Cases and Materials on Evidence

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creative or revolutionary, and how they can have any adequate appraisal of the capacities and performances of present-day Justices unless they have followed along from Monday to Monday as the preceding Justices announced their conclusions and their justifications for them. Teachers who use Mr. Sholley's casebook have at hand a convenient tool for sharpening students' minds to a perception of the historical and personal process of constitutional adjudication. As he puts the value of dealing with the decisions of a single court, he invokes the "way of a court with awkward precedents, the uses and abuses of dictum and dissent, the impact of powerful personalities upon a court and upon the law, the importance of the 'odd man' in a 'government of laws and not of men. . . .""

Though of lesser moment, a word might be added about editorial paraphernalia. Mr. Sholley has given more abstracts of other cases and more references to relevant periodical literature than any student is likely to master at least for classroom and examination purposes. But law review editors and neophyte teachers may well render thanks for guides to more complete knowledge.

Another feature of the book merits mention for the sake of its users or for those who choose to scan its contents. For over a decade I taught from Dean Hall's casebook without awareness that there was an index at the end. It was a most valuable index and explained what the editor had in mind. Mr. Sholley has an index, somewhat less extensive than that of Hall, but still fairly adequate for its purpose. Its captions are of two kinds, general main heads and many details of the material matters underlying the statutes and decisions. There are over 100 items on commerce. There are what might be called doctrinal or at any rate large topics like "regulation by Congress, effect of"; "permission of Congress, effect of"; "silence of Congress, effect of"; and there is a multitude of little homely topics like paupers, diseased animals, ferries, unfit fruit, drummers, peddlers, etc. Thus from the index one may get a good picture of what constitutional law deals with. For one who would not breathe freely in the altitude of Mount Sinai or of Olympus, here is help in keeping one's feet on the ground and possibly for now and then hitching one's wagon to a star.

THOMAS REED POWELL.


Morgan and Maguire's third edition is a fitting complement to their impressive contributions to the law of evidence. It is a better, more manageable tool than the second edition. It avoids some of the overcomplication of its predecessor without, in general, sacrificing depth or toughness. It is shorter by almost two hundred pages and yet has more coverage. This has been accomplished primarily by an expansion of the critical commentary, which now represents about one-quarter of the book. The commentary, except for occasional lapses, is searching, incisive, and concrete enough to

1 The Supplement is outside the scope of this review.
give body to the general propositions and to require clear-headed analysis of their meaning.\textsuperscript{2}

The content of the book has been substantially changed. Almost a half of the cases \textsuperscript{3} were decided after 1940, when the second edition was published. In general, the new materials, like the old, are well edited, contribute to an orderly development of topics, require straight thinking, and invite lively classroom discussion about the meaning and the fitness of the rules.\textsuperscript{4} The inclusion of a new section on administrative hearings is welcome. This departure promotes a useful comparison of the rules regulating admissibility and presentation of proof in the two systems as well as an awareness of the interaction and competition between them.\textsuperscript{5}

The new edition follows the basic outline of its predecessor, except for some relatively minor changes, only two of which will be considered here. The material on expert opinion has been split up from that on lay opinion, with about 600 pages intervening. This change is of doubtful merit, given the topics which may be the subject of both kinds of testimony and the doctrines, such as the ultimate issue rule, which control and unnecessarily complicate both kinds of testimony. The material designed to raise the judge-jury function with respect to disputed issues of fact controlling admissibility has been pulled together in one section instead of being sprinkled throughout the book. This consolidation is an improvement, but the placing of this material at the end of the volume, rather than at a considerably earlier stage, is questionable.\textsuperscript{6}

\textsuperscript{2} To make way for the commentary, the authors have eliminated almost all of the previous edition's problem materials, which were difficult to use because of their massive over-complexity. Nevertheless, "it is [the author's] intention to use the book very largely as the foundation for problem teaching" (p. ix). At the same time, they "see no reason [nor do I] why this new edition cannot be effectively employed under older and perhaps more conventional schemes of case teaching ..." (Ibid.).

The authors have prepared mimeographed problems, samples of which they have, subject to supply limitations, offered to their colleagues, with the suggestion that each instructor should prepare his own problems. These problems are useful. They would, however, be more so to the average user if they were accompanied by more concrete indications of how the authors believe the problems should be blended with more conventional use of the text.

\textsuperscript{3} The publisher's count.

\textsuperscript{4} Consideration of specific reforms has been facilitated by the inclusion of the relevant portions of the ALI Code throughout the volume. The appendix reproducing the entire Code is retained.

\textsuperscript{5} Query: Would materials on arbitration, which is only mentioned in passing, not be justified by the same considerations?

\textsuperscript{6} The complexity of the judge-jury problem makes it, I believe, desirable to develop a provisional general formula, which would be re-examined as the judge-jury problem recurs in the material developing particular exclusionary rules. This arrangement would, moreover, equip the student to spot this problem even when, as often occurs, it is not mentioned in the opinion. Finally, a lively class will press for a full scale discussion the first time the judge-jury problem arises. The discussion will be more meaningful if the class has already wrestled with the considerations relevant to a general formulation. For these reasons, an early discussion of the problem seems desirable even though it involves some anticipation of the basis for some of the exclusionary rules. Such anticipation will, in any event, be required in connection with the discussion of the objection material, which comes early in the volume.
It is convenient here to digress for a moment from problems of structure to consider the materials used to raise the “judge-jury problem.” They consist of seven tightly compressed pages of text, purporting to summarize about 25 cases and referring to many more. Not a single case is presented with any details regarding the situation involved or the court’s opinion. This overcompression wastes, rather than saves, class time, which must be used to put meat on the emaciated skeletons.

There are additional problems of structure which should be mentioned. The section on relevancy opens with the material on real evidence. But real evidence raises no special problem of relevancy, and the arrangement does not promote an orderly development of the topic. On the other hand, the arrangement fails to highlight a problem with special application to real evidence, i.e., the extent to which such evidence is subject to an analogue of the best evidence rule. These considerations together with the classification of documentary evidence as a species of real evidence suggest the desirability of closely juxtaposing so-called real evidence and documentary evidence.

The material on the general nature of hearsay comes several hundred pages after the material on examination. Although this arrangement is conventional, and justifiable analytically, it is doubtful pedagogically. The materials on examination and cross-examination bristle with hearsay problems, many of which are explicitly raised by the textual comments. If the student is expected to wrestle with these problems, he should be armed with the necessary background. The present arrangement doesn’t accomplish this. If it is followed, considerable exposition of the hearsay rule will be required long before the class has chewed on the hearsay materials, with the attendant risk of over-simplification or duplication. These difficulties could be avoided by integrating the material on personal knowledge and the general nature of hearsay and placing this integrated section before the examination section.

The confession material is treated as a hearsay exception and is placed after the material on admissions. As a result, the confession section is separated from the earlier material on self-incrimination and illegally-acquired evidence, by material on the hearsay rule and some of its exceptions. A closer juxtaposition of the constitutional and related limitations on admissibility would promote a clearer view of the doctrines involved, their differences, their interrelationships, and their cumulative impact on law enforcement.

Some questionable short-cuts are, moreover, taken in these areas. The McNabb doctrine is dealt with only by way of a short, general, fact-less exposition in a state case involving the “voluntary” test. This does not

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8 This is especially true where, as occasionally happens, the analysis in the text is questionable. For example, the authors suggest that the price of similar land in a “voluntary” arms-length sale is hearsay on the issue of market value of property in litigation (p. 142). But market value is the composite result of such sales and good faith offers to purchase. Accordingly, such sales and offers have operative market significance merely because they have occurred, and evidence regarding them would not appear to involve hearsay. The dangers of fabrication, rather than a hearsay analysis, would seem to be the proper basis for admitting evidence of sales while excluding evidence of offers. But cf. text, p. 142.
9 For an interesting example of the interplay of these doctrines, see Rochin v. California, 342 U.S. 165, 72 Sup.Ct. 205, 96 L.Ed. — (1952).
10 James v. State, 66 A.2d 888 (Md.1949), text, p. 572.
supply an adequate basis for an examination of the gloss on the McNabb doctrine or the perplexing policy issues it raises. The Upshaw case is, I believe, worth the additional pages. Similarly, in connection with illegally-acquired evidence, the Rabinowitz case would be more meaningful if accompanied by a fuller statement of Marron and Lefkowitz. In addition, an introductory note on the history of, and developments under, the Fourth Amendment or a fuller presentation of Mr. Justice Frankfurter's illuminating dissent in Rabinowitz, would have been useful.

The materials on self-incrimination, although expanded, present problems of coverage as well as sequence. The first case in the section, for example, deals with both the applicability of the privilege to legislative inquiries and the extent of the immunity required to displace the privilege. It is, I believe, preferable to examine the protection afforded by the privilege before dealing with the immunity problem. Such an arrangement would facilitate discussion of the problems of construction raised by the immunity statutes. More important than this particular sequence is the absence of materials designed to expose the traps for the unwary which are buried in the immunity statutes. The Shapiro case despite its length, might have been included for that purpose alone and on the independent ground that it is a better vehicle for discussing the required records problem than State v. Sterrin, included for this purpose.

In their commentary on the privilege against self-incrimination, the authors, although recognizing the historical basis for the view that the privilege is not applicable to police interrogation, criticize that view as "unfortunate." The practical thrust of their objection is, however, not clear. They recognize, of course, that due process developments obviate any need to invoke the privilege in order to exclude coerced statements, whether such statements are mere admissions or full confessions. On the other hand, if the privilege is held applicable to police interrogation, and if this doctrine is combined with State ex rel. Poach v. Sly, police interrogation of the actual suspect whether before or after arrest would violate the privilege. It is doubtful that the authors, who do not discuss this possibility, were contemplating or recommending such a far reaching and novel limitation on law enforcement in jurisdictions following Poach v. Sly.

The materials on administrative hearings also seem to me to fall below the high quality of the other sections of the book. These materials are treated as another exception to the hearsay rule. But the relaxation of the hearsay rule (and other exclusionary rules) is, we know, not peculiar to the administrative tribunal. Furthermore, the administrative materials, consistent with their positioning in the book, do not touch the stream-lined techniques of oral

15 Ex parte Johnson, 187 S.C. 1, 196 S.E. 164 (1938), text, p. 418.
17 Ibid.
18 78 N.H. 220, 98 Atl. 482 (1916), text, p. 471.
19 At p. 425.
20 63 S.D. 162, 237 N.W. 113 (1934), text, p. 428.
and written evidence employed in administrative hearings and specifically sanctioned by the Administrative Procedure Act. These omitted matters are at least as close to the heart of the evidence course as the problems concerning the weight to be given to prior findings at later stages of administrative and judicial review, and yet the material on these problems accounts for about 60 per cent of the section. The cases included, moreover, suffer because they are not accompanied by at least a summary of the evidence involved.

The presentation of abstract doctrine unnourished by concrete situations also mars the material on admissibility of declarations in conspiracy cases. This rich and confusing problem is disposed of in one page of over-compressed and sometimes obscure text. This material is not an adequate basis for dealing with the problems of admissibility, order of proof, and tactics involved in conspiracy cases. It does not, for example, raise sharply the problems involved in the Hitchman, Gypsum, and Krulewitch cases. Here again, page compression is false economy so far as class time is concerned.

Similar difficulties are raised by the brief treatment of the “lie detector” and the problems raised by expert appraisal of testimonial reliability. The “lie detector” is dismissed with a line about the inadmissibility of its conclusions. There is no mention of what is involved in the various tests, their reliability, the use of such tests not only in preliminary criminal investigation but also in industry, in government, and by trial judges. There is thus no basis for critically examining the rule of inadmissibility or for considering the lie detector problems which arise outside the context of the formal trial. The problems raised by the expert testimony in the Hiss case are disposed of in a two line summary. Both sets of problems deserve more attention not only because they are in the forefront of lay and professional interest but because they open up the whole thorny question of collaboration between the lawyer and psychologist.

A case book architect is, of course, confronted with the necessity for painful choice and self-denial. I venture to suggest one preferable area for austerity by the authors, i.e., in their use of citations to cases and A.L.R. notes, and in their use of fragmentary summaries of cases. There are just too many of these with too little basis for intelligent selection by the student.

21 For a discussion of these provisions, see Nathanson, Some Comments on the Administrative Procedure Act, 41 ILL.L.Rev. 363, 402 (1946).
22 At p. 505.
An abstract summary of the Krulewitch case is included, text, p. 565.
26 See pp. 904, 299.
28 See e.g., pp. 117-120, 274-77, 280-84. It might be desirable to place “see” before the references which “the average student” might reasonably be expected to read and “consult” before references intended for students or practitioners interested in more intensive study of a particular problem. This would pinpoint the teaching materials without sacrificing collateral advantages of more abundant citations.
The sensible student will probably avoid being buried in the avalanche, but prudence suggests an early warning to all. In contrast to the overabundance of case and A.L.R. citations, there is a famine of law review citations.29

Having raised some questions, although sometimes in the dogmatic mood, about the materials included in the book, I want to turn to some of the omissions of subject matter and emphasis in the new (as well as the previous) edition. The important ones relate to trial preparation and trial presentation, the limits of fair argument, and the jury problem. This enumeration is, in effect, a suggestion that the authors’ title might have been “Cases and Materials on Evidence, Proof, and Persuasion.”

The enumeration also suggests perennial questions about the law school curriculum: (1) is law school training for the problems of trial deficient? (2) if so, what curricular changes, if any, are in order? It would be an imposition on the editors to deal extensively with these questions in a book review, but a few comments are in order.

The charge that the law schools at large are flubbing training for trial is frequent and is backed by high authority.30 Assuming that “law schools” can be discussed in the large, there is, I believe, more exaggeration than truth in the charge.31 In examining the charge it is useful to set out the reasons for the novice’s trial inadequacy because they will suggest the limits of remedial action in law school. There are at least four such reasons, interrelated but separate. (1) There is the special tension of trial, with its battle excitement, its surprise, the adversary ready to pounce on any slip, the readiness of some older adversaries and judges to lecture “the young man,” the unpredictable jury, the client peering over the novice’s shoulder, and the fact that lines spoken in court cannot be rewritten; (2) trial skill is in part the product of repeated exposure to such tension and repeated experience with trial processes, which the student does not (and cannot) get in law school; (3) there is the possibility that graduates lack even such understanding of the processes of litigation which can be derived from study, mock trials, and such limited courtroom observation as is possible; (4) the tendency of much of the best talent to go into office-specialties has reduced the number of good trial lawyers whom the novice can observe.

The law reviews have reflected lively differences both as to how the problem of equipping students with trial “skills,” among others, should be defined, and as to how it should be met by the law schools.32 It is not appro-

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29 The authors undertake to mark with an asterisk cases discussed in the law reviews, but they don’t always perform. See, e. g., cases on pp. 164, 370. Even if they did, their device obviously sacrifices the benefits of selection.


31 This statement obviously suffers from the vagueness which characterizes discussion in this area. It is based on courtroom observation of novices and their elders and reports of mature trial lawyers and recent graduates. The sampling is inadequate and the reports are, of course, contradictory.

32 Judge Frank’s vigorous essays have stimulated continuing discussion of these problems. See his most recent essay cited in note 29, supra, and A Plea for Lawyschools, 56 Yale L.J. 396 (1947); cf. Cavers, “Skills” and Understanding, 1 J. Legal Educ. 395 (1949). It is unlikely that Judge Frank’s proposals for making the
priate here to re-examine the debate, but it is appropriate to consider whether some reshaping and supplementation of the traditional evidence materials would contribute to a greater understanding of the problems of trial.

I believe that such a change designed to focus more on the trial and pre-trial, rather than the appellate, situation, would be desirable, regardless of whether there is a special course or seminar devoted to trial problems. The law of evidence, we know, is concerned with the logical principles underlying probative value and with legal limitations on the use of probative data. It is not concerned with how to find proof, how to organize it, or how to use it. These problems are, of course, not peculiar to the trial sphere, and skillfulness in solving them should be a by-product of total training in law school and out. Nevertheless, lawyers have for the purpose of trial crystallized mechanics and insights of general significance which facilitate the organization and presentation of proof. These mechanics and insights deserve, I believe, more explicit treatment than they are given by Morgan and Maguire. There is, for example, no mention of standard techniques for assembling and preserving evidence when it is fresh, the hazards of not skeptically (albeit tactfully) cross-examining your client, the interplay during the case-building stage between the hypothesis about the controlling law and the hypothesis about the provable proposition of fact, and the organizing of testimony and exhibits in a “trial” brief or “fact” brief. These matters, although routine, involve both the lawyer’s basic vocabulary and the use of tools which impinge on all of his manifold activities.

It is for this reason that I question a distinction sometimes drawn between the problems of training those students bound for large offices and those about to hang out their own shingles. Even though the assumption that the large office will have an effective trial internship is warranted, that assumption involves only part of the story. The rest is suggested by Professor Simpson’s observation: “The heart of the judicial process is the trial in court. All that precedes the trial is but preparation. All that follows is but the correction of error, if error there be,” and I would add, adaptation to result. Lawyers, even if they never get to court, obviously must understand the trial, or more broadly, the adjudicative process, if they are to do their job effectively. The lawyer’s function with respect to litigation is like that of the foreign office with respect to war. The lawyer is generally trying to avoid litigation and at the same time to insure victory if it breaks out. There is no need to argue that success in such an enterprise requires an understanding of the process of litigation.

Such understanding and, more particularly, a better understanding of how the exclusionary rules operate, would also be promoted by some material focused directly on the problems of formulating or blocking a line of questioning in court. As everyone knows, a student (as well as a lawyer in trial) may discourse skillfully on a doctrine and fail miserably in trying to formu-

Such courses are not given in some schools and generally are taken by only a small proportion of the students when offered. Their usefulness will, moreover, increase to the extent that the student has previously acquired a better perspective for the problems of trial.

Simpson, The Problem of Trial, in David Dudley Field Centenary Essays 141, 142 (1949).
late a line of questioning consistent with it. Materials designed to force students to formulate such questioning would, of course, suffer from inescapable artificiality and would be subject to drastic time limitations—at least pending successful counter-attack for more time for the evidence-trial course. But even a few selected exercises would drive home the necessity for visualizing the impact of each rule on proof and presentation in court.

To some extent the trial transcript, which has been retained, and supplementary trial practice readings could meet the needs described above. But the transcript merely illustrates the use of the doctrine by somebody else. It does not push the student to think in terms of his use of the doctrine. Supplementary assignment of trial practice books is a dubious expedient. These books contain dross, which should be exposed, along with useful material, which should be highlighted. This is difficult to do unless their subject matter is integrated with the basic materials of class discussion. Indeed, without such integration, the assignments may merely add to the student’s collection of unread citations.

It would also, I believe, be desirable to add materials on fair argument by counsel, on jury selection, and on the desirability of the jury system—although these matters are not generally included in an evidence casebook and sometimes are completely omitted in law school. The material on argument would illustrate not only the interplay of proof and persuasion but also the ways in which doctrines regarding prejudice and confusion are frustrated by improper argument loosely regulated by passive trial judges and acquiescent appellate courts. Jury selection is, of course, related to argument not only because it is designed to eliminate those who promise to be inhospitable to the projected argument but also because the voir dire is used to drive home basic elements of the argument. There is a clear justification for examining the presuppositions of the jury system in an evidence course. The presence of a jury obviously has a direct impact on the lawyer’s use of the exclusionary rules and his presentation of evidence, in a particular trial; the jury system has, moreover, had great influence on the development of the legal framework for trial, including the exclusionary rules. Finally, inclusion of both of these topics would convey something of the flavor of American litigation.

I have used many more words in my questions about the book than in my praise of it. This imbalance merely illustrates that criticism is more interesting, at least to the critic, than is praise. I end as I began. The authors have made another distinguished contribution to the understanding and improvement of the law of evidence.

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35 The transcript would be made more useful by references relating the text to relevant portions of the transcript.