BOOK REVIEW

Arizona Law Of Evidence, Second Edition. By Morris K. Udall and Joseph Livermore. West Publishing Company, St. Paul, Minnesota, 1982.

Twenty-two years have elapsed since the appearance of Morris Udall's highly useful book *Arizona Law of Evidence*. A lot of water has gone over the legal dam during the intervening period, much of it evidentiary. In 1960 the Arizona Reports numbered 87. With the latest volume in 1981, in the intervening years an additional 67 larger volumes have appeared. Based upon a rough study made during the course of drafting the Federal Rules of Evidence, about one in four reported decisions contains one or more points of evidence. If these figures are accepted, the accumulated store of Arizona evidence cases has grown by almost 2500. Nor is all the growth in case law. The Supreme Court of Arizona adopted the Rules of Criminal Procedure in 1973, with substantial impact on the law of evidence, and the Rules of Evidence in 1977, with much greater impact. In addition, the legislature has not been inactive. The best of books must fall behind.

The appearance of an updated version is cause for rejoicing by the profession. The new second edition not only brushes away obsolescence but contributes a measure of critical insight that was less present in the original. Professors have more time to sit around and think about these things, and the addition of an author from the groves of academe has made a very good book even better. After all, Thayer, Wigmore, Morgan, and McCormick were all professors.

The organization and arrangement of the second edition closely follow the original. Happily, the authors have not fallen into the pattern of discussing one of the Rules of Evidence and then passing on to the next, as is done in many of the evidence texts that have appeared since the enactment of the Federal Rules of Evidence. The result of following the more general pattern that was chosen probably affords greater flexibility of treatment, easier transition from common law to rule, and greater perception of interrelationships. Section headings have, in numerous instances, been revised in order to accommodate to changes in the law or more accurately to reflect the text material. In some instances the location of subject matter has been shifted. For example, treatment of the Dead Man's Statute has been moved appropriately from Chapter 7 (Privileges) to Chapter 6 (Witnesses). In general, however, a person who is accustomed to the original

will readily find his subject of inquiry in the second edition. This reviewer managed to do so on the basis of no more than galley proofs, without the convenience of table of contents, table of cases, table of rules or statutes, or index. Without these aids, however, it was difficult to be certain that the story of Mr. Ollason's unfortunate experience, related at page 105, note 26, of the original edition has in fact been deleted. One omission in the second edition that should be noted is the final chapter of the original dealing with depositions, discovery, and production of evidence. Arguably, these are matters of procedure as well as evidence, though their impact is on evidence, and it may be that their deletion from the second edition was dictated by limitations of space.

As with the original, chapters conclude with a gap in the section numbering and an explanation of the omission, "§§ 5-10 are reserved for supplementary material." Since the 1973 Pocket Part in fact fleshed out only one of the missing sections by adding "§ 123. Evidence in Condemnation Actions," one might conclude that the real purpose is to serve as a warning to the optimists who think evidence is a closed system and that they know all of it, when, in fact, there will always be more to come.

No proper book review can fail to point out at least a few instances in which the views of the reviewer are at some variance with those of the author or authors, or further where explication may be in order. Hence, it seems appropriate to engage in some more or less random sampling to those ends.

The subject of the bases for expert opinion is treated in section 23. The facts or data on which an expert bases an opinion, says Evidence Rule 703, "If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, . . . need not be admissible in evidence." This, the authors say, is "almost mind-boggling." The authors then (note 7) quote an extract from the Federal Advisory Committee's Note to the rule and describe it as "extraordinarily strange." Yet in spite of this plenitude of direness, the instances given of Arizona cases applying the rule are eminently sensible and offer no occasion for alarm. The question of reasonableness has been decided by the courts, not by the experts, and in a reasonable manner, in conformity with the purposes and spirit of the rule. The federal cases also indicate that the identical prototype federal rule has worked well.

Impeaching one's own witness is discussed in section 42. Of course, as the authors point out, strict application of the traditional prohibition would leave a party whose witness double-crossed him completely at the mercy of the witness. The common law, therefore, recognized an exception and permitted the impeachment. However, if the impeachment took the form of a prior inconsistent statement, the possibility was opened up of using the guise of impeachment to get before the jury an otherwise inadmissible hearsay statement. The exception was, therefore, hedged about with the requirements of surprise and damage. Now, with the adoption of Rule 801(d)(1)(A), prior inconsistent statements of a witness are no longer barred by the hearsay rule. Hence the risk that the common law sought to guard against by requiring surprise and damage no longer exists. So far,

so good. However, the authors then suggest that there are limits in Arizona to the substantive use of prior statements, citing *State v. Cruz*, discussed further in section 124 (pp. 307-08), and that as a control measure the requirements of surprise and damage might be restored pro tanto as a safeguard. This conclusion is based on a misapprehension. Rule 801(d)(1)(A) does not say that all prior statements of witnesses are admissible as substantive evidence. It does say that they are not barred by the hearsay rule. They remain excludable on any other grounds that may be appropriate. Hence the problem in *Cruz*-type cases is not one of guarding against inadmissible hearsay but of applying some other ground for exclusion. The grounds that come to mind are specified in Rule 403, namely, prejudice substantially outweighing probative value, and danger of misleading the jury, and Rule 403 provides ample safeguards. See the *Cruz* discussion in section 124. Requiring surprise and damage has no relevance to these risks, and they should not be exhumed from their resting place.

The always troublesome question of admitting evidence of conviction of crime for impeachment purposes is explored in section 47. While Arizona Rule 609(a) follows, in general, the pattern of its federal counterpart, there are nonetheless significant differences, pointed out in note 7, which suggest caution in reading federal cases and textbooks that discuss primarily the federal rule. Both the Arizona and the federal rule, under somewhat different ground rules, accord admissibility to convictions of misdemeanors involving "dishonesty or false statement." An interesting question arises under this language. What are crimes of dishonesty? The answer is more interesting than the question. The federal decisions have equated dishonesty with false statement, with the result that theft-type crimes do not fall within the designation "crimes of dishonesty or false statement." The result is explainable only in terms of legislative history. The Conference Report resolved the difference between House and Senate by blandly asserting that dishonesty or false statement "means crimes, such as perjury, subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully." Thus reassured, the Congress accepted the report and enacted the rules. Obviously, the plain meaning of the rule, "dishonesty," and the Conference Report are at odds. If the definition of the report is followed, then under the Federal Rule stealing is not dishonest. One is tempted to ask, Where but in the Congress of the United States? Nevertheless, the federal courts have followed the Conference Report definition. *United States v. Smith*, 551 F.2d 348 (D.C. Cir. 1976), is the lead case. Gertrude Stein would have put the question, Is a statute a statute, or is it a legislative history? Whether Arizona will follow the federal path remains to be seen.

In Chapter 7 the authors explore the agglomerate of court decisions, statutory museum pieces, and legislative concessions to special interest groups that constitute the nonconstitutional law of privilege in Arizona. The need for a housecleaning becomes apparent before the reader completes the first section of the chapter, and the responsibility must rest at the

door of the organized bar. When the Arizona Rules were under consideration, the advisory committee, profiting from the collision between Court and the Congress with the Federal Rules, carefully tiptoed around the subject of privilege and recommended present Rule 501, which the Arizona Court adopted:

> Except as otherwise required by the Constitution of the United States, the Constitution of Arizona, or by applicable statute or rule, privilege shall be governed by the principles of the common law as they may be interpreted in light of reason and experience, or as they have been held to apply in former decisions.

Unfortunately, the authors neither quote nor discuss the rule, so we are left without the benefit of their insight as to the relative functioning of courts and legislature in the area of privilege. What was the effect of the grant of rulemaking power in the Modern Courts Amendment of 1960 upon the law of privilege? Upon the law of evidence generally? Is A.R.S. section 12-686 a valid enactment?

The attorney-client privilege as applied to corporations constitutes a part of the discussion of that privilege generally in section 74. A little more insight may be gained by noting that the Federal Advisory Committee in its Preliminary Draft adopted the control-group test. The Supreme Court then reviewed the Court of Appeals decision in *Harper & Row* (section 77, note 6), which roughly applied the privilege to communications between any corporate employee and its attorneys if it involved his corporate duties. The Supreme Court affirmed, as noted in the text, but it was no ordinary affirmance. Justice Douglas's publisher was one of the alleged antitrust miscreants in the case, and he, therefore, took no part. The outcome was an evenly divided court, four to four, and in the absence of sufficient votes to reverse, the result was affirmance. In view of this development, the Advisory Committee simply withdrew its provision, deciding to leave the matter for further consideration by the Court when the matter should arise in another case. As the authors point out, the Court answered adversely to the control-group theory in *Upjohn* (section 74, note 7) some ten years later. One may join in the authors' hope that the Arizona Court will not follow this unsatisfactory and inconclusive opinion.

Upjohn, one of the internal corporate investigation cases involving illegal corporate payments which surfaced in the 1970's, incidentally demonstrates the close connection between attorney-client privilege and so-called work-product privilege. One might wish for further treatment of the latter, though limitations of space must be recognized.

Proof of other crimes receives perceptive treatment in section 84. As the authors point out, the principle is generally agreed upon that evidence of other crimes is not admissible simply to prove that an accused person is prone to commit crime and hence is more likely to have committed the crime in question than would be the case without the evidence. The evidence is by no means lacking in probative value, but the invitation to the jury to remove such a person from the streets for the general good regardless of guilt in the case on trial is just too great; prejudice outweighs probative value. Hence, reviewing courts do not hesitate to reverse convictions

in which such evidence has played a part. However, like most rules, the other-crimes rule has its exception: If the evidence is offered for a purpose other than to show propensity, exclusion is not required. Recognized other purposes include motive, intent, knowledge, plan, scheme, and so on. Oddly enough, though strict when no other purpose is suggested, when one is suggested, trial judges seem much inclined to admit and many reviewing courts most unlikely to reverse. Once it appears that the other-crime evidence is relevant to a recognized purpose other than propensity, the further inquiry whether that purpose is itself relevant to guilt is likely not to be pursued "no matter how unpersuasive or strained the evidentiary inferences." Some of the federal decisions are giving these situations closer scrutiny. *United States v. Figueroa*, 618 F.2d 934 (2d Cir. 1980); *United States v. Krezdorn*, 639 F.2d 1327 (5th Cir. 1981). However, one wonders whether, in fact, many of the courts are fundamentally out of sympathy with the basic rule of exclusion of other-crimes evidence and are quite willing to allow the exception to swallow most of the rule. The Arizona sex cases may illustrate the point, though the Arizona Court has backed away substantially from its earlier position and has refused to pursue kinkiness through the doorway of the marital bedroom.

The attempted coup de grace on the phrase "verbal act" (section 122, note 2) seems regrettable. One wonders what "words having independent legal significance" would yield if run through Westlaw or Lexis. It is true that in 1922 Professor Morgan paid his disrespects to "verbal acts" in strong terms, suggesting "operative facts" as a substitute, on the theory that cleaning up the language would also help clean up the opinion-writers' thought processes. However, forty years later he had abandoned efforts to evolve an acceptable substitute for "verbal acts." Instead, he just spelled it out:

> It is clear that wherever evidence of the conduct of the declarant, whether consisting of words or of other action or inaction, is offered for a purpose which does not call upon the trier to treat the declarant in any respect as if he were a witness asserting the matter which the evidence is offered to prove, the evidence has no element of hearsay in it, as in the following examples.
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> 1. Words which are to be interpreted as they would be understood by the ordinary person in the situation of the hearer, such as, under the objective theory of contracts, words of offer, acceptance, rejection; words of gift, sale or bailment accompanying manual delivery of a chattel. Morgan, *Basic Problems of Evidence* 249 (1962).

McCormick, Wigmore, and Weinstein all use the term "verbal acts" as a handy mnemonic and analytical aid. If an owner and reader of the book under review were to pencil in "verbal acts" at the appropriate place in the margin, perhaps with a brief Surgeon General-type warning, the authors would probably not feel strongly about the matter.

A postscript might be added to the discussion of *Cruz* in section 124. The item of evidence was critical in that, if believed, it tended to raise the grade of the crime from manslaughter to murder. The case was presented

to the Court as a problem of the admissibility of hearsay. An alternative ground, seemingly not presented, is hinted at in the Court's opinion: "This presents a situation where . . . the reliability of the [out-of-court] statement requires resolution of a swearing contest between the declarant and the person to whom the statement was allegedly made." *State v. Cruz*, 128 Ariz. 538, 540, 627 P.2d 689, 691 (1981). The alternative ground, of course, is the sufficiency of the state's evidence to sustain the verdict of guilt beyond a reasonable doubt. During the course of the lengthy consideration to which the Federal Rules were subjected, the question was raised as to the sufficiency of an item of evidence admitted under Rule 801(d)(1)(A) to support a guilty verdict. On May 31, 1973, the reporter for the federal Advisory Committee, responding to an inquiry, wrote counsel for the Subcommittee on Reform of Federal Criminal Laws, House Committee on the Judiciary:

> Admittedly, if a judge were confronted with a situation, under the rule as transmitted to the Congress, in which the entire case for the prosecution was a prior inconsistent unsworn statement, it would be difficult indeed to see how he could avoid directing a verdict. From this conclusion, however, it by no means follows that he should have excluded the evidence in the first place.

Rules of Evidence: Hearings Before Subcommittee on Criminal Justice, House Committee on the Judiciary, 93rd Congress, 1st Session 98 (1973). See also *United States v. Orrico*, 599 F.2d 113 (6th Cir. 1979).

These observations, as is evident, have followed no particular organization, but rather have meandered from point to point as encountered in browsing through the text. They are not offered by way of disparagement, but only to indicate that there are discussable areas in which differences of view may fairly be held. This is an excellent book which every Arizona member of the profession should have at hand. In the original edition, the now senior author concluded his preface: "I feel compelled—though it may be unusual—to acknowledge that my kinsmen (including those holding public or judicial office) had nothing whatever to do with the preparation of this volume. Its errors and opinions are mine alone." The original stood the test of time and critical scrutiny, and the second edition will do likewise. No holding harmless of relatives will be required.

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