of materials of high intrinsic relevancy and persuasive value, erected by the hearsay rule and other exclusionary rules. In preparing the lectures for publication, little attempt has been made to eliminate the repetition which is requisite in oral presentation at various intervals to different audiences."[1]

The lectures are crisp and refreshing and, in some instances, freezingly so. The author, with easy liberty—and not without reason, takes exception to some of the precepts considered incontrovertible by such masters of the law of evidence as James Bradley Thayer and John Henry Wigmore. In the lecture on "Judicial Notice", for instance, Professor Morgan challenges the conclusions of Thayer and Wigmore to the effect that judicial notice does not import that the matter is indisputable. With incisive directness, he says:

> ". . . Professor Thayer's argument and illustrations, therefore, do not support his conclusion.
>
> "And Wigmore's text is no better. His citations are of no value. . . ."[2]

[1] Page xi.
[2] Page 52.

In the lecture entitled "History and Theory of Hearsay Rule", Professor Morgan observes that:

> ". . . if we are to have a rational system, we cannot accept ancient procedural precedents as having been divinely inspired or be deterred from questioning them by assurances that they had as early as 1790 been matured by the wisdom of the ages and are to be revered not only because of their antiquity but also because of their foundation in good sense (and particularly when the assurance comes from Lord Kenyon, whom Thayer once described as 'famously ignorant')."[3]

All practitioners will not share Professor Morgan's enthusiasm for the Federal Rules of Civil Procedure, especially those practitioners in common law jurisdictions. Nor will all practitioners agree that as a basic assumption all litigants dispute honestly, without unmoral intent, and that it is an answer to potential abuses and perversions of rules of discovery to say that ". . . at worst the result will be more desirable than that which could be obtained under the orthodox code practice."[4] Nevertheless, upon this subject, as upon other subjects exposed in the six lectures, the reader, although he may disagree in part, will find it impossible to remain unresponsive to the stimulating thought and sincere conclusions of the author to the effect that affirmative steps must be taken "toward making a lawsuit a rational proceeding for discovering the factual basis of a controversy"[5] and that one of these steps is a complete renovation of the rules of evidence.

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[3] Page 119.
[4] Page 31.
[5] Page 85.