In an area, such as this, where commercial practice has so changed in the last ten or fifteen years, and where there is such a paucity of judicial pronouncement, one cannot but think that it would have served his purposes better to have eschewed purely academic discussion wherever possible. No doubt Mr. Megrah felt constrained by his position as editor to devote some time to such matters, though I for one am convinced that it is about time that the old jurisprudential debate as to the question of consideration between issuing bank and seller was abandoned, and Lord Mansfield's original diagnosis that no consideration is, in fact, present is accepted as being correct.[22] It is inconceivable that any British bank would today ever raise this as a defense[23] and be upheld by an English court.

There seems little doubt that were the original author alive today, he would be more than satisfied with the efforts of his collaborator. The book, despite some faults, stands as the best existing statement of English law on the matter of bankers' commercial credits, and, as such, must be recognized as a significant contribution to the legal literature on this topic.

NORMAN I. MILLER*

* Law and Behavioral Science Research Fellow, University of Chicago Law School.

[22] Pillans v. Van Mierop, 3 Burr. 1663 (K.B., 1765). It has been accepted by the Uniform Commercial Code § 5—105 (Final draft, 1956). Consult also, Cheshire and Fifoot, Law of Contract 367 (4th ed., 1956). For the obvious objections to the author's agency theory, consult Davis, op. cit. supra note 3, at 64, and Davis, The Relationship between Banker and Seller under a Confirmed Credit, 52 L.Q.R. 225, 228 (1936). Compare also the General Provisions to the Uniform Customs, op. cit. supra note 4.

[23] But, as the Law Revision Committee pointed out, the liquidator of a bank might very well be obliged to raise such a technical defense. Sixth Report of the Law Revision Committee upon the Doctrine of Consideration 28 (1937). But see Denning, L.J., in Smith v. River Douglas Catchment Board, [1949] 2 All E.R. 179, 188 (C.A.).

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

"[T]his lectureship will be made so honorable that nobody, however great, or distinguished will willingly choose to decline your invitation" (p. ix). With these words General Horace W. Carpentier launched the James S. Carpentier Lectures at Columbia University in 1903. A glance at the names of those who have since delivered the lectures will show that the aims of the founder have been largely achieved. Professor Morgan's contribution, given in 1955, is equal in standing and competency to the lectures of the past. Indeed, his lectures are outstanding. Here, in 195 pages, is presented what might be termed the philosophy of a man who has spent his life developing powerful arguments for the reform of the law of evidence. The reviewer found the book both stimulating and provocative.

The aim of the work is to direct attention to the nature of the adversary system in the common law world, and to recommend directions for reform. The author devotes his opening lecture to the development of pleading. After reviewing the Year Books procedure, code and common law pleading, and the mistakes of the Hilary rules, his final recommendation is the adoption of the Federal Rules of Civil Procedure.

> Not only do the rules provide for disclosure of the materials relevant to the controversy; they provide also for their use to eliminate fictitious issues. No longer can a party hope to succeed by denial of an allegation which he knows to be true, because he thinks his opponent will be unable to produce admissible evidence of its truth [p. 33].

The second lecture deals with judicial notice. "A necessary deduction from my position is that if a fact lies within the field of judicial notice, no evidence tending to prove its contrary is admissible" (p. 48). A matter is either disputable, in which case it lies within the field of evidence, or it is indisputable, in which case it lies outside. In the author's opinion it would "destroy the very reason for [the court's] existence" (p. 43) if the clearly indisputable could be challenged in the court. It is to prevent this diversion and to expedite trials that the court takes notice of indisputable matters of fact. As the author points out, Thayer and Wigmore disagree with this viewpoint. Both claimed that the taking of judicial notice is not a determination of indisputability, and that counter evidence may still be introduced. Morgan challenges the authorities on which Thayer and Wigmore relied, claiming that Thayer misread the cases and that Wigmore quoted cases where "the matter as to which the evidence was offered was either clearly without the realm of judicial notice or fell within that group of situations where the indisputability of the matter was itself disputable" (p. 53).

The difficulty with Morgan's position is that it is largely academic to say that a judicially noticed proposition is conclusively established, if the question of disputability can be re-opened. As the author agrees, the controversy in the majority of cases arises from disagreement between the parties as to whether the questioned material is disputable or otherwise. Judicial notice may settle the question for the trial, but appeal on the ground of disputability restores much of the inconclusiveness which Morgan claims now exists in the right to challenge judicially noticed material. A party who appeals from the taking of judicial notice will, of course, ultimately challenge the fact asserted, but the appeal will be limited to a claim of disputability. The appellate court will reverse if it finds that the evidence does not sufficiently support the facts noticed, whereupon the matter re-enters the boundaries of the law of evidence.

The author's third lecture deals with the functions of judge and jury. The first part is concerned with the allocation and discharge of the burden of proof. After distinguishing between the burden of producing evidence and the burden

of persuasion, he discusses the effect of presumptions. Thayer himself supposed that a presumption called for "such an amount of evidence" from the opponent "as may render the view contended for rationally probable."[1] It seems, however, that once one accepts the contention that mere evidence is all that is required to balance the presumption, the rational significance of "presumption" is lost. Apart from policy in a particular case, the very logical effect of "presumption" is that rebutting evidence must establish the greater probability of the presumed fact's non-existence. The distinction between the quantum of rebuttal evidence rationally called for by the existence of any presumption, and the additional amount of evidence required by a policy rule in a particular case is a line most difficult to draw. Rationally, the mere existence of a presumption would appear to require a standard of "greater probability," and to this standard of proof policy may add. It therefore seems clear that the presumption puts upon the party alleging the non-existence of the presumed fact both the burden of producing evidence, and—to the extent of greater probability—the burden of persuasion of its non-existence. If this is so, the burden of persuasion of the non-existence of the particular presumed fact cannot shift.

It is surely indisputable that the burden of proof of the facts in issue, both of producing evidence and persuading, cannot shift, while the tactical burden of proof will shift from side to side as the argument progresses. In these circumstances it is not unlikely that the establishment of the existence or non-existence of the subject-matter of certain facts will be first on one party, and then on the other as the hearing advances; this effect being produced by the rational processes of argument and the operation of presumptions. Such an occurrence, however, would not appear to produce any shift in the burden of persuasion on a particular presumption, though tactically the adducing of evidence sufficient to rebut the presumption will throw the onus of argument on that issue back upon the beneficiary of the presumption. The author's argument on page 80 appears to confuse these distinctions.

Contrary to Thayer's contention that a presumption carries only a compulsory tentative assumption, Morgan suggests that:

> sensible procedure would require the abandonment of the Thayer doctrine as to presumptions and concede that the establishment of facts which create a presumption does in some situations and should in most cases fix the burden of persuasion as Rule 14 of the Uniform Rules of Evidence provides [p. 81].

The constructive value of this lies in the fact that in connection with presumptions the court is dealing with three phenomena: substantive law, the ramifications of policy, and mere rational and commonplace inferences. In these circumstances, of course, the burden of persuasion of the non-existence of the presumed fact will vary. In some cases it will be heavy, e.g., where a change of status is involved, as with the presumption of legitimacy of a child born in

[1] Thayer, Preliminary Treatise on Evidence 336 (1898).

wedlock. In other cases it will be light, as, for example, where the deaths of two persons apparently occur simultaneously, it is presumed that the older person died first.

In continuing his discussion on the burden of persuasion, the author raises a familiar problem. What language shall the judge use in describing to the jury the extent to which they must be persuaded by the evidence? Every lawyer is familiar with the civil charge of a "balance of probabilities," and with the criminal charge "beyond reasonable doubt." But Morgan fears that the juryman translates these terms into others more familiar to himself, and that these replacing terms do not carry exactly the same meaning to him as the one the court wishes to convey.

In England this problem has recently been raised in connection with the phrase "beyond reasonable doubt." In *Regina v. Summers*,[2] Lord Goddard, C.J., declared:

> I have never yet heard any court give a real definition of what is a "reasonable doubt," and it would be very much better if that expression were not used. Whenever a court attempts to explain what is meant by it, the explanation tends to result in confusion rather than clarity.[3]

Lord Goddard then suggested:

> It is far better, instead of using the words "reasonable doubt" and then trying to explain what is a reasonable doubt, to say to a jury: "You must not convict unless you are satisfied by the evidence given by the prosecution that the offence has been committed." The jury should be told that it is not for the prisoner to prove his innocence, but for the prosecution to prove his guilt, and that it is their duty to regard the evidence and see if it satisfies them so that they can feel sure, when they give their verdict, that it is a right one.[4]

Considerable criticism of the word "satisfied" followed *Regina v. Summers*. Three years later, in *Regina v. Hepworth and Fearnley*,[5] counsel for the defense stoutly argued before the Court of Criminal Appeal that the word *satisfied* made no distinction between the civil and criminal standards of proof, and on these grounds sought an acquittal. Lord Goddard, speaking again for the Court, declared, "I confess that I have had some difficulty in understanding how there are or can be two standards."[6] Morgan's point appears well taken when such phrases emanate from an appellate court.

The Lord Chief Justice also discussed the difficulty over the "reasonable doubt" charge:

> [I]t is very difficult to tell a jury what is a reasonable doubt. To tell a jury that it must not be a fanciful doubt is something that is without any real guidance. To tell them that a reasonable doubt is such a doubt as to cause them to hesitate in their own

[2] 1 A.E.R. 1059 (1952).

[3] Ibid., at 1060.

[4] Ibid., at 1060.

[5] 2 Q.B. 600 (1955).

[6] Ibid., at 603.

affairs never seems to me to convey any particular standard; one member of the jury might say he would hesitate over something and another member might say that that would not cause him to hesitate at all.[7]

Clearly this court will now lay stress on the over-all impression conveyed by a summing-up, rather than on a close analysis of any particular phrase. Perhaps this approach best satisfies Professor Morgan's contentions.

To conclude this lecture the author devotes his attention to rulings on the admissibility of evidence, under which head he considers the situation where competency, as well as relevancy, depends upon a preliminary fact. Under the orthodox rule the judge rules on competency when the preliminary fact arises, and if the dispute is resolved in favor of competency the same issue is later submitted to the jury. The author takes task with the usual explanations for competency. Is the *raison d'être* of the exclusion that truth be repressed because of relationship, or that the alleged untrustworthiness of the witness' evidence lowers its value? The first explanation goes to admissibility, the second to weight. With Professor Morgan's own viewpoint—that the aim should be the admissibility of all relevant evidence—most would agree, particularly on the present state of confused justifications for various types of withheld evidence. On all standards, the author feels that since under the orthodox rule the ruling of the judge will have some effect upon the jury, it is better that the sole decision on competency be given by the jury in their deliberations upon the merits. This would have the additional effect, whatever the theoretical approach, of compelling the evaluation of evidence, rather than its rejection prior to consideration.

The danger behind this solution is the ready opportunity for evidence of a witness to go to the jury, though a useful by-product of the incompetence based on interest has always been the incidental protection of relationship, as, for example, that between husband and wife. Since such protection in each case is a policy matter, it seems clear that competence should be replaced by privilege. This has been the marked attitude of English law for over a century, during which time the common law barriers, based upon mental incapacity and interest, have been progressively lifted by legislation. However, statutory language has resulted in confusion, since the legislature has not made the extent of privilege clear, both in Acts concerning civil and criminal competence. There is here some support for Professor Morgan's case that the reasons for, and hence the extent of, the exclusion of relevant evidence are rarely crystal clear. When replacing incompetence with non-compellability, one would think that the legislature would have faced the form and extent of privilege four square.[8]

To replace incompetence with non-compellability may be but to worsen the problems of the adversary system. On the other hand it does serve to heighten

[7] Ibid.

[8] See Shenton v. Tyler, Ch. 271 (1938) and 620 (1939), where the court equally lacked constructive ingenuity.

the need for a sound justification in the event of the exclusion of any relevant evidence on the grounds of policy. If a particular privilege becomes indefensible, then it can be legislatively rejected without jeopardizing the entire distinction between the function of judge and jury. Of course Professor Morgan agrees that if privileges are worth retaining, then the orthodox rule should remain in such cases. His argument for jury consideration of the competency question extends, however, to all circumstances in which the operation of the exclusionary rules involves a preliminary determination of the facts in issue. Insofar as policy does not require total exclusion of evidence, it does seem arguable that the competency issue should be left to the jury.

The second half of the work is devoted to an examination of the hearsay rule. In a style both clear and pungent the author levels a severe and crippling blow at the rationale and workings of this rule. He surveys the history of the rule, and shows the extraordinary fashion in which the rule was conceived, kept alive and finally renovated in its old age. An analysis of the present-day application of the rule is summed up in two sentences:

> This wearisome review of the authorities seems to me to constitute a clear demonstration that our modern courts in dealing with hearsay, while giving lip service to the reasons which impelled their predecessors to create the rule, have in fact entirely disregarded them. The oath and opportunity for cross-examination . . . do not save the utterance from exclusion as hearsay; the absence of both does not require its exclusion [p. 166].

Concentration on the oath and cross-examination, Morgan argues, has caused us to misconceive the limits of their value, and to assume a "naïve credulity" in jurors. To conclude, the author presents a fictitious case where the effect of the rule and its exceptions is that all evidence from witnesses who observed an accident is excluded, and only indirect evidence in various unreliable forms is admitted. Students of the hearsay rule should make a close examination of this brilliantly exposed case.

Professor Morgan asserts that much hearsay slips in through sheer lack of appreciation of the character of the proffered evidence.[9] One of the difficulties arises from a failure to define terms adequately. *Res gestae* is the classic example. The controversy over Professor Stone's analysis of the term[10] directs the mind to the necessity for a correct interpretation in each case of the facts in issue, and the facts relevant thereto. Professor Morgan's own analysis[11] demonstrates the fine line between evidence admitted as *res gestae* and evidence rejected under the hearsay rule. From both of these authorities it is apparent that ultimate clarification requires careful use, if not avoidance of the term

[9] Cross, The Scope of the Rule Against Hearsay, 72 L. Q. R. 91 (1956).

[10] Stone, *Res Gesta Reagitata*, 55 L. Q. R. 66 (1939).

[11] Morgan, A Suggested Classification of Utterances Admissible as Res Gestae, 31 Yale L. J. 229 (1922).

res gestae. Only by so doing can the extent of the hearsay exception in any way be assessed.

The problem is well illustrated by *Teper v. Regina*,[12] a recent decision of the Judicial Committee of the Privy Council on an appeal from a shopkeeper's conviction for arson. The issue was the propriety of the trial court's action in allowing a police constable to testify to an incident which happened not less than twenty-six minutes after the fire started. Just prior to seeing a man resembling the appellant coming from the direction of the fire, he had heard a cry of fire, and a woman's voice shouting, "Your place burning and you going away from the fire." Lord Normand, who delivered the judgment, held that hearsay words forming part of the *res gestae* are admissible as an exception to the hearsay rule upon the fulfillment of two requirements which form the reason for the exception: (1) the human utterance is both fact and form of expression, and (2) human action may be so interwoven with words that the significance of the action cannot be understood without the correlative words so that their dissociation would impede the discovery of the truth. Further, he said, hearsay words, if not absolutely contemporaneous with the act, must be so closely associated with the act as to be part of the thing being done, and thus an item or part of real evidence, and not merely a reported statement. The conviction was reversed, since the statements admitted lacked the requisite contemporaneity.

This contemporaneity umbrella merely confuses relevance and admissibility, and this confusion may in turn have prevented the court from construing how far the statement might have secured admission under other exceptions to the hearsay rule. *Res gestae* includes acts and words. The words may be of two types. First, those admitted to show the fact of utterance, which have nothing to do with hearsay since the fact of their having been made is capable of the sense perception of the witness, who is under oath and subject to cross-examination. Second, those admitted to show the truth of their content. These are hearsay, and admissible only under one of the exceptions. But Lord Normand made no effort to discuss whether the declaration in question sought admittance for truth of content or fact of statement. He merely said that the declaration must be so much a part of the act as to be part of the *res gestae*. By making the contemporaneity requirement of decisive significance he was classifying all *res gestae* as hearsay material, and ignoring the possibility that the statements may have been offered for the fact of statement, in which case the degree of contemporaneity would be of significance in assessing the statement's relevance, not its admissibility.

That the statements in *Teper v. Regina* were probably offered for the truth of their contents, since their probative value if offered for the fact of statement would have been rather slight, does not detract from the court's oversight in failing to discriminate carefully between the two different kinds of *res gestae*

[12] A.C. 480 (1952).

words, and is consequent by a misuse of the contemporaneity requirement.

The desire to define within the field of evidence occasionally meets with the condemnation of practitioners. Academicians are accused of wrongly approaching a subject which requires common sense and on-the-spot decisions. An English lawyer therefore has reason to welcome Professor Morgan's Carpentier Lectures, culminating with the stimulating hypothetical case on hearsay. He will also find satisfaction in assuredly sharing this enthusiasm with his American colleagues.

DONOVAN WATERS*

* Assistant Lecturer in Law, University College, London.

A Common Lawyer Looks at the Civil Law. By F. H. Lawson. Ann Arbor: University of Michigan Law School, 1955. Pp. xvii, 238. $4.00.

Describing his aims, Professor Lawson writes in his conclusion: "I hope I have succeeded in what I proposed to do, to introduce you to this very different world of the Civil Law, and to show you that the leading differences between it and the Common Law world are not differences of method or in the ways of handling source materials, but in the concepts themselves; and again that, although the concepts often differ in their general character, the most significant difference lies just in the simple fact that the two sets of concepts are not the same" (p. 209). This statement of purpose and conviction suggests several observations about the excellent book here under review.

Although *A Common Lawyer Looks at the Civil Law* is useful reading for a student beginning the comparative study of continental legal systems, the book's greatest value is not to the beginner. A truly introductory work needs more institutional detail and probably ought to be pitched on a lower level of sophistication. The basic problem to which the book addresses itself is of extreme difficulty—are the differences today found between the civil and the common law systems essentially the product of economic and social conditions or are they rather more to be explained in terms of the intellectual apparatus and stock of conceptions through which these systems have perceived and ordered reality? The book's great merit is its discussion of the role of concepts in shaping the common and civil laws that we know today.

Concepts shape a body of law in at least two ways. In the first place, concepts and the form in which they are set out have profound implications for a system's general thinking habits. Secondly, concepts and the distinctions they embody suggest certain results and render others, fitting less comfortably in the over-all pattern of analysis, less likely, quite without regard to the particular functional problem to be solved. Professor Lawson illuminates both of these matters.

Many differences between legal thinking on the Continent and in the common-law world are, in some measure, due to the relatively early concern of