# REVIEWS AND NOTICES

*Malpractice Liability of Doctors and Hospitals* (*Common Law and Quebec Law*). By WILLIAM C. J. MEREDITH, Q.C., Dean of the Faculty of Law, McGill University. With a foreword by J. GILBERT TURNER, M.D. Toronto: The Carswell Company Limited. 1956. Pp. xv, 300. ($7.75)

After writing two useful books for the legal profession—*Insanity as a Criminal Defence* (1931) and *Civil Law on Automobile Accidents* (*Quebec*) (1940)—Dean Meredith of the McGill Faculty of Law has turned his scholarly pen to a volume that will be of interest not only to his brethren in the law but to the medical profession as well. In fact one wonders which of the two callings will find his latest book, *Malpractice Liability of Doctors and Hospitals*, the more useful. On the one hand, a lawyer charged with any aspect of a malpractice suit is unlikely to find elsewhere a more authoritative, accurate and detailed examination of the Canadian law on the subject; on the other, the doctor, wondering how to avoid the pitfalls of liability in his practice, will find here an easily understood account of the extent to which the courts have extended the borders of medical responsibility for negligent acts.

It is, of course, true that the important field of legal medicine has already received considerable attention from legal writers. The frequent references in this volume to such works as the tenth edition of Taylor's *Principles of Medical Jurisprudence in England* and Regan's *Doctor and Patient and the Law* (1949), as well as Roscoe N. Gray's *Attorney's Textbook of Medicine* (1949) in the United States, are a reminder that standard works have existed for many years in other countries. In addition there are available the annual volumes of the Medico-Legal Journal, published in England, the French *Annales de Médicine Légale*, and other specialized periodicals. In Canada we have too the advantage of a treatise—a relatively short one—by K. G. Gray, M. D., Q. C., an eminent member of both the medical and legal professions in Toronto, a revised and enlarged edition of which, *Law and the Practice of Medicine*, has but recently appeared. And the publication of a volume in French, *La responsabilité civile du médecin et de l'établissement hospitalier*, by Professor Paul A. Crépeau,

of the Faculty of Law at the University of Montreal, is expected shortly.

As his title indicates, Dean Meredith has set himself the limited purpose of studying the liability of the medical profession for damages arising from malpractice—a term that has been defined in Webster's New International Dictionary as "the treatment of a case by a surgeon or physician in a manner contrary to accepted rules and with injurious results to the patient; hence any professional misconduct or any unreasonable lack of skill or fidelity in the performance of professional or fiduciary duties" (p. xii). Nevertheless, in the course of examining the question of liability, the author has introduced considerable material on such incidental and cognate subjects as the relations between doctor and patient, professional secrecy, the doctor as a witness and court procedure.

The primary concern of the volume, the doctor's liability arising from negligence—the breach of his legal duty to conform to the standards of proficiency and care required by law—raises of course the central question what, according to law, this standard of care is. After discussing various aspects of the question, the Dean puts at page 62 the following formulation of principle, deduced from the decisions of the courts:

> The standard of proficiency required by law has been defined as that of 'the ordinary competent medical practitioner'. A more specific requirement commonly applied in the United States is 'that reasonable degree of learning and skill ordinarily possessed by other practitioners in the same locality'. But the efficacy of this test has been questioned by an Ontario court on the ground that it is conceivable that all doctors in a given locality might be ignorant and behind the times. Upon the whole it would appear sounder to measure a doctor's skill by that *generally possessed by practitioners in similar communities in similar cases.* It follows that a court should not exact the highest, or a 'very high' standard and should not hold a doctor to have been negligent merely because the diagnosis, operation or other treatment might have been performed more skillfully by some other practitioner.

And so, as Dr. J. G. Turner, Executive Director of the Royal Victoria Hospital and President of the Canadian Hospital Association, suggests in his enthusiastic foreword, the book brings reassurance to the medical profession that the law, generally speaking, requires due and reasonable care, not superhuman performance, in weighing the responsibility of doctors and hospitals for negligence.

The author goes into considerable detail in discussing the various types of situation that commonly give rise to problems of legal liability, as will appear from some of the sub-headings of the chapter on Malpractice in Diagnosis and Treatment: Diagnosis; Misinterpretation of X-ray Picture; X-ray Burns; Bandages

and Casts Applied too Tightly; Injection of Drugs; and the inevitable case of the surgeon who sews up his patient without removing all sponges from the cavity. In each case the applicable rule is illustrated by a number of court decisions taken from different jurisdictions, so that the reader gets a practical insight into how the rule is applied to a particular set of facts. Very often the author adds his own comment, as for example that, notwithstanding the dismissal of an action against a doctor for failing to diagnose a mastoid within a reasonable time after the symptoms appeared, a medical man, when uncertain about a case, should take immediate steps to call in another practitioner.

A good deal of space is devoted to the responsibility of hospitals. The extension of medical care in recent years has seen the expansion of institutions, operated under intricate rules and complex circumstances. To the hospital administrator the question of hospital liability is of course of prime importance. The reader's understanding of this liability is facilitated by the division of the discussion into three categories, depending on whether (a) the doctors, interns and nurses concerned are in the hospital's employ; (b) the doctor is not so employed; and (c) the interns and nurses are under the direction of a third party. In the case of (a), it is pointed out, the hospital is liable for negligence occurring in the course of their regular duties; in (b), there is no liability even if the doctor uses the operating room, nursing services and other facilities of the hospital; and in the case of (c) the liability may be shifted to the temporary employer, although the general employer, the hospital, may still be liable if the negligent act was committed in the course of the employee's regular duties. The chapter on this subject covers fifty-four pages and contains as many as a hundred and forty-three footnotes, most of them references to judicial decisions.

As I read this book I reflected that it could not have been written nearly as well by anyone without the long and intimate association Dean Meredith has had with the medical profession, both as adviser and trial counsel for a number of institutions and practitioners. His interest in the field over a period of many years has enabled him to deal authoritatively with a subject that requires a considerable knowledge of technical detail. Yet the book is written in non-technical language, so that the layman, even the layman with no direct concern in legal medicine, should be able to follow its pages easily.

For the layman with a medico-legal background and the lawyer there are copious footnotes to guide him in more intensified research if he is so inclined. The author had a choice between distributing the more than five hundred footnotes the book contains at the bottom of the pages or relegating them to the end of each

chapter. In the interests of the general reader he chose the end of chapters, and the choice was probably a wise one, even if it proves somewhat disconcerting for anyone accustomed to absorbing footnotes as he goes along.

Finally, it is to be said that the author, given the limited size of his book, seems to this civilian to have been successful in his attempt to deal with the law not only of Quebec but of the common-law provinces as well—a fact that will ensure the work a national distribution. As he points out in his introduction, the differences between the two legal systems are not as substantial in this field as in some others. Leading English authorities, such as the *Hillyer* case, that have for so long influenced the courts in all the provinces are amply discussed. American jurisprudence, too, is frequently referred to by the author, for it has contributed greatly to the lingua franca of medical liability.

HARRY BATSHAW*

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*Chitty on Contracts.* Twenty-first edition under the general editorship of JOHN BURKE and PETER ALLSOP. Volume 1, *General Principles*, by KENNETH SCOTT and BRYAN CLAUSON. Volume 2, *Specific Contracts*, by PETER ALLSOP, BARRY CHEDLOW, BRYAN CLAUSON, RAOUL COLINVAUX, C. GRUNFELD, R. A. MACCRINDLE, CLIVE M. SCHMITTHOFF and D. A. L. SMOUT. London: Sweet & Maxwell Limited. Toronto: The Carswell Company Limited. 1955. Pp. (Vol. 1) clxiv, 836, plus pocket supplement, and (Vol. 2) cxxxi, 744, plus pocket supplement. ($27.00)

A treatise on a fundamental subject such as contracts, and one so well known as *Chitty*, which has gone through twenty editions since 1826, hardly requires a review. What more need be said of a book which, since its first publication, has not passed a decade without a new edition, and on several occasions has reappeared after a space of only three years? If the old fashioned but as yet unrepealed law of supply and demand proves anything, it should establish *Chitty on Contracts* as the standard work for English lawyers and a welcome addition to the library of many Canadians as well. The only thing that needs to be said is that the standard of the earlier editions has been maintained, and the editors are justified in their opening boast that "the reform of Chitty on *Con-*

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*tracts* into a modern law book has been carried a stage further in this edition". Of course the editors do not enter into any discussion of what constitutes a *modern* law book, but one is tempted to assume that they are referring mainly to format, for they proceed shortly to point out that

> the text has been divided into numbered paragraphs to facilitate the use of the book and supplements to be produced from time to time.
>
> The work falls easily into two sections and has been divided into two volumes which have been so designed that they may be used separately or together.

Whether modernity implies much of a change in writing or analytical style may be observed by a brief glimpse at the discussion of two "major changes" since the last edition to which the editors draw attention. One of the "changes" is described briefly: "The doctrine of consideration was thought to have been weakened by the decision in *Central London Property Trust* v. *Hightrees House* in 1947, but it is now seen that this doctrine is too firmly fixed to be overthrown by a side wind". *Hightrees* is referred to on five different pages in volume 1 and not at all in volume 2. The first reference is in a footnote and says nothing of significance. The second reference merely repeats the proposition in the preface. The third reference is to be found in the discussion of the familiar problem of *Foakes* v. *Beer*. Although the *Hightrees* principle, that "when a promise is given which (1) is intended to create legal relations, (2) is intended to be acted upon by the promisee and (3) is in fact so acted upon, the promisor cannot bring an action against the promisee which involves the repudiation of his promise or is inconsistent with it" (p. 55), was "not questioned" by Asquith L.J. or Denning L.J. (its founder) in *Combe* v. *Combe*, [1951] 2 K.B. 215, and although *Foakes* v. *Beer* is not discussed by Denning J. in *Hightrees*, or even mentioned, except in the presumably revised report of his decision in the Law Reports, the editors of *Chitty* have not so much as emphasized the rather interesting proposition that a trial judge and the Court of Appeal are apparently just ignoring the House of Lords and *Foakes* v. *Beer*. The last two references to *Hightrees* are footnotes only, and on page 268 *Foakes* v. *Beer* is still preferred as the "law" and the significance of *Hightrees* is only hinted at. Nowhere in these pages are the facts of either *Hightrees* or *Foakes* v. *Beer* set out or discussed and the *problem* of the cases is hardly discernible through the barren abstractions of the legal propositions. In short, the new editors of *Chitty* follow the traditional style of English legal text-writing.

The second "major change" is of considerable interest to all contract-law students, and its effect on the twentieth edition of *Chitty* is interesting and rather amusing. As stated in the preface,

the change sounds quite "major", quite exciting, and very "progressive": "section 4 of the Statute of Frauds (except in relation to guarantees) and section 4 of the Sale of Goods Act, 1893, have been repealed by the Law Reform (Enforcement of Contracts) Act, 1954 . . .". But much of the excitement dies out when one remembers that the English years ago, in the Law of Property Act, 1925, lifted the "sale of land" clause out of section 4 so that, in practical terms, the only major deletion from the statute is the "not to be performed within the space of one year" clause and the "sale of goods" clause. In effect, then, all the cases and headaches of guarantees and land cases remain, together with all the lore about the note or memorandum. In the twentieth edition the topic ran from page 123 to page 141 and in the current edition it runs from pages 127 to 140.

Changes in content are more evident in volume 2, where chapters 17 to 28 are radically reorganized. Three chapters are "entirely new", and others have been expanded to cover new aspects of their topics. Of the new chapters, chapter 4, on Carriage by Land and Air, is notable for its excellent treatment of the statutory aspects of the subject. Section 2 of that chapter is significantly entitled "Standard Contracts and Statutory Regulations". A curious feature of this "modern law book" is the omission of any organized or formal discussion of the standard-form-contract problem, apart from standard contracts of statutory origin, despite the increasing prominence of the standard-form contract in all branches of commercial activity where simple contracts in writing are the basis of the activity. H. B. Sales' article on Standard Form Contracts in (1953), 16 Modern Law Review 318, remains the only recent treatment of this widespread twentieth-century practice in a world of nineteenth-century contract-law concepts. Chapter 5, on Conflict of Laws (by Clive M. Schmitthoff) is based on chapter 5 of that author's *The English Conflict of Laws* (3rd ed., 1954), reviewed in these pages (1955), 33 Can. Bar Rev. 363, by Professor Brainerd Currie. Recent graduates of Osgoode Hall will note with interest that the substantial additions to chapter 3 on Bankers' Contracts, on the Relation of Banker and Customer and Banker's Commercial Credits were written by Mr. David Smout, which probably accounts for the occasional references in these additions to Canadian and American decisions.

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*A Bibliography on Foreign and Comparative Law: Books and Articles in English.* Compiled and annotated by CHARLES SZLADITS. Parker School of Foreign and Comparative Law, Columbia University. Distributed by Oceana Publications, New York. 1955. Pp. xx, 508. ($15.00)

Dr. Szladits received his early legal training in Hungary, and subsequently came to the United States by way of the United Kingdom. He has set out to compile a bibliography that will include "all books and articles in the English language dealing with non-common law legal systems and with general subjects bearing upon the comparative study of law". His work takes both public law and private law as its field and, in addition, includes sections on private international law and what might conveniently be labelled as the general jurisprudence and methodology of comparative-law study. Recognizing that much of the literature of comparative law is to be found in non-legal periodicals, especially in the United States, where teaching and research in comparative law may frequently be centered in faculties cognate to law, like politics, history and international relations, Dr. Szladits has dipped very deeply into inter-disciplinary treatises and periodicals. Canadian readers will note his frequent recourse to the pages of the Canadian Bar Review and the University of Toronto Law Journal, though the omission of the McGill Law Journal and the Canadian Journal of Economics and Political Science militates against the comprehensiveness of the coverage from the Canadian viewpoint.

Necessarily, of course, with any work of this nature and length, there are problems of inclusion and exclusion, and the method of classification used may strike one at times as somewhat arbitrary. Thus Dr. Szladits has generally sought to exclude works on Anglo-American law as such: he has, however, included within the ambit of his study Scotland, South Africa, Ceylon, Quebec and Louisiana, for, "although technically all are within the Anglo-American orbit these legal systems have special importance in comparative law, because they display the influence of English law on a body of doctrine already profoundly romanized and stand between the common law and civil law systems". One consequence is that the present work contains a great many references to discussions on the recent constitutional conflict in the Union of South Africa, but correspondingly very little on major issues of public law in the other English-speaking countries, for example, problems of centralization and decentralization of authority in the great federal countries (United States, Canada, Australia and India) and the problem of the adjustment, especially under the pressure of the Cold War crisis, of conflicts between individual and group interests in speech and political activity, on the one hand, and state interests in national security, on the other.

The study and teaching of comparative law in law schools and graduate schools have advanced tremendously in the United States in the decade since the end of World War II, to a considerable extent as a response to the post-war responsibilities of the United States in the international arena. The case in Canada for comparative-law study is quite as strong. Canada's special rôle in world affairs as a middle power with close ties to both the United States and to the United Kingdom and the Commonwealth countries is enough to justify the new emphasis on foreign law in Quebec and Ontario law schools, quite apart from the obvious historical factor of the joint civil-law and common-law legal tradition.

Comparative law can be a useful tool for the judicial decision-maker too. Mr. Justice Frankfurter, vaulting nimbly over the barrier of surface dissimilarities or conflicts in the text or structure of the various constitutional instruments has found in the jurisprudence of what he characterizes as the "English-speaking World" (apart from the United States, the United Kingdom and the Commonwealth countries) a rich source of analogies to aid in the solution of cases before the United States Supreme Court. It may be regretted that the Canadian Supreme Court has seemed to cut itself off so completely, in the recent *Saumur* case (*Saumur* v. *City of Quebec and Attorney-General of Quebec*, [1953] 2 S.C.R. 299), from reference to decisions of the United States Supreme Court on substantially identical fact situations, on the score that the presence of a formal Bill of Rights in the American constitution precluded any consideration of American experience in Canada. This is, it is suggested, a rather narrow, conceptualist, approach, overlooking the extent to which the interests actually pressed by the rival parties in the Canadian case may parallel the conflicts of interests presented in the prior American decisions. The sort of conflict involved in the *Saumur* case (interests in free speech, religion, political activity, on the one hand, as against interests in public order, security, cleanliness of city streets, on the other) has in fact been reproduced in a considerable number of American cases in recent years, also involving Jehovah's Witnesses.

Of course the resolution of the conflict of interests finally adopted in the American cases is not suitable for automatic application in Canada, because a policy appropriate to the political, social and economic conditions of the one country may not accord with the special conditions of the other. But in the rather trial-and-error process of selecting one policy consideration instead of another, the experience of foreign jurisdictions, if applied pragmatically, can be of real service to the courts. I hasten to add, however, that I am not commending that purely mechanical type of

recourse to comparative law that is occasionally to be found in judicial opinions, particularly in the United States—the rather indiscriminate scattering of footnotes to assorted foreign-law decisions without any consideration of their differing societal backgrounds: such an approach is a useless exercise in legal pedantry—bad judicial craftsmanship and also bad taste.

Dr. Szladits' comprehensive bibliography is a work of great range and thoroughness. It will prove of tremendous value to those who are prepared to use it intelligently. I regard it as indispensable to the well-equipped law school and supreme court library.

EDWARD MCWHINNEY*

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*Commentary on the Constitution of India.* By D. G. BASU. Third edition. Calcutta: S. C. Sarkar & Sons Ltd. Two volumes. 1955-1956. Pp. (Vol. 1) lvi, 875, (Vol. 2) lvi, 847. (£3; ($8.50 U.S.) a volume)

The third edition of Basu's monumental *Commentary on the Constitution of India* has become available at a time when developments in the application of the Indian Constitution are in the news. Pandit Nehru has just declared that Chitral and some other small princely domains formerly regarded as part of Pakistan are in fact part of India. At the same time India has signed the agreement with France that liquidates French India and returns the former French enclaves to Indian sovereignty. As regards Chitral, it is alleged that this territory was formerly under the suzerainty of Kashmir and therefore has, with Kashmir, become part of India. This, of course, prejudges the constitutional status of Kashmir and tends to disregard the terms of article 51 of the Constitution, which stipulates that "the State shall endeavour to (a) promote international peace and security; (b) maintain just and honourable relations between nations; (c) foster respect for international law and treaty obligations in the dealings of organised peoples with one another; and (d) encourage settlement of international disputes by arbitration" (vol. 1, pp. 402-404).

In volume 2 Mr. Basu devotes no less than fifteen pages (587-601) to a discussion of the position of the State of Jammu and Kashmir under the Indian Constitution (art. 370), but nowhere in the discussion, not even in the exposition of the historical background of this issue, is there the slightest hint that Chitral ever recognized the overlordship of the Maharaja of Kashmir, or formed a part of the territory of his state, or was regarded as being within India. Mr. Basu points out (p. 593, n. 7) that "it

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would be possible for the Parliament of India to increase or diminish the area of Jammu and Kashmir, to alter its name or boundaries . . . if the Legislature of Jammu and Kashmir *consents*". It is presumed, of course, that this relates to boundary adjustments with other Indian states or as a result of international agreement. It cannot have been intended that such adjustments should take place, either with or without the consent of the local legislature, at the expense of a neighbouring independent sovereign state.

The Indian Constitution consists of 395 articles and nine schedules, and Mr. Basu has set himself the task of devising his *Commentary* as a "comparative treatise on the universal principles of Justice and Constitutional Government with special reference to the organic instrument of India". The advantage of this comparative approach lies in the fact that, although there has been no fundamental legal revolution in India, and although the traditions of English law still exist, the tendency of the constitutional draftsmen was to look outside English law for their models. The Constitution of India is to a great extent based on that of the United States and on the offspring of the American Constitution, that of Japan, but the draftsmen and the parliamentarians who were responsible for adopting it had been steeped in the English tradition. The result is a hybrid. American institutions and concepts have been modified by English law, a combination which frequently tends to complicate rather than simplify.

Within two years of the passing of the Constitution Mr. Basu had, in 1951, produced a book of 380 pages entitled *Cases on the Constitution of India*, which, together with a later version now in the press, serves as a companion to his masterly *Commentary*. The need for judicial comment is not surprising when one is faced with a constitution in which the powers of all officials are subjected to judicial interpretation, in which there are three types of states, each possessing different rights, in which the part (III) on fundamental rights is even now not fully observed, and by article 21 of which "No person shall be deprived of his life or personal liberty except according to procedure established by law", thus giving the courts ample opportunity for dialectical discussion on the difference between "procedure established by law" and "due process of law" and enabling them to hold that the "reasonableness" of "a law which deprives a person of his personal liberty . . . cannot be questioned under any clause of Art. 19", which postulates the freedoms to which Indian citizens are entitled. A whole series of cases, of which *Gopalan* v. *State of Madras*, (1950) S.C.R. 88, is the fountain-head, have made it clear "that once it is found that a statute enacted under Art. 21 is within the competence of the Legislature in question, our Courts would be powerless to question the *propriety* of the legislation or in any way to modify its

effect on the ground that it seeks to 'unduly' restrict personal liberty. In short, there is no scope for judicial review of a law coming under Art. 21 either under the provisions of Art. 19 or under any general principles of natural justice." (Vol. 1, p. 271)

In view of the quoted comment, it is interesting to note Mr. Basu's explanation of the "Need for Fundamental Rights" (Vol. 1, pp. 74 *et seq.*) in the Indian Constitution. "There was no such thing in any of the Government of India Acts which were naturally framed according to British ideas about individual rights. The Indian experience of the application of the Rule of Law in India was not, however, happy and there was a strong feeling that it was not administered with even hands by the foreign rulers in India as in their own land. This resulted in the demand that in any future Constitution, there must be a declaration of fundamental rights." (p. 74) It is the more surprising, therefore, that "a person may be prosecuted and punished even *after* commencement of the Constitution, for an offence committed before the Constitution came into force, even though the law which made the offence punishable is inconsistent with Part III of the Constitution. The *procedure* for such prosecution after the commencement of the Constitution must not, however, be repugnant to the Constitution. Since there was no 'fundamental right' prior to the commencement of the Constitution, an order which was made prior to the commencement of the Constitution cannot be challenged on the ground of contravention of any fundamental right." (p. 80)

The similarities with other federal constitutions, and the large adaptations from them, have led Mr. Basu to compare, section by section, the Indian Constitution with those of the United States, Australia, Canada, South Africa and Burma, as well as with those of Japan, the Republic of Ireland, France, Ceylon and, of course, the United Kingdom. His *Commentary* provides a detailed and comparative analytical study of one of the most complicated constitutional documents of all time, an analysis which places future constitution-makers deeply in his debt.

L. C. GREEN*

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*Some Problems of Proof under the Anglo-American System of Litigation.* By EDMUND MORRIS MORGAN. James S. Carpentier Lectures. New York: Columbia University Press. Toronto: Oxford University Press. 1956. Pp. xii, 207. ($3.75)

Old General Carpentier, who founded the Carpentier Lectures fifty odd years ago, must now be taking his friends over to the

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edge of their cloud and pointing down at Professor Morgan in Nashville with considerable pride and satisfaction. There is no higher standard than the expectations of a founder, and they are not often met. The General must have been pleased in 1907, when his lectures were given by John Chipman Gray, *The Nature and Sources of the Law*. No doubt he was pleased twenty years later when Judge Cardozo gave them. The General's friends are undoubtedly congratulating him now for these lectures on our law of evidence that Morgan gave last year.

They come to us as a law book that has all four of the prime excellences. It is short, but only because it is compact. Morgan exemplifies in himself one of the virtues of his subject, the most lawyerlike of the arts, the art of relevance. It is clear, because the author is bent on making his reader understand, and not simply admire. It is sagacious, because Morgan is as practical as he is theoretical, and *vice versa*. He has one eye on the purpose of a rule and the other, so to speak, on its consequences. History is his handmaiden, not the mistress of his intellectual household. Precedents are put where a good lawyer puts them. They either speak with authority or they are demonstrably wrong. And, what's more, Morgan has a sense of humour, which is so necessary in the detection and the recognition of the ridiculous.

Morgan, as I read him, proceeds on the basis of two understandings. One is that we are dealing not so much with proof—despite the fact that the very title of his book is "Some Problems of Proof"—as we are with persuasion. This may be a matter of degree, and yet there is an important difference. For an irrational factor can contribute to persuasion, which should play no part in proof. I do not think Morgan would deny that when the Law calls in a jury to collaborate with a judge, the Law must know what it is about, and when the Law forbids the jury to qualify or even to explain its verdict, a privilege the Law concedes to a witness who is asked a question he cannot answer yes or no, the Law is trying to protect irrational behaviour.

The other premise on which Morgan proceeds comforts me in a suggestion I once made, that justice is something larger and more intimate than truth, which is only one of the ingredients of justice, and that justice lies in the satisfaction of those concerned in the settlement of the controversy (*It's Your Law*, p. 21). Morgan puts it, "We must concede that the trial is a proceeding not for the discovery of truth as such, but for the establishment of a basis of fact for the adjustment of a dispute between litigants. Still it must never be forgotten that its prime objective is to have that basis as close an approximation to the truth as is practicable." (p. 128) And in his book, *Basic Problems of Evidence*, he said, "It is not to be forgotten that a law suit is not a scientific investigation for

the discovery of truth, but a proceeding to determine the basis for, and to arrive at a settlement of, a dispute between litigants" (p. 11). I agree, though I see no reason to be concessive. We are dealing with a satisfaction: for the litigants, primarily and immediately, for their friends and others more or less concerned or interested, and last but not least for those who may some day find themselves in a similar predicament and for whom the outcome may be a precedent. The courts have neither the leisure nor the competence to make the truth more than "a prime objective". All this seems to me to be implicit, not only in the adversary process, but in the fact that a trial is a matter of persuasion and not a matter of demonstration.

In the first chapter Morgan gives us a short account of the history behind what we now accept as the collaboration between the judge and jury. Judges, needless to say to lawyers, have changed less than juries. Lawyers have always been more set in their ways than laymen. Morgan, most commendably, treats the great legal historians, Maitland and Holdsworth and the rest, as source material, sources for ideas and explanations, right or wrong, as we now believe, as well as sources for the facts. Let history and its historians keep their place. Here and elsewhere in this book, if I may adapt Keats most inappropriately, is all ye know and pretty nearly all ye need to know about the history of the rules of evidence.

I don't see that the function of the judge has changed at all since the happily remote era when they, as well as the jurors, were punishable for a false judgment. As soon as the judges were relieved of this liability, they took over the issues of law, which left only what they regarded as issues of fact for the juries. As Morgan points out, the jurors too were relieved, but it took until well into the eighteenth century before the Law was able to confine their deliberations to the evidence that was presented to them in court.

The point Morgan makes concerns the framing and definition of the issues, which is obviously of the first importance, to reduce the expense of preparation, to be frugal of the court's time, and to secure a final determination of the controversy. It is a compliment to history when Morgan can say in praise of rules 26 through 37 of the Federal Rules of Civil Procedure that "There is now available to the Bench and Bar a procedure by which litigants can secure all the advantages of the Year Book system of oral pleading without its disadvantages" (p. 34).

Logic in the hands of a practical man is very refreshing. If a trial is "a rational resolution of a dispute", as Morgan rightly says it is (p. 41), the courts will not waste their time on what is indisputable. Of such the courts take judicial notice. This is the

subject of Morgan's second chapter. Too much of it, I think, is spent on distinguishing the cases on which Wigmore relied for his mistaken view, and it was Thayer's view too, that a matter of which the court took judicial notice was open to rebuttal. But neither Wigmore nor Thayer is an authority who can be ignored, and this is a book for lawyers as well as for those who want to understand what lawyers have made of the rules of evidence. Yet the reader will be more interested in Morgan right than either Thayer or Wigmore wrong.

Morgan takes the position that the question is simply whether the matters are either "notoriously" true or capable of immediate and accurate demonstration. In either case, a court of law is no place to determine whether they are true or false. Yes, but how far dare we let our courts take judicial notice of what they take for granted? There are dangers here, as Morgan warns (pp. 67-68). In cases where the issue is due process of law or the equal protection of the laws, the court takes judicial notice of great generalities, and the danger is that the courts will mistake a dogma for a truism, or that those who do not agree with the decision will take a truism for a dogma. That "separate education facilities are inherently unequal" is to me so obviously true that I don't mind others calling it a dogma, so true that I wish the Supreme Court of the United States had not even mentioned any psychological treatises in a footnote (*Brown* v. *Board of Education* (1953), 347 U.S. 483, at page 494, note 11; and see Edmund Cahn's article in the New York University Law Review, vol. 30, pp. 150-169, where he points out that the court did not rely on psychological theories).

There is an illuminating, and less than laudatory, chapter chiefly on what the Law tells the judge to tell the jury about presumptions and burdens of proof, and how the jury may profit by their applications. There is more about the judge's duty to keep testimony from the jury. I have never been able to see anything more in legally required presumptions or prescribed burdens than devices which justify the tribunal, jury or judge, to come to a decision on necessarily inadequate or unsatisfactory evidence. As such they are rational. Otherwise they are no more rational than the Law expects juries to be.

The history, the theory and the practice of the hearsay rule take the second half of the book. As for its history, its origin is irrelevant, but the different ways the courts have undertaken to justify the rule are important. Morgan reviews their reasons, compactly and significantly. Stress was first laid on the lack of an oath, which I think meant the lack of its sanctity as well as its sanction. For I take it that an oath to tell the truth was regarded as an appeal for divine strength and illumination, not just a sub-

mission to the pains of hell fire for falsehood. The lack of cross-examination appeared as an additional reason. I surmise that it came as much out of solicitude for the rights of the other party in the case as out of belief in its efficacy to the truth. A party could waive cross-examination, or neglect it, or botch it. Moreover, a previous cross-examination in another case by someone else's attorney is not accepted as a satisfactory substitute. It is significant that we hear no complaint that the jury could not be trusted with hearsay until the 1800's. Then a contempt for the intellectual powers of a jury became the orthodox excuse for not liberalizing and making good sense of the rule against hearsay. It was then, I suspect, an aristocratic excuse. When it became immersed in democracy, it turned into the lawyer's reason for not letting laymen of merely common sense consider in court what they use as a matter of course in their own affairs.

The book winds up with a synthetic case. It is a factitious, but by no manner of means an unusual, far less an impossible, automobile accident case, in which the hearsay rule almost mischievously frustrates the court from conducting "a proceeding designed to secure by rational processes a factual basis for the orderly adjustment of a dispute . . ." (p. 86). All the available evidence of eye witnesses to the accident has been eliminated by the rule. The most reliable testimony is rejected. What's left is a puzzle for a seer.

"Then why", Morgan asks, "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, their liberty, and their lives be content with rules which in application so often shock common sense?" (pp. 193-194). A bold bar association could very well stage this case of *Pedestrian* v. *Owner*. Perhaps some law school will call it up for trial at a sitting of its moot court.

There may be a dozen or so attorneys who are already prepared with precedent and reason to object to damaging testimony or to press the admission of what is essential to success. The rest of the bar who try cases in court or advise others who do can only make themselves ready to prepare themselves. If they will take this book, *Some Problems of Proof*, and the two-volume pamphlet Morgan wrote for the American Law Institute, *Basic Problems of Evidence* (1954), and keep them handy, they will be on the very verge of being able to try the case commendably, or advise trial counsel, or tell a junior how to make effective use of Wigmore. They will also be more thoughtful lawyers.

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